# A DIGEST

OF

# THE INTERNATIONAL LAW

OF THE

# UNITED STATES,

TAKEN FROM

## DOCUMENTS ISSUED BY PRESIDENTS AND SECRETARIES OF STATE,

AND FROM

## DECISIONS OF FEDERAL COURTS AND OPINIONS OF ATTORNEYS-GENERAL.

EDITED BY

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IN THREE VOLUMES.

[SECOND EDITION.]

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VOLUME III.

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WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1887.

# CHAPTER XII.

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### I. *TRANSIT OVER, BY INTERNATIONAL LAW.*

SUCH TRANSIT CANNOT RIGHTFULLY BE CLOSED.

§ 287.

As has already been stated, navigable water-courses which traverse the dominions of two or more sovereigns, and on the freedom of which the commerce of the world in part depends, cannot, without a wrong to the commercial world as a whole, be permanently obstructed by any one of the sovereigns by whom their banks are controlled. This was the position taken by the United States in its controversy with Denmark as to the sound, and such is now the view of the leading European powers as to all great thoroughfares of trade not inclosed entire within the realm of one particular sovereign.

See *supra*, §§ 40, 147, 150*c*.

If a canal across the Isthmus be opened, "so as to admit of the passage of sea-vessels from ocean to ocean, the benefit of it ought not to be exclusively appropriated to any one nation, but should be extended to all parts of the globe, upon the payment of a just compensation or reasonable tolls."

Mr. Clay, Sec. of State, to Messrs. Anderson and Sergeant, May 8, 1826. MSS. Inst., Ministers.

Mr. Calhoun's speech, March 30, 1848, on the isthmus relations of the United States, and against the military occupation of Yucatan, or its annexation by the United States, is given in 4 Calhoun's Works, 450, and is noticed *supra*, §§ 57, 72.

President Pierce's message of May 15, 1856, with the correspondence attached thereto, is in Senate Ex. Doc. 68, 34th Cong., 1st sess., House Ex. Doc. 123, 34th Cong., 1st sess.

The relations of the United States to the Isthmus require "that the passage across the Isthmus should be secure from danger of interruption. For this purpose, as well as for the ends of justice, exemplary punishment should be promptly inflicted upon the transgressors, and the responsibility of the Government of New Granada for the misconduct of its people should be recognized."

Mr. Marcy, Sec. of State, to Mr. Bowlin, May 3, 1856; June 4, 1856; Dec. 3, 1856. MSS. Inst., Colombia.

Lieut. Michler's report of July 14, 1857, of survey for an interoceanic canal, is given in Senate Ex. Doc. 9, 36th Cong., 2d sess.

"The general policy of the United States concerning Central America is familiar to you. We desire to see the isthmian routes opened and free for the commerce and intercourse of the world, and we desire to see the States of that region well governed and flourishing and free from the control of all foreign powers. The position we have taken we shall adhere to, that this country will not consent to the resubjugation of those States, or to the assumption and maintenance of any European authority over them.

"The United States have acted with entire good faith in this whole matter. They have done all they could do to prevent the departure of illegal military expeditions with a view to establish themselves in that region, and at this time measures are in progress to prevent the organization and departure of another, which is said to be in preparation. Should the avowed intention of the French and British Governments be carried out and their forces be landed in Nicaragua, the measure would be sure to excite a strong feeling in this country, and would greatly embarrass the efforts of the Government to bring to a satisfactory close these Central American difficulties which have been so long pending."

Mr. Cass, Sec. of State, to Mr. Mason, Nov. 25, 1858. MSS. Inst., France.

For a full exposition and criticism of Gen. Walker's expedition to the Isthmus in 1858, see Mr. Cass, Sec. of State, to Mr. Molina, Nov. 26, 1860. MSS. Notes, Cent. Am.

The report of Admiral Davis, July 11, 1866, on interoceanic canal and railway is in Senate Ex. Doc. No. 62, 39th Cong., 1st sess.

As to Isthmus canal routes, see Mr. Fish, Sec. of State, to Mr. Washburne, Nov. 13, 1876. MSS. Inst., France.

The interest of the United States in the opening of a ship-canal on the Isthmus is peculiarly great. "Our Pacific coast is so situate that, with our railroad connections, time (in case of war) would always be allowed to prepare for its defense. But with a canal through the Isthmus the same advantage would be given to a hostile fleet which would be given to friendly commerce; its line of operations and the line in which warlike demonstrations could be made, could be enormously shortened. All the

treaties of neutrality in the world would fail to be a safeguard in a time of great conflict."

Mr. Evarts, Sec. of State, to Mr. Dichman, Apr. 19, 1880. MSS. Inst., Colombia.

"This Government cannot consider itself excluded, by any arrangement between other powers or individuals to which it is not a party, from a direct interest, and if necessary a positive supervision and interposition in the execution of any project which, by completing an interoceanic connection through the Isthmus, would materially affect its commercial interests, change the territorial relations of its own sovereignty, and impose upon it the necessity of a foreign policy, which, whether in its feature of warlike preparation or entangling alliance, has been hitherto sedulously avoided."

*Ibid.* For other portions of this instruction, see *supra*, § 145.

"The policy of this country is a canal under American control. The United States cannot consent to the surrender of this control to any European power, or to any combination of European powers. If existing treaties between the United States and other nations, or if the rights of sovereignty or property of other nations stand in the way of this policy—a contingency which is not apprehended—suitable steps should be taken by just and liberal negotiations to promote and establish the American policy on this subject, consistently with the rights of the nations to be affected by it.

"The capital invested by corporations or citizens of other countries in such an enterprise must, in a great degree, look for protection to one or more of the great powers of the world. No European power can intervene for such protection without adopting measures on this continent which the United States would deem wholly inadmissible. If the protection of the United States is relied upon, the United States must exercise such control as will enable this country to protect its national interests and maintain the rights of those whose private capital is embarked in the work.

"An interoceanic canal across the American Isthmus will essentially change the geographical relations between the Atlantic and Pacific coasts of the United States, and between the United States and the rest of the world. It will be the great ocean thoroughfare between our Atlantic and our Pacific shores, and virtually a part of the coast line of the United States. Our merely commercial interest in it is greater than that of all other countries, while its relations to our power and prosperity as a nation, to our means of defense, our unity, peace, and safety, are matters of paramount concern to the people of the United States. No other great power would, under similar circumstances, fail to assert a rightful control over a work so closely and vitally affecting its interest and welfare.

"Without urging further the grounds of my opinion, I repeat, in conclusion, that it is the right and the duty of the United States to assert and maintain such supervision and authority over any interoceanic canal across the isthmus that connects North and South America as will protect our national interests. This I am quite sure will be found not only compatible with, but promotive of, the widest and most permanent advantage to commerce and civilization."

President Hayes, message of March 8, 1880.

"The interest of the United States in a practical transit for ships across the strip of land separating the Atlantic from the Pacific has been repeatedly manifested during the last half century. My immediate predecessor caused to be negotiated with Nicaragua a treaty for the construction, by and at the sole cost of the United States, of a canal through Nicaraguan territory, and laid it before the Senate. Pending the action of that body thereon, I withdrew the treaty for re-examination. Attentive consideration of its provisions leads me to withhold it from resubmission to the Senate.

"Maintaining, as I do, the tenets of a line of precedents from Washington's day, which proscribe entangling alliances with foreign states, I do not favor a policy of acquisition of new and distant territory, or the incorporation of remote interests with our own.

"The laws of progress are vital and organic, and we must be conscious of that irresistible tide of commercial expansion which, as the concomitant of our active civilization, day by day is being urged onward by those increasing facilities of production, transportation, and communication to which steam and electricity have given birth; but our duty in the present instructs us to address ourselves mainly to the development of the vast resources of the great era committed to our charge and to the cultivation of the arts of peace within our own borders, though jealously alert in preventing the American hemisphere from being involved in the political problems and complications of distant Governments. Therefore I am unable to recommend propositions involving paramount privileges of ownership or right outside of our own territory, when coupled with absolute and unlimited engagements to defend the territorial integrity of the state where such interests lie. While the general project of connecting the two oceans by means of a canal is to be encouraged, I am of opinion that any scheme to that end to be considered with favor should be free from the features alluded to.

"The Tehuantepec route is declared, by engineers of the highest repute and by competent scientists, to afford an entirely practicable transit for vessels and cargoes, by means of a ship-railway, from the Atlantic to the Pacific. The obvious advantages of such a route, if feasible over others more remote from the axial lines of traffic between Europe and the Pacific, and particularly between the valley of the Mississippi

and the western coast of North and South America, are deserving of consideration.

"Whatever highway may be constructed across the barrier dividing the two greatest maritime areas of the world must be for the world's benefit, a trust for mankind, to be removed from the chance of domination by any single power, nor become a point of invitation for hostilities or a prize for warlike ambition. An engagement combining the construction, ownership, and operation of such work by this Government, with an offensive and defensive alliance for its protection, with the foreign state whose responsibilities and rights we would share, is, in my judgment, inconsistent with such dedication to universal and neutral use, and would, moreover, entail measures for its realization beyond the scope of our national polity or present means.

"The lapse of years has abundantly confirmed the wisdom and foresight of those earlier administrations which, long before the conditions of maritime intercourse were changed and enlarged by the progress of the age, proclaimed the vital need of interoceanic transit across the American Isthmus and consecrated it in advance to the common use of mankind by their positive declarations and through the formal obligation of treaties. Toward such realization the efforts of my administration will be applied, ever bearing in mind the principles on which it must rest, and which were declared in no uncertain tones by Mr. Cass, who, while Secretary of State, in 1858, announced that 'What the United States want in Central America, next to the happiness of its people, is the security and neutrality of the interoceanic routes which lead through it.'

"The construction of three transcontinental lines of railway all in successful operation, wholly within our territory, and uniting the Atlantic and the Pacific Oceans, has been accompanied by results of a most interesting and impressive nature, and has created new conditions, not in the routes of commerce only, but in political geography, which powerfully affect our relations toward, and necessarily increase our interests in any trans-isthmian route which may be opened and employed for the ends of peace and traffic, or, in other contingencies, for uses inimical to both.

"Transportation is a factor in the cost of commodities scarcely second to that of their production, and weighs as heavily upon the consumer. Our experience already has proven the great importance of having the competition between land carriage and water carriage fully developed, each acting as a protection to the public against the tendencies to monopoly which are inherent in the consolidation of wealth and power in the hands of vast corporations.

"These suggestions may serve to emphasize what I have already said on the score of the necessity of a neutralization of any interoceanic transit; and this can only be accomplished by making the uses of the

route open to all nations and subject to the ambitions and warlike necessities of none.

"The drawings and report of a recent survey of the Nicaragua Canal route, made by Chief Engineer Menocal, will be communicated for your information."

President Cleveland, First Annual Message, 1885. See *supra*, § 72.

A report from Mr. Forsyth, Sec. of State, of Mar. 12, 1838, as to a ship-canal across the Isthmus, with the accompanying papers, will be found in House Ex. Doc. 228, 25th Cong., 2d sess.

President Fillmore's message and papers of Feb. 19, 1853, is in Senate Ex. Doc. 44, 32d Cong., 2d sess.

President Fillmore's message of July 27, 1854, respecting a right of way across the Isthmus of Tehuantepec, with the accompanying documents, is given in Senate Ex. Doc. 97, 32d Cong., 1st and 2d sess. See also correspondence attached to President Pierce's message at commencement of 34th Cong., 1st sess., Dec. 3, 1855.

Mr. Rockwell's report on isthmus transit is contained in House Rep. 145, 30th Cong., 2d sess.

The following list of Congressional documents is taken from the Department Register:

Interoceanic canals:

Reports of Lull and Collins Expedition of 1875, maps. Senate Ex. Doc. 75, 45th Cong., 3d sess.

Should be under control of the United States. President's message, Mar. 8, 1880. House Ex. Doc. 47, 46th Cong., 2d sess.

Trade between Atlantic and Pacific coasts. Report of Treasury Department, Mar. 15, 1880. House Ex. Doc. 61, 46th Cong., 2d sess.

Report of Lieut. T. A. M. Craven, dated Feb. 18, 1859, of a survey made of the Isthmus of Darien, Mar. 18, 1880. House Ex. Doc. 63, 46th Cong., 2d sess.

Further letter from Treasury Department on the subject of shipping between the Atlantic and Pacific coasts, May 15, 1880. House Ex. Doc. 86, 46th Cong., 2d sess.

Resolution declaring that the consent of the United States is a necessary condition precedent to the execution of any canal, Feb. 16, 1881. Senate Mis. Doc. 42, 46th Cong., 3d sess.

Testimony taken before the select committee in regard to the selection of a suitable route for a canal across the American Isthmus, Feb. 25, 1881. House Mis. Doc. 16, 46th Cong., 3d sess.

Monroe doctrine. Report of Committee on Foreign Affairs, Feb. 14, 1881. House Rep. 224, 46th Cong., 3d sess. Part 2, minority rep., Mar. 4, 1881.

Favorable report on resolution that consent of the United States is a necessary condition precedent to execution of the canal project, May 16, 1881. Senate Rep. 1, special sess.

Resolution, Apr. 27, 1881. Senate Mis. Doc. 18, special sess.

Senate resolution as to action of the Government for protection of United States interests in the projected canal, Oct. 13, 1881. Senate Mis. Doc. 4, special sess.

The avowal of Colombia to terminate the treaty of 1846 with the United States. President's message, Oct. 24, 1881. Senate Ex. Doc. 5, special sess.

Steps taken by the United States to promote the construction of a canal. President's message, June 13, 1879. House Ex. Doc. 10, 46th Cong., 1st sess.

Resolution calling for correspondence and treaties projected since February, 1869, Dec. 4, 1879. Senate Mis. Doc. 9, 46th Cong., 2d sess.

Relations between United States and Colombia, Central America, and European states with respect to. Treaties negotiated. Wyse-De Lesseps grant from Colombia. President's message, Mar. 8, 1880. Senate Ex. Doc. 112, 46th Cong., 2d sess.

Report of the select committee on the interoceanic ship-canal, declaring that the United States will assert and maintain their right to possess and control any such canal, no matter what the nationality of its corporators or the source or their capital may be, Mar. 3, 1881. House Rep. 390, 46th Cong., 3d sess.

Report of historical and technical information relating to the problem of interoceanic communication by way of the American Isthmus, by Lieut. John T. Sullivan, U. S. N., with plates and maps, May 2, 1882. House Ex. Doc. 107, 47th Cong., 2d sess.

Clayton-Bulwer treaty and the Monroe doctrine. Papers and correspondence giving a historical review of the relations between Great Britain and the United States with respect to Central America and the construction of communications between the Atlantic and Pacific Oceans. President's message, July 29, 1882. Senate Ex. Doc. 194, 47th Cong., 1st sess.

Reports of Rear-Admiral G. H. Cooper and Lieut. R. P. Rodgers, U. S. N., respecting progress of work on the ship-canal across the Isthmus of Panama, with plates and maps, Mar. 12, 1884. Senate Ex. Doc. 123, 48th Cong., 1st sess.

## II. *TRANSIT OVER, BY TREATY WITH NEW GRANADA.*

### (1) Limitations of treaty.

### § 288.

Article 35 of the treaty of 1846 with New Granada is as follows:

"The United States of America and the Republic of New Granada, desiring to make as durable as possible the relations which are to be established between the two parties by virtue of this treaty, have declared solemnly, and do agree to, the following points:

"1. For the better understanding of the preceding articles, it is and has been stipulated between the high contracting parties, that the citizens, vessels, and merchandise of the United States shall enjoy in the ports of New Granada, including those of the part of the Granadian territory generally denominated Isthmus of Panama, from its southernmost extremity until the boundary of Costa Rica, all the exemptions, privileges, and immunities concerning commerce and navigation, which are now or may hereafter be enjoyed by Granadian citizens, their vessels, and merchandise; and that this equality of favors shall be made to extend to the passengers, correspondence, and merchandise of the United States, in their transit across the said territory, from one sea to the other. The Government of New Granada guarantees to the Government of the United States that the right of way or transit across the Isthmus of Panama upon any modes of communication that now exist, or that may be hereafter constructed, shall be open and free to the Government and citizens of the United States, and for the transportation of any articles of produce, manufactures, or merchandise, of lawful commerce, belonging to the citizens of the United States; that no other tolls or charges shall be levied or collected upon the citizens of the United States, or their said merchandise thus passing over any road or canal that may be made by the

Government of New Granada, or by the authority of the same, than is, under like circumstances, levied upon upon and collected from the Granadian citizens; that any lawful produce, manufactures, or merchandise belonging to citizens of the United States, thus passing from one sea to the other, in either direction, for the purpose of exportation to any other foreign country, shall not be liable to any import duties whatever; or, having paid such duties, they shall be entitled to drawback upon their exportation; nor shall the citizens of the United States be liable to any duties, tolls, or charges of any kind, to which native citizens are not subjected for thus passing the said Isthmus. And, in order to secure to themselves the tranquil and constant enjoyment of these advantages, and as an especial compensation for the said advantages, and for the favors they have acquired by the 4th, 5th, and 6th articles of this treaty, the United States guarantee, positively and efficaciously, to New Granada, by the present stipulation, the perfect neutrality of the before-mentioned Isthmus, with the view that the free transit from the one to the other sea may not be interrupted or embarrassed in any future time while this treaty exists; and in consequence, the United States also guarantee, in the same manner, the rights of sovereignty and property which New Granada has and possesses over the said territory.

"2. The present treaty shall remain in full force and vigor for the term of twenty years from the day of the exchange of the ratifications; and from the same day the treaty that was concluded between the United States and Colombia, on the 13th of October, 1824, shall cease to have effect, notwithstanding what was disposed in the 1st point of its 31st article.

"3. Notwithstanding the foregoing, if neither party notifies to the other its intention of reforming any of, or all, the articles of this treaty twelve months before the expiration of the twenty years stipulated above, the said treaty shall continue binding on both parties beyond the said twenty years, until twelve months from the time that one of the parties notifies its intention of proceeding to a reform.

"4. If any one or more of the citizens of either party shall infringe any of the articles of this treaty, such citizens shall be held personally responsible for the same, and the harmony and good correspondence between the nations shall not be interrupted thereby; each party engaging in no way to protect the offender, or sanction such violation.

"5. If unfortunately any of the articles contained in this treaty should be violated or infringed in any way whatever, it is expressly stipulated that neither of the two contracting parties shall ordain or authorize any acts of reprisal, nor shall declare war against the other on complaints of injuries or damages, until the said party considering itself offended shall have laid before the other a statement of such injuries or damages, verified by competent proofs, demanding justice and satisfaction, and the same shall have been denied, in violation of the laws and of international right.

"6. Any special or remarkable advantages that one or the other power may enjoy from the foregoing stipulation, are and ought to be always understood in virtue and as in compensation of the obligations they have just contracted, and which have been specified in the first number of this article."

This treaty, now in force as to New Granada under the recently assumed title of Colombia, is discussed in connection with the Clayton-Bulwer treaty, *supra*, § 150*f*.

(2) CONTINUANCE OF.

§ 289.

As has been already seen this treaty remains in force, nor has it ever been claimed that it comes within the purview of the Clayton-Bulwer treaty so as to be in any way modified thereby.

*Supra*, § 150*f*.

### III. *EFFECT OF GUARANTEE OF, UNDER TREATY.*

#### (1) Such guarantee binds Colombia.

§ 290.

"The federative Republic of Colombia, officially styled the United States of Colombia, was formed by the convention of Bogota concluded September 20, 1861, by the representatives of nine States, previously a part of New Granada." (Martin's Statesman's Year Book, tit. Colombia.) As the Isthmus of Panama is in Colombia, the treaty with New Granada binds Colombia. And aside from this view, as New Granada, in the sense in which the term was used at the time of the convention of Bogota, was virtually conterminous with the province of Colombia, as thus reconstituted, there can be no question that the treaty specifically binds Colombia.

*Supra*, §§ 4, 137.

#### (2) Does not guarantee against changes of Government.

§ 291.

The guarantee of "perfect neutrality" in the treaty is not a guarantee against change of Government in Colombia, since treaty obligations, when binding a country as an entity, are not, as we have seen, affected by intermediate revolutions, and therefore exists irrespective of such revolutions. (*Supra*, § 137.) The United States, however, is (1) authorized and required by the treaty to protect the transit of the isthmus from foreign invasion, and (2) is authorized to compel Colombia to keep the transit free from domestic disturbance. (*Supra*, § 145.) For this purpose the United States is entitled to employ in the isthmus such forces as may enable Colombia to keep the transit open. The distinctions in this respect are given *supra*, §§ 145, 150*f*. See App., vol. iii, § 145.

In connection with the documents given *supra*, §§ 145, 150 *f*, the following may be considered:

"The present condition of the Isthmus of Panama, in so far as regards the security of persons and property passing over it, requires serious consideration. Recent incidents tend to show that the local authorities cannot be relied on to maintain the public peace of Panama, and there is just ground for apprehension that a portion of the inhabitants are meditating further outrages, without adequate measures for the security and protection of persons or property having been taken, either by the State of Panama, or by the General Government of New Granada.

"Under the guarantees of treaty, citizens of the United States have, by the outlay of several million dollars, constructed a railroad across the Isthmus, and it has become the main route between our Atlantic and Pacific possessions, over which multitudes of our citizens and a

vast amount of property are constantly passing—to the security and protection of all which, and the continuance of the public advantages involved, it is impossible for the Government of the United States to be indifferent.

"I have deemed the danger of the recurrence of scenes of lawless violence in this quarter so imminent as to make it my duty to station a part of our naval force in the harbors of Panama and Aspinwall, in order to protect the persons and property of the citizens of the United States in these ports, and to insure to them safe passage across the Isthmus. And it would, in my judgment, be unwise to withdraw the naval force now in those ports, until, by the spontaneous action of the Republic of New Granada, or otherwise, some adequate arrangement shall have been made for the protection and security of a line of interoceanic communication so important at this time, not to the United States only, but to all other maritime states both of Europe and America."

President Pierce, Fourth Annual Message, 1856.

"The Government is of the opinion that the position of the free ports of Panama and Colon as mere stations on one of the world's most important highways should demand a simpler and less rigid enforcement of customs rules against the vehicles of mere transient passage than may be requisite to protect the fiscal interests at ports of entry. It is deemed that the mutual concessions and guarantees under which the transit was established entitle all those who honestly and pacifically use it to exceptional facilities, which may not be needed, or be even proper at other ports. It would be very much to be regretted if a contrary course should prevail in conflict with the true interests of Colombia herself, no less than of those who avail themselves of the privileges incidental to the transit."

Mr. Frelinghuysen, Sec. of State, to Mr. Scruggs, Mar. 6, 1883. MSS. Inst., Colombia.

### IV. *RELATIONS TO PARTICULAR COUNTRIES.*

#### (1) COLOMBIA.

#### § 292.

The position of Colombia as to the treaty of 1846 has been already discussed. (*Supra*, §§ 145, 150*f*, 297 *ff.*)

The following may be considered in the same relation:

"You will remember that soon after the receipt of your note of February 13 I took occasion to have an interview with you, in which I intimated that this Government could scarcely consider the newspaper reports referred to as a sufficient basis for the demand of formal explanations; that I was not then in possession of the information upon which the definite wishes of this Government would finally take shape, but that you might rest assured that no action had been taken or was

contemplated which could in any degree be regarded as inattentive to the complete equality and independence of the Colombian Republic, or in the least disregardful of its interests; and that, in case this Government should find it useful to its commercial and naval interests to establish coaling stations in any ports of the Isthmus, it would present the matter in the usual manner to the friendly allowance of the Colombian Government.

"Upon the receipt of your note of April 1, from New York, I several times made inquiries as to the time of your return in order that I might secure an interview, and upon the receipt of your note of the 15th of April, advising me of your return, you were immediately desired to do me the honor of calling at the Department, when you were informed that my necessary absence in New York would postpone my reply for a day or two, but that I would endeavor to furnish you an answer in season for your mail of the 20th instant.

"I have recalled these facts to your attention simply to confirm the assurance, which you must already feel, that there has been on the part of this Government no disposition to misconstrue or neglect your natural desire to be duly informed of any action which might affect the interests or dignity of the state you represent.

"It is only since the receipt of your letter of April 1 that this Government has been enabled to furnish you that precise information of the movements of its naval vessels on the Atlantic and Pacific coasts of the Isthmus which you have expressed a desire to receive.

"The Government of Colombia has been for a long time aware that the safety and convenience of both their naval and mercantile marine might require the establishment by the United States of coaling stations at some points on the Atlantic and Pacific coasts of Central America; and the Government of the United States has never doubted that the friendly feeling existing between the two countries, and the treaty obligations of this Government to the Government of Colombia would induce that Government to afford it every aid and facility in obtaining and occupying such stations, should they be desired, within the territory of Colombia. This Government was aware that the acquisition of such places, whether by the purchase of private property or by public grant, would need to be brought to the notice of the Colombian Government, and it has never entertained a doubt that its assent would be cheerfully given. Nor has this Government ever supposed that the examination and survey of the harbors and unoccupied shores of these coasts could excite the apprehension of any of the Central American powers.

"This convenience sought by a commercial and naval power has, as you are well informed, been accorded to this Government at various points in the Atlantic and Pacific waters by all friendly powers upon the mere suggestion by this Government that it was desired. I have

therefore to inform you that this Government, having under consideration the propriety of establishing coaling stations at the earliest practicable moment at such points in the State of Panama as might seem best adapted for that purpose, orders were given to the U. S. S. Adams, Commander Howell, to visit the Gulf of Dulce, and to the U. S. S. Kearsarge, Commander Picking, to visit the Boca del Toro and Chiriqui Lagoon, and to report fully the capabilities of those locations. Within the last few days only reports have been received from both of these commanders.

"From Commander Howell the Government learns that the point best adapted for its purpose is Golfito, in the Gulf of Dulce, and that with the permission of the local authorities he has made a small deposit of coal in that neighborhood.

"As the boundary line in the Gulf of Dulce between Costa Rica and Colombia has not been determined, this Government is at present unable to say where within the territorial limits of the two States the point selected is situated.

"From Commander Picking the Government learns that in his opinion Shepherd's Harbor, in the Almerante Bay, is the situation, in the Boca del Toro, best adapted for a coaling station."

Mr. Evarts, Sec. of State, to Mr. Arosemena, Apr. 17, 1880. MSS. Notes, Colombia; For. Rel., 1880.

"I had the honor to receive your note of the 19th ultimo, wherein, while disclaiming desire on your part to interfere with any arrangements which may be made at Bogotá by the United States minister, Mr. Dichman, with regard to coaling stations on the Colombian Isthmus, as contemplated in my note to you of April 17 last, you intimate your trust that orders have been issued by the competent Department for the withdrawal from Chiriqui Bay and Dulce Gulf of the United States war-vessels lately engaged there in taking soundings and other operations preparatory to the establishment of such coaling stations. You are pleased to add that such a step on the part of this Government would greatly facilitate any arrangement or agreement that may be entered into by the United States of Colombia in relation to the matter, inasmuch as it would quiet the agitation which has been caused in your country by the operations of the vessels in question, and, which you suggest, must inevitably find an echo in official circles.

"I cannot but share the regret, which I doubt not you must feel, that the operations of the Adams in the Gulf of Dulce and of the Kearsarge in Chiriqui Bay should have given rise to the disquietude you mention. Our conferences hitherto, and the frank and full note I had the honor to address to you on the 17th of April last, will, I doubt not, have removed from your own mind and from that of the Government of Colombia any impression that the movements of the Adams and Kearsarge were in

violation of comity or in disparagement of the national independence and sovereignty of the United States of Colombia, or that they were, in short, otherwise than in the routine of amicable intercourse and in conformity to the usage and courtesy of friendly nations, whose ports and harbors, whether open to commerce or not, are at all times free to the national vessels of a power with which relations of peace and good-will prevail.

"I am in receipt of official advices to the effect that on the 12th of May ultimo, the executive of the State of Panama, in compliance, as alleged, with the orders of the citizen President of the nation, communicated to the consular officers of the United States at the ports of Panama and Aspinwall an intimation to the commanders of the vessels in questions to not only cease the operations of taking soundings, which it was alleged they had been engaged in, but, furthermore, that the Adams should forthwith quit the port of Golfito on account of its not being open to commercial operations (*puerto habilitado*).

"I need hardly advert to the aspect of unfriendliness which this proceeding assumes, and the spirit in which it might readily be received, were not this Government confident that the whole proceeding on the part of the authorities of the State of Panama is based on an unhappy misconception, which, in the interest of good-will, this Government is desirous to see removed. For I am sure you will agree with me that the peremptory notification thus conveyed to the distant vessels and officers of the United States, although, perhaps, an echo in official regions of the baseless disquietude of the populace, is not consonant with the calm and amicable communication looking to the accomplishment of the same end in the withdrawal of the vessels, which you, a week later in point of time, make, officially, at the seat of this Government in your note of the 19th ultimo, to which I now have the honor to reply.

"Under these circumstances you will have no difficulty in understanding my readiness and desire to regard the act of the authorities of Panama as ill-judged and unsupported by the cool good sense of your federal Government, whose considerate and amicable purposes I find reflected in your recent note.

"The information I possess from the officers of the United States in Colombia and from the naval authorities of the United States in those regions, enables me to inform you with pleasure, that at the time of the action taken by the executive of the State of Panama, the U. S. S. Adams was no longer in Colombian waters but lay at Punta Arenas, in the friendly neighboring Republic of Costa Rica, and that having accomplished the peaceable object of her voyage, she was then under orders of recall to a home port of the United States.

"I may also add, with regard to the corresponding operations of the Kearsarge in the waters of Chiriqui Lagoon, that at the date of last advices, and under the orders of the Navy Department, given some

time previously, that vessel was about to quit Las Bocas del Toro, having completed her errand.

"It is therefore very probable that, at the time you addressed me, the Kearsarge, like the Adams, was already out of Colombian jurisdiction.

"The present occasion seems a fitting one for me to again assure you, as I have done in my note of April 17, that the errand upon which these national vessels of the United States visited the waters of a state to which we are allied by ties of friendship and treaty guarantees, neither in design nor in execution justified any feeling of alarm or irritation on the part either of the government of the State of Panama or of the population thereof. The repetition of this assurance is, I feel, all that is now needful to add to the explanation of that note.

"It is therefore confidently hoped by the President that the actual course so inconsiderately adopted by the executive of Panama, notwithstanding the ample and frank explanations made to him by Mr. Diehman, on the occasion of the official visit of the latter to Panama, on the 5th of May last, and notwithstanding, moreover, an explicit promise then made by President Cervera to Mr. Diehman, of which this Government was duly advised, that he would hold in abeyance any step then contemplated toward the Adams and Kearsarge, until Mr. Diehman should have made to the federal authorities at Bogotá the communication with which he was charged, will either be promptly disavowed or satisfactorily explained by the supreme Government of the United States of Colombia. For in whatever way the act of President Cervera, as communicated to the consuls of the United States at Colon (Aspinwall) and Panama on the 12th ultimo may be regarded, it cannot be deemed as otherwise than unprecedented, and, if not unfriendly in its conception, as at least partaking to an unfortunate extent of the appearance of unfriendliness.

"It is the purpose of the Department to place before the Government at Bogotá the just grievance of this Government in the matter, not in a spirit of querulous indignation at the treatment offered to its vessels under an irresponsible impulse of uninstructed suspicion, but in confidence that the apparent offense of wishing to exclude the public vessels of the United States, in time of peace, from any of the ports and places of the Colombian Union may be speedily relieved of its unhappy features, and that your note to me, to which I now reply, will be found to truly represent, as I have assumed it to do, the spirit of sincere friendship and thoughtful consideration which I cannot but believe the Colombian Government feels toward that of the United States, and which, I am not slow to affirm, is felt in like eminent degree by the United States toward their sister Republic.

"I am confident, Mr. Minister, that your enlightened judgment and marked friendliness will lead you to concur with me in the need of a

better understanding of this strange and precipitate action of the executive of the State of Panama."

Mr. Evarts, Sec. of State, to Mr. Aroscmena, June 5, 1880. MSS. Notes, Colombia; For. Rel., 1880.

As to debts of Colombia, as affected by subsequent revolutions see *supra*, § 236.

As to the British treaty with Colombia of 1878, in respect to an Isthmus ship-canal, see article by Engelhardt in 18 Revue de droit int., 166.

(2) NICARAGUA.

§ 293.

The action of Nicaragua in relation to the ship-canals projected through her territory, and to Great Britain, as exhibited in her negotiations with that power, as to the Mosquito coast, is detailed in other sections. (*Supra*, § 150*f*; *infra*, § 295.)

The following documents are to be considered in connection with those given *supra*, § 150*f*:

"You will represent to the Government of Nicaragua that this Government cannot undertake to guarantee the sovereignty of the line of the (proposed) canal to her until the course which that work shall take, with reference to the river San Juan, and its terminus on the Pacific, shall be ascertained, and until the difference between Nicaragua and Costa Rica, concerning their boundary, shall be settled."

Mr. Webster, Sec. of State, to Mr. Korr, May 4, 1851. MSS. Inst., Am. St.

"If Nicaragua chooses to maintain the position you assume in your note to me, that her citizens who incorporated themselves with the community at San Juan are still in friendly relations with her and entitled to her protection, then she approves, by an implication, which she is not at liberty to deny, of that political establishment planted on her own soil, and becomes responsible for the mischiefs it has done to American citizens. It would be a strange inconsistency for Nicaragua to regard the organization at San Juan as a hostile establishment on her territory, and at the same time claim the right to clothe with her nationality its members.

"Assuming, as it is respectful to do, that you have duly appreciated the consequences of the step you have taken, I infer that the Government of Nicaragua, by claiming the right of protection over the persons at San Juan, will not hesitate to acknowledge her responsibility to other states for the conduct of the people which she has permitted to occupy that part of her territory."

Mr. Marcy, Sec. of State, to Mr. Marcoleta, Aug. 2, 1854. MSS. Notes, Cent. Am.

As to attack on Greytown (San Juan), see *supra*, § 224*a*.

As to government of Greytown, see *supra*, § 224.

"You will impress upon Count Walewski that we want nothing of Nicaragua which is not honorable to her, and which we have not a fair

right to demand. We shall, under no circumstances, abandon the determination that the transit routes across the Isthmus shall be kept open and safe for all commercial nations."

Mr. Cass, Sec. of State, to Mr. Mason, Apr. 12, 1859. MSS. Inst., Franco.

"In reply the undersigned feels called on simply to reiterate the doctrine which has been made public in the dispatch which he addressed to General Lamar, on the 25th July, 1858, on the subject, and which is embraced substantially in the following sentences:

"'Nor do they [the United States] claim to interfere with the local Governments in the determination of the questions connected with the opening of the routes and with the persons with whom contracts may be made for that purpose. What they do desire and mean to accomplish is that the great interests involved in this subject should not be sacrificed to any unworthy motive, but should be guarded from abuse, and that, when fair contracts are fairly entered into with American citizens, they should not be wantonly violated.' And again: 'There are several American citizens who, with different interests, claim to have formed engagements with the proper authorities of Nicaragua for opening and using the transit routes, with various stipulations defining their privileges and duties, and some of these contracts have already been in operation. This Government has neither the authority nor the disposition to determine the conflicting interests of these claimants. But what it has the right to do, and what it is disposed to do, is to require that the Government of Nicaragua should act in good faith towards them, and should not arbitrarily and wrongfully divest them of rights justly acquired and solemnly guaranteed.'

"Where one of the parties to a contract proceeds by an arbitrary act to annul it, on the ground that the other party has failed to comply with its conditions, and by a process which precludes any investigation, the plainest principles of justice are violated. What the United States require is not that their citizens should be maintained in rights they have forfeited, but that they should not be deprived of rights derived from the Government of Nicaragua without a fair examination by an impartial tribunal."

Mr. Cass, Sec. of State, to Mr. Jerez, May 5, 1859. MSS. Notes, Cent. Am.

"Everybody wishes the Spanish-American states well, and yet everybody loses patience with them for not being wiser, more constant, and more stable. Such, I imagine, is the temper in which every foreign state finds itself when it proposes to consider its relations to those Republics, and especially the Republics of Central America. I know, at least, that this has always been the temper of our best statesmen in regard to Nicaragua. Union, or, at least, practical alliance with Nicaragua has always been felt by them as a necessity for the United States, and yet no one ever deems it prudent to counsel the establishment of such intimate relations. Possessing one of the continental transits most

interesting to the United States, Nicaragua is at once jealous of foreign intervention to render it available, and incompetent to open and maintain it herself. But Nicaragua, like the other Spanish-American states, has far better excuses for its shortcomings than it generally has credit for. That state became precociously mature, and it adopted our model of government with little of that preliminary popular education and discipline which seem necessary to enable any people to administer, maintain, and preserve free republican institutions. The policy pursued by foreign nations towards Nicaragua has not been liberal or generous. Great Britain, in her wars with Spain, early secured a position in the state very detrimental to its independence, and used it to maintain the Indians in a condition of defiance against the creole population, while it did nothing, at least nothing effectually, to civilize the tribes whom it had taken under its protection. Unwilling to lend the aid necessary to the improvement of the country, Great Britain used its protectorate there to counteract domestic efforts and intervention from this Government to make that improvement which was necessary for the interest of Nicaragua herself, and hardly less necessary for all the western nations. Our own Government has been scarcely less capricious, at one time seeming to court the most intimate alliance, at another treating the new Republic with neglect and indifference, and at another indirectly, if not directly, consenting to the conquest and desolation of the country by our own citizens for the purpose of re-establishing the institution of slavery, which it had wisely rejected. It may be doubtful whether Nicaragua has not until this day been a loser instead of a gainer by her propinquity to, and intercourse with, the United States.

"Happily this condition of things has ceased at last. Great Britain has discovered that her Mosquito protectorate was as useless to herself as it was injurious to Nicaragua, and has abandoned it. The United States no longer think that they want slavery re-established in that state, nor do they desire anything at the hands of its Government but that it may so conduct its affairs as to permit and favor the opening of an interoceanic navigation, which shall be profitable to Nicaragua and equally open to the United States and to all other maritime nations.

"You go to Nicaragua in this fortunate conjuncture of circumstances. There is yet another comfort attending your mission. Claims of American citizens upon the Government of Nicaragua have long been a source of diplomatic irritation. A convention which provides for the settlement of these claims has been already negotiated. It wants only the consent of the Senate of the United States to an amendment proposed by Nicaragua, which, it is believed, would not materially change the effect of the convention, and such consent may, therefore, be expected to be given at the approaching special session of Congress.

"Your instructions, therefore, will be few and very simple. Assure the Republic of Nicaragua that the President will deal with that Government justly, fairly, and in the most friendly spirit; that he desires

only its welfare and prosperity. Cultivate friendly dispositions there toward the United States. See that no partiality arises in behalf of any other foreign state to our prejudice, and favor, in every way you can, the improvement of the transit route, seeking only such facilities for our commerce as Nicaragua can afford profitably to herself, and yield, at the same time, to other commercial nations."

Mr. Seward, See. of State, to Mr. Dickinson, June 5, 1861. MSS. Inst., Am. States; Dip. Corr., 1861.

"This Government does not mean to insist that citizens of the United States have an absolute right to display the national flag over their buildings and ships in Nicaragua, and on steamers navigating merely inland waters of that country. But the undersigned is now informed that the American Transit Company has heretofore, with the full consent and approval of the Government of Nicaragua, habitually kept the flag of the United States flying over such buildings and vessels as the buildings and waters aforenamed. It seems to the undersigned that if for any reason the Government of Nicaragua had thought it desirable that this indulgence should cease, comity would require in that case that this should have been made known to the Government of the United States or at least its representative residing in Nicaragua, to the end that the now offending flag might be voluntarily withdrawn.

"The forcible and violent removal of the flag, at so many points, without any previous notice, seems to imply a readiness to offend the just sensibilities of this country, and indeed the allegation is distinctly made that the flag was removed in each case with marked indignity and in a specially insulting manner."

Mr. Seward, See. of State, to Mr. Molina, Sept. 28, 1863. MSS. Notes, Cent. Am.

As to impediments east by the Government of Nicaragua in way of roads across Isthmus, see Mr. Cass, See. of State, to Mr. Dimitry, Aug. 31, 1859. MSS. Inst., Am. States.

For a full history of the negotiations between the United States and Great Britain in respect to Nicaragua and the construction of a ship-canal through the Isthmus, see Mr. Fish, See. of State, to Mr. Schenck, Apr. 26, 1873. MSS. Inst., Gr. Brit., quoted *supra*, § 150*f*.

As to negotiations for transit with Nicaragua in 1884, see Mr. Frelinghuysen, See. of State, to Mr. Phelps, Apr. 28, 1884. MSS. Inst., Peru.

For a history of action of Government of the United States on the subject of a ship canal through Nicaragua, see Mr. Frelinghuysen to Mr. Hall, July 19, 1884, Feb. 12, 1884, Apr. 3, 1884, Feb. 10, 1885. MSS. Inst., Cent. Am.

In relation to Nicaragua the following list of Congressional documents, taken from the Department register, may be referred to:

Claims of United States citizens against. President's message, Dec. 9, 1878. Senate Ex. Doc. 3, 45th Cong., 3d sess.

Resolution appointing committee to examine claims, Feb. 4, 1879. Senate Rep. 711, 45th Cong., 3d sess.

Claims of Woolsey Teller and Eliza Livingston. Report advising the negotiation of a treaty for settlement of similar claims, Feb. 6, 1879. House Rep. 96, 45th Cong., 3d sess.

Report in favor of the appointment of a select committee to examine into the claims and take evidence, Jan. 13, 1880. House Rep. 86, 46th Cong., 2d sess.

Resolution providing for a committee of five to examine claims, June 30, 1879. House Mis. Doc. 20, 46th Cong., 1st sess.

Report submitting a bill to carry out any claims convention with that Government that may be concluded, Apr. 28, 1880. Senate Rep. 532, 46th Cong., 2d sess.

Report in favor of authorizing the President to negotiate a treaty for the settlement of claims, Mar. 3, 1881. House Rep. 396, 46th Cong., 3d sess.

Report calling on the President to arrange a convention for the consideration of claims, Feb. 7, 1882. House Rep. 255, 47th Cong., 1st sess.

Nicaragua Canal route, report in favor of. President's message, Apr. 18, 1879. Senate Ex. Doc. 15, 46th Cong., 1st sess.

As to the Maritime Canal Company of Nicaragua, the following documents may be noticed:

Amendments to proposed charter, Feb. 12, 1881. House Rep. 211, 46th Cong., 3d sess.

Favorable report, Apr. 4, 1882. Senate Rep. 368, 47th Cong., 1st sess.

Favorable report, with map. July 21, 1882, House Rep. 1698, 47th Cong., 1st sess.; Aug. 7, 1883, part 2, minority report.

Favorable report, Jan. 31, 1883. Senate Rep, 952, 47th Cong., 2d sess.

### (3) Costa Rica.

### § 294.

The relations of Costa Rica to the United States are elsewhere distinctively noticed, *supra*, § 140.

As to contested boundary between Costa Rica and Nicaragua, and as to their contention as to canal site, see Mr. Webster, Sec. of State, to Mr. Walsh, Apr. 29, 1852, Apr. 30, 1852. MSS. Inst., Am. States. See also Mr. Everett, Sec. of State, to Mr. Kerr, Jan. 5, 1853, *ibid.*, for a full discussion of the same issues.

### (4) The Mosquito Country and Belize.

### § 295.

The importance of the question of the present relations of Great Britain and the Mosquito country has been already pointed out. (*Supra*, § 150*f*.) It remains now to observe that the United States has at all periods, after the question was agitated, denied the title of Great Britain to a protectorship of the Mosquito coast. This has been not only resolutely, but with much elaborateness of argument, in instructions by Mr. Clayton, Secretary of State, to Mr. Squier (Cent. Am.), May 1, 1849; to Mr. Bancroft (Great Britain), May 2, 1849, and to Mr. Lawrence (Gr. Brit.), October 20, 1849, December 10, 1849; by Mr. Marcy, Secretary of State, to Mr. Buchanan, July 2, 1853, and to Mr. Dallas, May 24, July 26, 1856; by Mr. Webster, Secretary of State, to Mr. Graham, Secretary of the Navy, March 17, 1852, and by Mr. Everett in a report to the President of February 16, 1853. Other documents showing the baselessness of this

claim are noticed, *supra*, § 150*f*, in the discussion of the Clayton-Bulwer treaty.

That Great Britain has no basis for her claim to the protectorate of the Mosquito country see Mr. Clayton, Sec. of State, to Mr. Bancroft, May 2, 1849, MSS. Inst., Gr. Brit.; Mr. Clayton to Mr. Lawrence, Oct. 20, 1849; same to same, Dec. 10, 1849; Mr. Marcy to Mr. Buchanan, July 2, 1853; Mr. Marcy to Mr. Dallas, May 24, 1856, July 26, 1856.

As to Belize and Ruatan, see Mr. Marcy to Mr. Buchanan, June 12, 1854, Aug. 6, 1855; Mr. Marcy to Mr. Dallas, Mar. 14, 1856, April 7, 1856, May 24, 1856, July 26, 1856. See also Senate Ex. Doc. 27, 32d Cong., 2d sess.; report of Mr. Everett to the President, Feb. 16, 1853, MSS. Report Book; Bancroft Davis, Notes on Treaties, 104.

For an elaborate discussion of the whole question see Mr. Clayton, Sec. of State, to Mr. Squier, May 1, 1849. MSS. Inst., Am. States.

That the Mosquito Indians do not possess the rights of sovereignty and cannot give title, see Mr. Webster, Sec. of State, to Mr. Graham, Mar. 17, 1852; Mr. Marcy, Sec. of State, to Mr. Ingersoll, June 9, 1853, MSS. Inst., Gr. Brit.; to Mr. Buchanan, Aug. 6, 1855; to Mr. Dallas, July 26, 1856.

That the British protectorate over the Mosquito territory is in violation of the Clayton-Bulwer treaty, see Mr. Marcy, Sec. of State, to Mr. Buchanan, July 2, 1853. MSS. Inst., Gr. Brit.

"Under the assumed title of protector of the Kingdom of the Mosquitos, a miserable, degraded, and insignificant tribe of Indians, she doubtless intends to acquire an absolute dominion over this vast extent of sea coast. With what little reason she advances this pretension appears from the convention between Great Britain and Spain, signed at London on the 14th day of July, 1786. By its first article, 'His Britannic Majesty's subjects, and the other colonists who have hitherto enjoyed the protection of England, shall evacuate the country of the Mosquitos, as well as the continent in general and the islands adjacent, without exception, situated beyond the line hereafter described as what ought to be the frontier of the extent of the territory granted by His Catholic Majesty to the English for the uses specified in the third article of the present convention, and in addition to the country already granted to them in virtue of the stipulations agreed upon by the commissioners of the two Crowns in 1783.'"

Mr. Buchanan, Sec. of State, to Mr. Hise, June 3, 1848. MSS. Inst., Am. States. 1 Curtis' Buchanan, 623.

"This application has led to an inquiry by the Department into the claim set up by the British Government, nominally in behalf of His Mosquito Majesty, and the conclusion arrived at is that it has no reasonable foundation. Under this conviction, the President can never allow such pretension to stand in the way of any rights or interests which this Government or citizens of the United States now possess, or may hereafter acquire, having relation to the Mosquito shore, and especially to the port and river of San Juan de Nicaragua. He is decided in the opinion that that part of the American continent having been discovered by Spain and occupied by her so far as she deemed compatible with her

interests, of right belonged to her; that the alleged independence of the Mosquito Indians, though tolerated by Spain, did not extinguish her right of dominion over the region claimed in their behalf, any more than similar independence of other Indian tribes did or may now impair the sovereignty of other nations, including Great Britain herself, over many tracts of the same continent; that the rights of Spain to that region have been repeatedly acknowledged by Great Britain in solemn public treaties with that power; that all those territorial rights in her former American possessions descended to the states which were formed out of those possessions, and must be regarded as still appertaining to them in every case where they may not have been voluntarily relinquished or canceled by conquest followed by adverse possession."

Mr. Clayton, Sec. of State, to Mr. Bancroft, May 2, 1849. MSS. Inst., Gr. Brit.

"It is understood that New Granada sets up a claim to the Mosquito shore, based upon the transfer of the military jurisdiction there to the authorities at Carthagena and Bogotá, pursuant to the royal order of His Catholic Majesty of the 30th November, 1803, and upon the 7th article of the treaty between Colombia and Central America, by which those Republics engaged to respect their limits based upon the *uti possidetis* of 1810. Great Britain also claims that coast in behalf of the pretended King of the Mosquitos, and Nicaragua claims it as heir to the late confederation of Central America. With the conflicting claims of New Granada and Nicaragua we have no concern, and, indeed, there is reason to believe that they will be amicably adjusted. We entertain no doubt, however, that the title of Spain to the Mosquito shore was just, and that her rights have descended to her late colonies adjacent thereto. The Department has not hesitated to express this opinion in the instructions to Mr. Squier, the chargé d'affaires to Gautemala, and Mr. Bancroft has been instructed to make it known to the British Government also. You may acquaint the minister for foreign affairs of New Granada with our views on this subject, and may assure him that all the moral means in our power will be exerted to resist the adverse pretensions of Great Britain."

Mr. Clayton, Sec. of State, to Mr. Foote, July 19, 1849. MSS. Inst., Colombia.

"The power in existence at Greytown is claimed to be derived from the Mosquito Indians, who have not been, and will not be, acknowledged as an independent nation by this Government."

Mr. Webster, Sec. of State, to Mr. Graham, Mar. 17, 1852. MSS. Dom. Let.
As to correspondence with Great Britain respecting the Mosquito country, see message of President Fillmore, Jan. 21, 1853, and accompanying papers. Senate Ex. Doc. 27, 32d Cong., 2d sess.

"The United States cannot recognize as valid any title set up by the people at San Juan derived from the Mosquito Indians. It concedes to this tribe of Indians only a possessory right—a right to occupy and

use for themselves the country in their possession, but not the right of sovereignty or eminent domain over it."

Mr. Marcy, Sec. of State, to Mr. Ingersoll, June 9, 1853. MSS. Inst., Gr. Brit.

"The British Government denies that it has yielded anything by that (1850) treaty in regard to its protectorate of the Mosquito Indians. It, however, professes a willingness, as I understand, to withdraw that protectorate if the Government of Nicaragua can be induced to treat the Mosquitos fairly and allow them some compensation for the territory now claimed by them for the relinquishment of their occupancy, and for the peaceable surrender of it to Nicaragua. Admitting these Indians to be what the United States and Nicaragua regard them, a savage tribe, having only possessory rights to the country they occupy, and not the sovereignty of it, they cannot fairly be required to yield up their actual possessions without some compensation. Might not this most troublesome element in this Central American question be removed by Nicaragua in a way just in itself, and entirely compatible with her national honor? Let her arrange this matter as we arrange those of the same character with the Indian tribes inhabiting portions of our own territory."

Mr. Marcy, Sec. of State, to Mr. Borland, June 17, 1853. MSS. Inst., Am. St.

"The United States Government, in its correspondence with the British Government, has denied the pretensions set up for the people at San Juan de Nicaragua (or Greytown) to any political organization or power derived in any way or form from the Mosquitos."

*Ibid.*

"The protectorate which Great Britain has assumed over the Mosquito Indians is a most palpable infringement of her treaties with Spain, to which reference has just been made, and the authority she is there exercising under pretense of this protectorate is in derogation of the sovereign rights of several of the Central American States and contrary to the manifest spirit and intention of the treaty of April 19, 1850, with the United States.

"Though ostensibly the direct object of the Clayton and Bulwer treaty was to guarantee the free and common use of the contemplated ship-canal across the Isthmus of Darien, and to secure such use to all nations by mutual treaty stipulations to that effect, there were other and highly important objects sought to be accomplished by the convention. The stipulation regarded most of all, by the United States, is that for discontinuing the use of her assumed protectorate of the Mosquito Indians, and with it the removal of all pretext whatever for interfering with the territorial arrangements which the Central American States may wish to make among themselves. It was the intention, as it is obviously the import, of the treaty of April 19, 1850, to place Great Britain under an obligation to cease her interpositions in the affairs of Central America

and to confine herself to the enjoyment of her limited rights in the Belize. She has by this treaty of 1850 obligated herself not to occupy or colonize any part of Central America or to exercise any dominion therein. Notwithstanding these stipulations she still asserts the right to hold possession of and to exercise control over large districts of that country and important islands in the Bay of Honduras, the unquestionable appendages of the Central American States. This jurisdiction is not less mischievous in its effects, nor less objectionable to us, because it is covertly exercised (partly at least) in the name of a miserable tribe of Indians, who have in reality no political organization, no actual Government, not even the semblance of one, except that which is created by British authority and upheld by British power."

Mr. Marcy, Sec. of State, to Mr. Buchanan, July 2, 1853. MSS. Inst. Gr. Brit.

"So far as I am aware, this Government has never had occasion to take the question of the proprietorship of those (the Mosquito) islands into consideration. I cannot say, beforehand, what would be the opinion of the Department on the subject, as we make it a rule to express no opinion upon a hypothetical case.

"It is obvious, however, from the names of the islands, that they were discovered by the Spaniards. Though this, unaccompanied by actual occupancy, may not have imparted to Spain any right of ownership to the exclusion of the citizens or subjects of other countries, yet, as the islands lie within a short distance of the Mosquito coast, it is quite probable that, if they had, for any purpose, been visited by persons not owing allegiance to Spain, she might have endeavored to prevent this. It is more certain that she would have endeavored to prevent any other nation from occupying them for military or naval purposes. The rights of sovereignty possessed by Spain in Central America extended, as we claim, over the territory actually conquered or obtained by contract from the aborigines, as well as over that the Indian title to which had not been extinguished. The British Government contends that the Indian title to the Mosquito coast has never been extinguished; and partly on that ground asserts the right to protect the inhabitants of that coast. It is not unlikely that that Government might also contend that the islands to which you refer belong by right of proximity to the Mosquito shore and, therefore, that its right of protection extends to them also."

Mr. Marcy, Sec. of State, to Messrs. Thompson and Oudeshuys, Dec. 27, 1853. MSS. Dom. Let.

"The political condition of what is called the Mosquito Kingdom has for several years past been a matter of discussion between the United States and Great Britain. This Government has uniformly held that the Mosquito Indians are a savage tribe, and that though they have rights as the occupants of the country where they are, they have no

sovereign or political authority there, and no capacity to transfer to individuals an absolute and permanent title to the lands in their possession, and that the right of eminent domain—which only can be the source of such title—is in certain of the Central American States.

"If the emigrants (persons purposing to settle in the Mosquito Kingdom) should be formed into companies, commanded by officers, and furnished with arms, such organization would assume the character of a military expedition, and being hardly consistent with professions of peaceful objects, would devolve upon this Government the duty of inquiring whether it be not a violation of our neutrality act."

Mr. Marcy, Sec. of State, to Mr. Kinney, Feb. 4, 1855. MSS. Dom. Let.

Great Britain had not, at the time of the convention of April 19, 1850, "any rightful possessions in Central America, save only the usufructuary settlement at the Belize, if that really be in Central America; and at the same time, if she had any, she was bound by the express tenor and true construction of the convention, to evacuate the same, so as thus to stand on precisely the same footing in that respect as the United States."

Mr. Marcy, Sec. of State, to Mr. Dallas, July 26, 1856. MSS. Inst., Gr. Brit. *Supra*, § 150 *f*. [The whole of this instruction is of great importance, and should be carefully studied in this connection.]

The "statement for the Earl of Clarendon," by Mr. Buchanan, United States minister in London, dated January 6, 1854, given in the Brit. and For. St. Pap. for 1855–'56, vol. 46, contains the following passages:

"It would be a vain labor to trace the history of the connection of Great Britain with the Mosquito shore and other portions of Central America previous to her treaties with Spain of 1783 and 1786. This connection doubtless originated from her desire to break down the monopoly of trade which Spain so jealously enforced with her American colonies, and to introduce into them British manufactures. The attempts of Great Britain to accomplish this object were pertinaciously resisted by Spain, and became the source of continual difficulties between the two nations. After a long period of strife these were happily terminated by the treaties of 1783 and 1786, in as clear and explicit language as ever was employed on any similar occasion; and the history of the time rendered the meaning of this language, if possible, still more clear and explicit.

"Article VI of the treaty of peace of 3d September, 1783, was very distasteful to the King and Cabinet of Great Britain. This abundantly appears from Lord John Russell's 'Memorials and Correspondence of Charles James Fox.' The British Government, failing in their efforts to have this article deferred for six months, finally yielded a most reluctant consent to its insertion in the treaty.

"Why this reluctant consent? Because Article VI stipulates that, with the exception of the territory between the river Wallis or Belize and the Rio Hondo, within which permission was granted to British subjects to cut log-wood, 'all the English who may be dispersed in any other parts, whether on the Spanish continent ("continente Espaguol"), or in any of the islands whatsoever dependent on the aforesaid Spanish continent, and for whatever reason it might be, without exception, shall

retire within the district above described in the space of eighteen months, to be computed from the exchange of ratifications.'

"And the treaty further expressly provides, that the permission granted to cut logwood 'shall not be considered as derogating, in any wise, from his [Catholic Majesty's] rights of sovereignty' over this logwood district; and it stipulates, moreover, 'that if any fortifications should have been actually heretofore erected within the limits marked out, His Britannic Majesty shall cause them all to be demolished, and he will order his subjects not to build any new ones.'

"But, notwithstanding these provisions, in the opinion of Mr. Fox, it was still in the power of the British Government 'to put our [their] own interpretation upon the words "continente Espagnol," and to determine, upon prudential considerations, whether the Mosquito shore comes under that description or not.'

"Hence the necessity for new negotiations which should determine, precisely and expressly, the territory embraced by the treaty of 1783. These produced the convention of the 14th of July, 1786; and its very first article removed every doubt on the subject. This declared that 'His Britannic Majesty's subjects, and the other colonists who have hitherto enjoyed the protection of England, shall evacuate the country of the Mosquitos, as well as the continent in general, and the islands adjacent, without exception,' situated beyond the new limits prescribed by the convention within which British subjects were to be permitted to cut, not only logwood, but mahogany and all other wood; and even this district is 'indisputably acknowledged to belong of right to the Crown of Spain.'

"Thus what was meant by the 'continente Espagnol' in the treaty of 1783, is defined, beyond all doubt, by the convention of 1786; and the sovereignty of the Spanish King over the Mosquito shore, as well as over every other portion of the Spanish continent and the islands adjacent, is expressly recognized.

"It was just that Great Britain should interfere to protect the Mosquito Indians against the punishment to which they had exposed themselves as her allies from their legitimate and acknowledged sovereign. Article XIV of the convention, therefore, provides that His Catholic Majesty, prompted solely by motives of humanity, promises to the King of England that he will not exercise any act of severity against the Mosquitos inhabiting in part the countries which are to be evacuated by virtue of the present convention, on account of the connections which may have subsisted between the said Indians and the English; and His Britannic Majesty, on his part, will strictly prohibit all his subjects from furnishing arms or warlike stores to the Indians in general situated upon the frontiers of the Spanish possessions.'

"British honor required that these treaties with Spain should be faithfully observed; and from the contemporaneous history no doubt exists but that this was done; that the orders required by Article XV of the convention were issued by the British Government, and that they were strictly carried into execution.

"In this connection a reference to the significant proceedings in the House of Lords on the 26th of March, 1787, ought not to be omitted. On that day a motion was made by Lord Rawdon that the terms of the convention of July 14, 1786, do not meet the favorable opinion of this House.' The motion was discussed at considerable length, and with great ability. The task of defending the ministry upon this occasion was undertaken by Lord Chancellor Thurlow, and was most trium-

phantly performed. He abundantly justified the ministry for having surrendered the Mosquito shore to Spain; and proved that 'the Mosquitos were not our allies; they were not a people we were bound by treaty to protect.' His lordship repelled the argument that the settlement was a regular and legal settlement, with some sort of indignation; and so far from agreeing, as had been contended, that we had remained uniformly in the quiet and unquestionable possession of our claim to the territory he called upon the noble Viscount Stormont to declare, as a man of honor, whether he did not know the contrary.

"Lord Rawdon's motion to condemn the convention was rejected by a vote of 53 to 17.

"It is worthy of special remark that all sides of the House, whether approving or disapproving the convention, proceeded upon the express admission that it required Great Britain, employing its own language, 'to evacuate the country of the Mosquitos.' On this question the House of Lords was unanimous.

"At what period, then, did Great Britain renew her claims to the country of the Mosquitos, as well as the continent in general, and the islands adjacent, without exception? It certainly was not in 1801, when, under the Treaty of Amiens, she acquired the island of Trinidad from Spain, without any mention whatever of further acquisitions in America. It certainly was not in 1809, when she entered into a treaty of alliance, offensive and defensive, with Spain, to resist the Emperor Napoleon in his attempt to conquer the Spanish monarchy. It certainly was not in 1814, when the commercial treaties, which had previously existed between the two powers, including, it is presumed, those of 1783 and 1786, were revived. On all these occasions there was no mention whatever of any claims of Great Britain to the Mosquito protectorate, or to any of the Spanish-American territories which she had abandoned. It was not in 1817 and 1819, when acts of the British Parliament (57 and 59 George III), distinctly acknowledged that the British settlement at Belize was 'not within the territory and dominion of His Majesty,' but was merely 'a settlement for certain purposes, in the possession and under the protection of His Majesty;' thus evincing a determined purpose to observe with the most scrupulous good faith the treaties of 1783 and 1786 with Spain.

"In the very sensible book of Captain Bonnycastle, of the corps of British Royal Engineers, on Spanish-America, published at London, in 1818, he gives no intimation whatever that Great Britain had revived her claim to the Mosquito protectorate. On the contrary, he describes the Mosquito shore as 'a tract of country which lies along part of the northern and eastern shore of Honduras,' which had 'been claimed by the British.' He adds, 'the English held this country for eighty years, and abandoned it in 1787 and 1788.'

"Thus matters continued until a considerable period after 1821, in which year the Spanish provinces composing the captain-generalship of Guatemala asserted and maintained their independence of Spain. It would be a work of supererogation to attempt to prove, at this period of the world's history, that these provinces having, by a successful revolution, become independent states, succeeded within their respective limits to all the territorial rights of Spain. This will surely not be denied by the British Government, which took so noble and prominent a part in securing the independence of all the Spanish-American provinces.

"Indeed, Great Britain has recorded her adhesion to this principle of international law in her treaty of December 26, 1826, with Mexico,

then recently a revolted Spanish colony. By this treaty, so far from claiming any right beyond the usufruct which had been conceded to her under the convention with Spain in 1786, she recognizes its continued existence and binding effect, as between herself and Mexico, by obtaining and accepting from the Government of the latter a stipulation that British subjects shall not be 'disturbed or molested in the peaceable exercise of whatever rights, privileges, and immunities they have at any time enjoyed within the limits described and laid down' by that convention. Whether the former Spanish sovereignty over Belize, subject to the British usufruct, reverted of right to Mexico or to Guatemala, may be seriously questioned; but, in either case, this recognition by Great Britain is equally conclusive.

"And here it may be appropriate to observe that Great Britain still continues in possession, not only of the district between the Rio Hondo and the Sibun, within which the King of Spain had granted her a license to cut mahogany and other woods, but the British settlers have extended this possession south to the river Sarstoon, one degree and a half of latitude beyond 'the limits described and laid down' by this convention. It is presumed that the encroachments of these settlers south of the Sibun have been made without the authority or sanction of the British Crown, and that no difficulty will exist in their removal.

"Yet in view of all these antecedents the island of Ruatan, belonging to the State of Honduras, and within sight of its shores, was captured in 1841 by Colonel McDonald, then Her Britannic Majesty's superintendent at Belize, and the flag of Honduras was hauled down and that of Great Britain was hoisted in its place. This small State, incapable of making any effectual resistance, was compelled to submit, and the island has ever since been under British control. What makes this event more remarkable is that it is believed a similar act of violence had been committed on Ruatan by the superintendent of Belize in 1835; but on complaint by the Federal Government of the Central American States, then still in existence, the act was formally disavowed by the British Government, and the island was restored to the authorities of the Republic.

"No question can exist but that Ruatan was one of the 'islands adjacent' to the American continent which had been restored by Great Britain to Spain under the treaties of 1783 and 1786. Indeed, the most approved British gazetteers and geographers up till the present date have borne testimony to this fact, apparently without information from that hitherto but little known portion of the world, that the island had again been seized by Her Majesty's superintendent at Belize, and was now a possession claimed by Great Britain.

"When Great Britain determined to resume her dominion over the Mosquito shore, in the name of a protectorate, is not known with any degree of certainty in the United States. The first information on the subject in the Department of State, at Washington, was contained in a dispatch of the 20th January, 1842, from William S. Murphy, esq., special agent of the American Government to Guatemala, in which he states that in a conversation with Colonel McDonald at Belize the latter had informed him that he had discovered and sent documents to England, which caused the British Government to revive their claim to the Mosquito territory.

"According to Bonnycastle the Mosquito shore 'lies along part of the northern and eastern shore of Honduras;' and by the map which accompanies his work, extends no further south than the mouth of the

river Segovia, in about 12° north latitude. This respectable author certainly never could have imagined that it extended south to San Juan de Nicaragua, because he describes this as the principal port of Nicaragua on the Caribbean Sea, says there are 'three portages' between the lake and the mouth of the river, and 'these carrying places are defended, and at one of them is the fort San Juan, called also the Castle of Nuestra Señora, on a rock, and very strong; it has 36 guns mounted, with a small battery, whose platform is level with the water; and the whole is inclosed on the land side by a ditch and rampart. Its garrison is generally kept up at 100 infantry, 16 artillerymen, with about 60 of the militia, and is provided with bateaux, which row guard every night up and down the stream.' Thus, it appears, that the Spaniards were justly sensible of the importance of defending this outlet from the lake of Nicaragua to the ocean; because, as Captain Bonnycastle observes, 'this port (San Juan) is looked upon as the key of the Americas, and with the possession of it and Realejo, on the other side of the lake, the Spanish colonies might be paralyzed by the enemy then being master of the ports of both oceans.' He might have added that nearly 60 years ago, on the 26th February, 1796, the port of San Juan de Nicaragua was established as a port of entry of the second class by the King of Spain. Captain Bonnycastle, as well as the Spaniards, would have been greatly surprised had they been informed that this port was a part of the dominions of His Majesty the King of the Mosquitos, and that the cities and cultivated territories of Nicaragua surrounding the lakes Nicaragua and Managua had no outlet to the Caribbean Sea except by his gracious permission.

"It was, therefore, with profound surprise and regret [that] the Government and people of the United States learned that a British force, on the 1st of January, 1848, had expelled the State of Nicaragua from San Juan, had hauled down the Nicaraguan flag, and had raised the Mosquito flag in its place. The ancient name of the town, San Juan de Nicaragua, which had identified it in all former times as belonging to Nicaragua, was on this occasion changed, and thereafter it became Greytown.

"These proceedings gave birth to serious apprehensions throughout the United States that Great Britain intended to monopolize for herself the control over the different routes between the Atlantic and Pacific, which, since the acquisition of California, had become of vital importance to the United States. Under this impression, it was impossible that the American Government could any longer remain silent and acquiescing spectators of what was passing in Central America.

"Mr. Monroe, one of our wisest and most discreet Presidents, announced in a public message to Congress, in December, 1823, that 'the American continents, by the free and independent condition which they have assumed and maintained, are henceforth not to be considered subjects for future colonization by any European powers.' This declaration has since been known throughout the world as the 'Monroe doctrine,' and has received the public and official sanction of subsequent Presidents, as well as of a large majority of the American people. Whilst this doctrine will be maintained whenever, in the opinion of Congress, the peace and safety of the United States shall render this necessary, yet to have acted upon it in Central America might have brought us into collision with Great Britain, an event always to be deprecated, and, if possible, avoided. We can do each other the most good, and the most harm, of any two nations in the world, and, there-

fore, it is our strong mutual interest, as it ought to be our strong mutual desire, to remain the best friends. To settle these dangerous questions, both parties wisely resorted to friendly negotiations, which resulted in the convention of April, 1850. May this prove to be instrumental in finally adjusting all questions of difficulty between the parties in Central America, and in perpetuating their peace and friendship.

"Surely the Mosquito Indians ought not to prove an obstacle to so happy a consummation. Even if these savages had never been actually subdued by Spain, this would give them no title to rank as an independent state without violating the principles and the practice of every European nation, without exception, which has acquired territory on the continent of America. They all mutually recognized the right of discovery, as well as the title of the discoverer to a large extent of interior territory, though at the moment occupied by fierce and hostile tribes of Indians. On this principle the wars, the negotiations, the cessions, and the jurisprudence of these nations were founded. The ultimate dominion and absolute title belonged to themselves, although several of them, and especially Great Britain, conceded to the Indians a right of mere occupancy, which, however, could only be extinguished by the authority of the nation within whose dominions these Indians were found. All sales or transfers of territory made by them to third parties were declared to be absolutely void; and this was a merciful rule even for the Indians themselves, because it prevented them from being defrauded by dishonest individuals.

"No nation has ever acted more steadily upon these principles than Great Britain, and she has solemnly recognized them in her treaties with the King of Spain, of 1783 and 1786, by admiting his sovereignty over the Mosquitos.

"Shall the Mosquito tribe of Indians constitute an exception from this hitherto universal rule? Is there anything in their character or in their civilization which would enable them to perform the duties and sustain the responsibilities of a sovereign state in the family of nations?

"Bonnycastle says of them, that they 'were formerly a very powerful and numerous race of people, but the ravages of rum and the smallpox have diminished their number very much.' He represents them, on the authority of British settlers, as seeming 'to have no other religion than the adoration of evil spirits.' The same author also states, that the warriors of this tribe are accounted at 1,500.' This possibly may have been correct in 1818, when the book was published, but at present serious doubts are entertained whether they reach much more than half that number. The truth is, they are now a debased race and are degraded even below the common Indian standard. They have acquired the worst vices of civilization from their intercourse with the basest class of the whites, without any of its redeeming virtues. The Mosquitos have been thus represented by a writer of authority, who has recently enjoyed the best opportunities for personal observation. That they are totally incapable of maintaining an independent civilized government is beyond all question. Then, in regard to their so-called King, Lord Palmerston, in speaking of him to Mr. Rives, in September, 1851, says: 'They had what was called a King, who, by-the-bye,' he added in a tone of pleasantry, 'was as much of a king as you or I;' and Lord John Russell, in his dispatch to Mr. Crampton, of the 19th of January, 1853, denominates the Mosquito Government as 'a fiction,' and speaks of the King as a person 'whose title and power are, in truth, little better than nominal.'

"The moment Great Britain shall withdraw from Bluefields, where she now excises exclusive dominion over the Mosquito shore, the former relations of the Mosquitos to Nicaragua and Honduras as the successors of Spain, will naturally be restored. When this event shall occur, it is to be hoped that these states in their conduct towards the Mosquitos and the other Indian tribes within their territories, will follow the example of Great Britain and the United States. Whilst neither of these has ever acknowledged, or permitted any other nation to acknowledge, any Indian tribe within their limits as an independent people, they have both recognized the qualified right of such tribes to occupy the soil, and as the advance of the white settlements rendered this necessary, have acquired their title by fair purchase.

"Certainly it cannot be desired that this extensive and valuable Central American coast, on the highway of nations between the Atlantic and Pacific, should be appropriated to the use of 3,000 or 4,000 wandering Indians as an independent state, who would use it for no other purpose than that of hunting and fishing and savage warfare. If such an event were possible, the coast would become a retreat for pirates and outlaws of every nation from whence to infest and disturb the commerce of the world on its transit across the Isthmus, and but little better would be its condition should a new independent state be established on the Mosquito shore; besides, in either event, the present Central American States would deeply feel the injustice which had been done them in depriving them of a portion of their territories; they would never cease in attempts to recover their rights, and thus strife and contention would be perpetuated in that quarter of the world where it is so much the interest, both of Great Britain and the United States, that all territorial questions should be speedily, satisfactorily, and finally adjusted."

To this is given in reply an elaborate statement of Lord Clarendon (Brit. and For. St. Pap. for 1855–'56, vol. 46, 255–271); a rejoinder by Mr. Buchanan (*ibid.*, 272), and further correspondence between Mr. Buchanan, Mr. Marcy, Mr. Dallas, Lord Clarendon, and Mr. Crampton. See App., § 150*g*.

"A protectorate necessarily implies the actual existence of a sovereign authority in the protected power, but where there is, in fact, no such authority there can be no protectorate. The Mosquitos are a convenience to sustain British pretensions, but cannot be regarded as a sovereign state. Lord Palmerston, as was evinced by his remark to Mr. Rives, took this view of the political condition of the Mosquitos, and it is so obviously correct that the British Government should not be surprised if the United States consider the subject in the same light."

Mr. Marcy, Sec. of State, to Mr. Buchanan, Aug. 6, 1855. MSS. Inst., Gr. Brit.

"It, however, became apparent, at an early day after entering upon the discharge of my present functions, that Great Britain still continued in the exercise or assertion of large authority in all that part of Central America commonly called the Mosquito coast, and covering the entire length of the State of Nicaragua and a part of Costa Rica; that she regarded the Belize as her absolute domain, and was gradually extending its limits at the expense of the State of Honduras; and that she

had formally colonized a considerable insular group known as the Bay Islands, and belonging, of right, to that State.

"All these acts or pretensions of Great Britain, being contrary to the rights of the States of Central America, and to the manifest tenor of her stipulations with the United States, as understood by this Government, have been made the subject of negotiation through the American minister in London. I transmit herewith the instructions to him on the subject, and the correspondence between him and the British secretary for foreign affairs, by which you will perceive that the two Governments differ widely and irreconcilably as to the construction of the convention and its effect on their respective relations to Central America.

"Great Britain so construes the convention as to maintain unchanged all her previous pretensions over the Mosquito coast and in different parts of Central America. These pretensions as to the Mosquito coast are founded on the assumption of political relation between Great Britain and the remnant of a tribe of Indians on that coast, entered into at a time when the whole country was a colonial possession of Spain. It cannot be successfully controverted that, by the public law of Europe and America, no possible act of such Indians, or their predecessors, could confer on Great Britain any political rights.

"Great Britain does not allege the assent of Spain as the origin of her claims on the Mosquito coast. She has, on the contrary, by repeated and successive treaties, renounced and relinquished all pretensions of her own, and recognized the full and sovereign rights of Spain in the most unequivocal terms. Yet these pretensions, so without solid foundation in the beginning, and thus repeatedly abjured, were, at a recent period, revived by Great Britain against the Central American States, the legitimate successors to all the ancient jurisdiction of Spain in that region. They were first applied only to a defined part of the coast of Nicaragua, afterwards to the whole of its Atlantic coast, and lastly to a part of the coast of Costa Rica; and they are now reasserted to this extent, notwithstanding engagements to the United States.

"On the eastern coast of Nicaragua and Costa Rica, the interference of Great Britain, though exerted at one time in the form of military occupation of the port of San Juan del Norte, then in the peaceful possession of the appropriate authorities of the Central American States, is now presented by her as the rightful exercise of a protectorship over the Mosquito tribe of Indians.

"But the establishment at the Belize, now reaching far beyond its treaty limits into the State of Honduras, and that of the Bay Islands, appertaining of right to the same state, are as distinctly colonial governments as those of Jamaica or Canada, and therefore contrary to the very letter as well as the spirit of the convention with the United States, as it was at, the time of ratification, and now is, understood by this Government.

"The interpretation which the British Government, thus in assertion and act persists in ascribing to the convention, entirely changes its character. While it holds us to all our obligations, it in a great measure releases Great Britain from those which constituted the consideration of this Government for entering into the convention. It is impossible, in my judgment, for the United States to acquiesce in such a construction of the respective relations of the two Governments to Central America.

"To a renewed call by this Government upon Great Britain to abide by and carry into effect the stipulations of the convention according to its obvious import, by withdrawing from the possession or colonization of portions of the Central American States of Honduras, Nicaragua, and Costa Rica, the British Government has at length replied, affirming that the operation of the treaty is prospective only, and did not require Great Britain to abandon or contract any possessions held by her in Central America at the date of its conclusion.

"This reply substitutes a partial issue, in the place of the general one presented by the United States. The British Government passes over the question of the rights of Great Britain, real or supposed, in Central America, and assumes that she had such rights at the date of the treaty, and that those rights comprehended the protectorship of the Mosquito Indians, the extended jurisdiction and limits of the Belize, and the colony of the Bay Islands, and thereupon proceeds by implication to infer that, if the stipulations of the treaty be merely future in effect, Great Britain may still continue to hold the contested portions of Central America. The United States cannot admit either the inference or the premises. We steadily deny that, at the date of the treaty, Great Britain had any possessions there other than the limited and peculiar establishment at the Belize, and maintain that, if she had any, they were surrendered by the convention.

"The Government, recognizing the obligations of the treaty, has, of course, desired to see it executed in good faith by both parties, and in the discussion, therefore, has not looked to rights which we might assert, independently of the treaty, in consideration of our geographical position and of other circumstances which create for us relations to the Central American States different from those of any Government of Europe.

"The British Government, in its last communication, although well knowing the views of the United States, still declares that it sees no reason why a conciliatory spirit may not enable the two Governments to overcome all obstacles to a satisfactory adjustment of the subject.

"Assured of the correctness of the construction of the treaty constantly adhered to by this Government, and resolved to insist on the rights of the United States, yet actuated also by the same desire which is avowed by the British Government, to remove all causes of

serious misunderstanding between two nations associated by so many ties of interest and kindred, it has appeared to me proper not to consider an amicable solution of the controversy hopeless.

"There is, however, reason to apprehend that, with Great Britain in the actual occupation of the disputed territories, and the treaty, therefore, practically null so far as regards our rights, this international difficulty cannot long remain undetermined without involving in serious danger the friendly relations which it is the interest as well as the duty of both countries to cherish and preserve. It will afford me sincere gratification if future efforts shall result in the success anticipated heretofore with more confidence than the aspect of the case permits me now to entertain."

President Pierce, Third Annual Message, 1855.

President Pierce's message of Feb. 14, 1856, covering correspondence with respect to Nicaragua and Costa Rica and the Mosquito Indians, is given in Senate Ex. Doc. 25, 34th Cong., 1st sess.

"The President cannot himself admit as true, and therefore cannot under any possible circumstances advise the Republic of Nicaragua to admit, that the Mosquito Indians are a state or a Government any more than a band of Maroons in the island of Jamaica are a state or Government. Neither, of course, can he admit that any alliance or protective connection of a political nature may exist for any purpose whatever between Great Britain and those Indians."

Mr. Marcy, Sec. of State, to Mr. Dallas, July 26, 1856. MSS. Inst., Gr. Brit.

As to protests by the Government of the United States against English and French naval expeditions to prevent filibusters landing "on any part of the Mosquito coast or at Greytown, without any application for that purpose from any local authority," see Mr. Cass, Sec. of State, to Mr. Lamar, Dec. 1, 1858, Mar. 2, 1859. MSS. Inst., Am. St.

"The same rules applicable to the aborigines elsewhere on the American continent are supposed to govern in the case of the Mosquito Indians within the territorial limits of the Republic of Nicaragua, to whom the United States deny any claim of sovereignty, or any other title than the Indian right of occupancy, to be extinguished at the will of the discoverer, though a species of undefined protectorate has several times been claimed over them by Great Britain. This subject gave rise to much discussion, on account of the contiguity of the territory to the proposed interoceanic communication, to promote which a convention was concluded between the United States and Great Britain on 19th April, 1850. In that convention there is no reference to the Mosquito protectorate, though by a subsequent agreement between these powers, dated 30th April, 1852, intended to be proposed to the acceptance of the Mosquito King, as well as of Nicaragua and Costa Rica, there was a reservation to these Indians of a district therein described. But Nicaragua refused to enter into the arrangement, and protested against all foreign intervention in her affairs. (Congressional Globe, 1852–'53, xxvi, 268; *ibid.*, xxvii, 252, 286; 8 Stat. L., 174; Annuaire des deux mondes, 1852–'53, 741; Appendix, 922; President Fillmore's message, Annual Reg., 1852, 301. See also for negotiations with Great

Britain subsequent to the interoceanic treaty, Cong. Doc., 32d Cong., 2d sess, Senate Ex. Docs. 12 and 27; *ibid.*, 33d Cong., 1st sess., Ex. Docs. 8 and 13.)"

Lawrence's Wheaton (ed. 1863), 71.

President Buchanan, in his fourth annual message, announced that "Her Britannic Majesty concluded a treaty with Honduras on the 28th November, 1859, and with Nicaragua on the 28th August, 1860, relinquishing the Mosquito protectorate." By that treaty Great Britain recognized, as belonging "to and under the sovereignty of Nicaragua, the country hitherto occupied by the Mosquito Indians, within the frontiers of the Republic; that a certain designated district should be assigned to these Indians, but *that it should remain under the sovereignty of Nicaragua, and should not be ceded by the Indians to any foreign prince or state, and that the British protectorate should cease three months after the exchange of ratifications.*"

*Ibid.*

It was provided, however, in this treaty, that the titles theretofore granted under the alleged protectorate should be valid. (*Supra*, § 150*f*.) Under these titles the British settlers held. It has already been observed (*supra*, § 150*f*) that President Buchanan's expressions of satisfaction with the treaty, in the message above noticed, were based on the assumption that Great Britain had ceased to exercise any influence whatever over the Mosquito country. That this is not the case, however, follows from the ratification, by the treaty, of British titles from Indians, already noticed, giving British subjects a controlling power in the territory, and from other conditions to be presently detailed.

Difficulties having arisen between Great Britain and Nicaragua, under this treaty, as to the degree of influence Great Britain was entitled to exercise over the Mosquito coast, the two powers agreed in 1880 to submit the questions at issue between them to the arbitrament of the Emperor of Austria. As translated, the material parts of the award are as follows:

(1) "The treaty of Nicaragua of January 28, 1860, does not recognize in Nicaragua a full and unlimited sovereignty over the Mosquito Indians, but concedes in the third article to these Indians a limited autonomy (self-government.)

(2) "The Republic of Nicaragua is authorized, in order to give evidence of her sovereignty of the territory of the Mosquito Indians, to hoist on it the flag of the Republic.

(3) "The Republic of Nicaragua is authorized to appoint a commissioner in order to the protection (wahrnehmung) of her sovereign rights in the territory of the Mosquito Indians.

(4) "The Mosquito Indians are authorized to carry their own flag, provided that in it there is a recognition of the sovereignty of the Republic of Nicaragua.

(5) "The Republic of Nicaragua is not authorized to grant concessions for the obtaining of the natural products of the territory assigned to the Mosquito Indians. This right belongs to the Mosquito Government.

(6) "The Republic of Nicaragua is not authorized to regulate the trade of the Mosquito Indians, or to tax the importation or exportation of goods into or from that territory. This right belongs to the Mosquito Government.

(7) "The Republic of Nicaragua is bound to pay the arrears of annuity due by the treaty to the Mosquito Indians."

Article 8 (the last article) relates exclusively to the relations of Nicaragua to the free port of San Juan del Norte (Greytown).

To the award of the Emperor is appended an opinion (gutachten) in which is given in detail the reasons on which his conclusion rests. From this opinion the following condensed translation is given of the passages bearing upon the present issue:

"I. The title to the territory occupied by the Mosquito Indians, on the east shore of Central America, though with an undefined boundary on the land sides, was for a long time in dispute. On the one side it was claimed by the Spanish-American states of South America, as succeeding to the rights of Spain. Spain had before the separation of these states, uniformly asserted her claim to the title, and had in 1803, issued a decree for its enforcement. But neither Spain nor the states which succeeded her had ever reduced their claim into possession; and the Mosquito Indians were in this way, so far as concerns the Spanish and Spanish-American authorities, left in practical independence. This independence they exercised by entering into commercial and international relations, particularly with England. Their relations with England began immediately after England's conquest of Jamaica in the last half of the seventeenth century, and ripened in 1720 into a formal treaty between the governor of Jamaica and the chief (or king) of the Mosquito Indians, which finally grew into an international relation of protectorship. (Schutz-verhältniss.) But this protectorate was contested not only by the Spanish-American states, but by the United States of America; a contest which increased in earnestness as the question of isthmus transit grew in importance.

"In 1848, the Mosquito Indians having, with the help of England, obtained possession of the important sea-port of San Juan del Norte (Greytown) complications threatening war grew up between them and the United States under whose protection the Republic of Nicaragua had placed itself. To remove these difficulties England and the United States concluded in April, 1850, the Clayton-Bulwer treaty, which soon, however, gave rise to fresh difficulties. England's object was, by an arrangement with the United States to determine the relations of the Mosquito Indians, and in particular of the sea-port of San Juan del Norte (Greytown). In this way originated in April, 1850, the so-called Crampton-Webster treaty (Martens-Samsoer, Recueil de Traités, xiv, 195) in which England tacitly renounced the protectorate of the Mosquito Indians and conceded that the sovereignty of the whole of the Mosquito territory within the limits of Nicaragua should be recognized as in Nicaragua, with the exception of a definitely bounded territory which was to be left to the unrestrained and independent control of the Mosquito Indians. Nicaragua, however, declined to accede to this arrangement, so far as it gave independent territory to the Mosquito Indians, but claimed sovereignty over the whole coast. Further negotiations with the United States having proved abortive (the Clarendon-Dallas treaty, the last effort in this direction, not having been ratified by the Senate of the United States) England entered into direct negotiations with Nicaragua, which ended in the treaty of Managua of January 28, 1860.

"II. In this treaty England expressly surrendered the protectorship of the Mosquito country, and recognized the sovereignty of Nicaragua over it under certain limitations, bounding it by fixed lines within which

the Indians were to have the right of self-government. The question submitted to the determination of the Emperor of Austria was the relationship between such sovereignty on the one side and such self-government on the other. As to this the following conclusions are reached:

"The sovereignty of Nicaragua extends over the whole coast. This excludes, under the treaty, an absolute internationally recognizable sovereignty in the Mosquito Indians.

"The Mosquito Indians are subordinated to the protectorate of Nicaragua in the place of the former protectorate of England. They have, however, self-government assigned to them over a specifically limited territory. This territory, which is called *Reserva Mosquito* (Mosquito reservation), is an integral and inseparable part of the collective territory of the Republic of Nicaragua, and an international appurtenance (pertinenz) of the mainland. Within the limits of the territory thus prescribed the Mosquito Indians are to enjoy their own mode of life and national existence; this territory, although remaining part of Nicaragua, is immediately under the control of the Indians, as *their* territory, the land of the Mosquitos. This indirectly follows from the clause prohibiting alienation of the territory by the Mosquito Indians to a foreign power. Within the territory, by the very words of the treaty, the Mosquito Indians *have the right of governing (according to their own customs, and according to any regulations which may from time to time be adopted by them, not inconsistent with the sovereign rights of the Republic of Nicaragua) themselves, and all persons residing within such district.* * * * But this 'self-government' does not extend to foreign affairs, as the *Reserva Mosquito* internationally forms part of the Republic Nicaragua. The Mosquito Indians have not, therefore the right to enter into relations of treaty with foreign states, to interchange with such states diplomatic agents, to wage war or make peace. Their 'self-government' is exclusively municipal. But it precludes, under the treaty, Nicaragua from granting monopoly privileges as to the products of the Mosquito territory, and from interfering with the port duties imposed by the Mosquito authorities. And there is nothing in the subsequent condition of the territory which relieves Nicaragua from the payment of the annuity (rente) agreed on by the treaty."

On the question of the right of England to interpose to exact the fulfillment of her treaty with Nicaragua it is added:

"It is true that England in the treaty of Managua recognized the sovereignty of the Republic of Nicaragua over the Mosquito territory, and renounced her own protectorate. But this was 'subject to the conditions and engagements specified in the treaty.' England has her own interest in the fulfillment, in favor of her former constituents, of those conditions, and may, therefore, in her own name, press such fulfillment. This cannot be called an unjustifiable 'intervention,' as it is simply pressing a treaty guarantee."

It is a matter of notoriety that the governing population in the Mosquito country consists of British subjects (whites or negroes from Jamaica), acting under laws based on those of England, with English process in the English language. It has already been seen that under the treaty of Great Britain with Nicaragua, titles previously granted by the Mosquitos are validated, though this is in defiance of the rule that Indian grants convey no title internationally valid. (*Supra*, § 150*f*.) But however this may be, there can be no question that, with such a state of facts at least in controversy, Great Britain, so far from renouncing her protectorship over the Mosquito Indians, takes the position of their

guardian in their struggles with Nicaragua, appears as their protector before an international court, and is recognized by that court as holding this guardianship.

(5) HONDURAS.

§ 296.

The treaty relations of Honduras to the United States and to Great Britain in the present connection, are noticed in prior sections *supra*, §§ 146, 150*f*. It will also be seen that the British title to Honduras is based originally on an informal concession to British settlers to cut logwood and mahogany on the Belize, which ultimately was merged in an alleged conquest from Spain. (*Supra*, § 150 *f*.) As to effect of intermediate wars on British title to the above franchise, see *infra*, § 303; *supra*, § 135.

(6) VENEZUELA.

§ 297.

The treaty relations of the United States with Venezuela are noticed *supra*, § 165*a*. The claims against Venezuela, and the convention therefor, are discussed *supra*, § 220.

# CHAPTER XIII.

## FISHERIES.

[As some of the principal questions involved in this chapter are now the subject of diplomatic negotiation, the course taken in respect to other portions of this work is departed from, and instead of a republication of extracts at large from the pertinent documents, a summary is given of the material doctrines of international law bearing on the topic, this summary consisting mainly of references to points stated in other chapters. The notes given are mainly such as explain the history of the doctrines stated in the text, and do not contain references to present negotiations.]

I. LAW OF NATIONS.

(1) Fishing on high seas open to all, § 299.

(2) Sovereign of shore has jurisdiction of three-mile marine belt following the sinuosities and indentations of the coast, § 300.

II. NORTHEAST ATLANTIC FISHERIES.

(1) These were conquered from France by the New England colonies, acting in co-operation with Great Britain, with whom they were afterwards held in common by such colonies, § 301.

(2) Treaty of peace (1783) was not a grant of independence, but was a partition of the empire, the United States retaining a common share in the fisheries, § 302.

(3) War of 1812 did not divest these rights, § 303.

(4) Treaty of 1818 recognized their existence and affirmed their continuance, § 304.

(5) Under these treaties the three-miles belt follows the sinuosities and indentations of the coast, § 305.

(6) Bay of Fundy and other large bays are open seas, § 305*a*.

(7) Ports of entry are not affected by limitations imposed by treaty of 1818, § 306.

(8) British municipal legislation may restrict, but cannot expand, British rights under these treaties, § 307.

(9) Great Britain, and not her provinces, is the sovereign to be dealt with for infraction of such fishing rights, § 308.

III. BY PURCHASE OF ALASKA THE UNITED STATES IS ENTITLED TO THE JOINT RIGHTS OF RUSSIA AND OF THE UNITED STATES IN NORTHERN PACIFIC, § 309.

### I. *LAW OF NATIONS.*

#### (1) FISHING ON HIGH SEAS OPEN TO ALL.

#### § 299.

The high seas (with the exception of territorial waters) are open to all nations, no nation having territorial title to them, except in respect to the particular waters covered by its ships.

*Supra*, §§ 26, 33. Schuyler's Am. Dip., 404 *ff.*

See articles in Revue des Deux-Mondes, les pêcheries de Terre Neuve et les Traités, Nov., 1874, t. xvi, and in 29 Hunt's Merch. Mag., 420.

As to right of nations over sea fisheries see House Rep. 7, 46th Cong., 1st sess.

(2) SOVEREIGN OF SHORE HAS JURISDICTION OF THREE-MILE MARINE BELT FOLLOWING THE SINUOSITIES AND INDENTATIONS OF THE COAST.

§ 300.

It has been already seen that rivers and inland lakes and seas, when contained in a particular state, are subject to the sovereign of such state, and that when a river divides two states each has jurisdiction of the waters that wash his shores, this jurisdiction being divided by the middle of the channel of the river unless otherwise provided by treaty (*supra*, § 30). It has also been seen that the prevalent view, so far as concerns the North Atlantic waters, is that the sovereigns of shores bordering those waters, have, by usage, when not by treaty, a police jurisdiction over a marine belt following the sinuosities and indentations of the shore, and extending seaward three miles (*supra*, § 32).

*II. NORTHEAST ATLANTIC FISHERIES.*

(1) THESE WERE CONQUERED FROM FRANCE BY THE NEW ENGLAND COLONIES, COOPERATING WITH GREAT BRITAIN, WITH WHOM THEY WERE AFTERWARDS HELD IN COMMON BY THOSE COLONIES.

§ 301.

To the energy, valor, and skill of the New England forces engaged in the attack by Great Britain on the French Canadian coast in 1758 the conquest of that coast is largely due. The New England seafaring and fishing population, having taken a leading part in this conquest, became, not merely of right but from the nature of things, tenants in common of the fisheries thereby conquered. This tenancy they continued to hold at the time of the treaty of peace.

"The arguments on which the people of America found their claim to fish on the banks of Newfoundland arise, first, from their having once formed a part of the British Empire, in which state they always enjoyed, as fully as the people of Britain themselves, the right of fishing on those banks. They have shared in all the wars for the extension of that right, and Britain could with no more justice have excluded them from the enjoyment of it (even supposing that one nation could possess it to the exclusion of another), while they formed a part of that empire, than they could exclude the people of London or Bristol. If so, the only inquiry is, How have we lost this right? If we were tenants in common with Great Britain while united with her, we still continue so, unless by our own act we have relinquished our title. Had we parted with mutual consent we should doubtless have made partition of our common rights by treaty. But the oppressions of Great Britain forced us to a separation (which must be admitted, or we have no right to be independent); and it cannot certainly be contended that those oppressions abridged our rights or gave new ones to Britain. Our rights, then, are not invalidated by this separation, more particularly as we have kept up our claim from the commencement of the war, and assigned the attempt of Great Britain to exclude us from the fisheries as one of the causes of our recurring to arms."

Mr. R. R. Livingston, Secretary of State, to Dr. Franklin, January 7, 1782. 9 Franklin's Works (Sparks' ed.), 135. See Jay's Fisheries Dispute, 1887.

Fisheries "on the coasts and bays of the provinces conquered in America from France were acquired by the common sword, and mingled blood of Americans and Englishmen—members of the same empire, we, with them, had a common right to

these fisheries; and, in the division of the empire, England confirmed our title without condition or limitation, a title equally irrevocable with those of our boundaries or of our independence itself."

Note to speech of Mr. Rufus King, in Senate, April 3, 1818. Annals of Cong., 1818, p. 338.

"The inhabitants of the United States had as clear a right to every branch of the fisheries, and to cure fish on land, as the inhabitants of Canada or Nova Scotia; * * the citizens of Boston, New York, or Philadelphia had as clear a right to those fisheries, and to cure fish on land, as the inhabitants of London, Liverpool, Bristol, Glasgow, or Dublin; fourthly, that the third article was demanded as an ultimatum, and it was declared that no treaty of peace should be made without that article. And when the British ministers found that peace could not be made without that article, they consented—for Britain wanted peace, if possible, more than we did; fifthly, we asked no favor, we requested no grant, and would accept none."

Ex-President John Adams to William Thomas, August 10, 1822. This letter was quoted and its positions adopted by Mr. Cass in his speech on the fisheries in the Senate on August 3, 1852 (App. Cong. Globe. 1852). See report on fisheries by Lorenzo Sabine, 1853.

"Louisburg, on Cape Breton, held by the French, was supposed to be the most important and commanding station (in French North America) and to have more influence than any other upon the destinies of this part of the country, and it was with a force of between three and four thousand Massachusetts men, under Pepperell, and a few hundred from the colonies, with two hundred and ten vessels, that sailed to Louisburg, invested and took it for the British Crown in trust for the British Crown and colonies."

Mr. Dana, Halifax Com., 1653.

(2) TREATY OF PEACE (1783) WAS NOT A GRANT OF INDEPENDENCE, BUT WAS A PARTITION OF THE EMPIRE, THE UNITED STATES RETAINING THEIR COMMON SHARE IN THE FISHERIES.

§ 302.

The treaty of peace (1783) did not grant independence, nor did it create the distinct colonies, afterwards States in the Federal Union of the United States, nor did it assign their boundaries, or endow them with franchises or servitudes such as their rights in the fisheries. "The relations which had subsisted between Great Britain and America," to adopt the language of the Master of the Rolls in Sutton *v.* Sutton, 1 Myl. & R., 675, hereafter cited more fully, "when they formed one empire," "made it highly reasonable" in framing the treaty of peace, "that the subjects of the two parts of the divided empire should, notwithstanding the separation, be protected in the mutual enjoyment" of certain territorial rights. It was certainly "reasonable" that the British negotiators should have adopted the principle of partition as above stated. They represented a ministry which, though afterwards torn asunder by the personal contentions of Shelburne and Fox, entered into power pledged to the concession of a friendly separation between the two sections, conceding to each mutual rights of territoriality. Aside from the fact that such a separation, carrying with it a retention of old reciprocal rights, was far less galling to Great Britain than would be the admission that independence was wrung from her by conquest; the idea of a future reciprocity between the two nations, based on old traditions, as moulded by modern economical liberalism, was peculiarly attractive to Shelburne, by whom, as prime minister, the

negotiations were ultimately closed. (See Franklin MSS., deposited in Department of State; Bancroft's Formation Fed. Const., vol. VI, ch. 1.) On this basis alone, also, could. as we will presently see, British subjects be secure of taking, by inheritance or purchase, landed estates in the United States; on this basis alone could Great Britain be sure of a common enjoyment of the lakes and of the Mississippi, whose northern waters were then supposed to pass in part through British territory. Hence, unquestionably under the influence of this view, which was then pressed by Great Britain at least as eagerly as it was by the United States, no word of cession or grant was introduced into the preliminary articles of peace or into the treaty of peace based on them. So far from this being the case, they adopt the phraseology of treaties of partition, or, as the Master of the Rolls calls it, of "separation." The two sections of the empire agree to separate, each taking with it its territorial rights as previously enjoyed; and among these rights, that which was most important to the United States, and was most conspicuously before the commissioners, was that to the common use of the fisheries. Applying to the fisheries this principle of partition or of "separation," which it was then so essential for Great Britain, in view of the great interests held by her subjects in the United States, to assert, the commissioners accepted, as part of the same system, the position, that the United States held, in common with Great Britain, the fisheries which previously it had held, in entirety with Great Britain, when it was subject to titular British supremacy. This will at once be seen by an examination of the fishery article in the treaty of 1783. This article is as follows:

"ART. III. It is agreed that the people of the United States shall *continue to enjoy* unmolested the right to take fish of every kind on the Grand Bank, and on all the other banks of Newfoundland; also in the Gulph of Saint Lawrence, and at all other places in the sea where the inhabitants of both countries used at any time heretofore to fish. And also that the *inhabitants of the United States shall have liberty* to take fish of every kind on such part of the coast of Newfoundland as British fishermen shall use (but not to dry or cure the same on that island), and also on the coasts, bays, and creeks of all other of His Britannic Majesty's dominions in America; and that the American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbors, and creeks of Nova Scotia, Magdalen Islands, and Labrador, so long as the same shall remain unsettled; but so soon as the same or either of them shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such settlement, without a previous agreement for that purpose with the inhabitants, proprietors, or possessors of the ground." See proceedings in Continental Congress, as detailed in Jay's Fisheries Dispute, 24.

That colonies becoming independent retain their boundaries and prior territorial rights has been already generally stated. (See *supra*, § 6.)

"By the third article of the treaty of 1783 it was agreed that the people of the United States should *continue* to enjoy the fisheries of Newfoundland and the Bay of Saint Lawrence, and at all other places in the sea where the inhabitants of both countries *used at any time theretofore* to fish; and also that they should have certain fishing liberties on all the fishing coast within the British jurisdiction of Nova Scotia, Magdalen Islands, and Labrador. The title by which the United States held those fishing rights and liberties was the same. It was the possessory use of the right * * * at any time theretofore, as British subjects, and the acknowledgment by Great Britain of its *continuance* in the people of the United States after the treaty of separation. It was a national right; and, therefore, as much a *right*, though not so immediate an *interest*, to the people of Ohio and Kentucky, ay, and to the people of Louisi-

ana, after they became a part of the people of the United States, as it was to the people of Massachusetts and Maine."

Mr. J. Q. Adams, The Fisheries and the Mississippi, 96.

"The continuance of the fishing liberty was the great object of the article (the third of the treaty of 1783), and the language of the article was accommodated to the severance of the jurisdictions, which was consummated by the same instrument. It was coinstantaneous with the severance of the jurisdiction itself, and was no more a grant from Great Britain than the right acknowledged in the other part of the article, or than the independence of the United States acknowledged in the first article. It was a continuance of possessions enjoyed before; and at the same moment and by the same act under which the United States acknowledged those coasts and shores as being under a *foreign* jurisdiction, Great Britain recognized the liberty of the people of the United States to use them for purposes connected with the fisheries."

Mr. J. Q. Adams, The Fisheries and the Mississippi, 188. Adopted in 1 Lyman's Diplomacy of the U. S., 117.

"That this was the understanding of the article by the British Government as well as by the American negotiators is apparent to demonstration by the debates in Parliament upon the preliminary articles. It was made, in both houses, one of the great objections to the treaty. In the House of Commons, Lord North * * * said: 'By the third article we have, in our spirit of reciprocity, given the Americans an unlimited right to take fish of every kind on the Great Bank and on all the other banks of Newfoundland. But this was not sufficient. We have also given them the right of fishing in the Gulf of Saint Lawrence, and at all other places in the sea where they have heretofore enjoyed, through us, the privilege of fishing. They have likewise the power of even partaking of the fishery which we still retain. We have not been content with resigning what we possessed, but even share what we have left.' * * * In this speech the whole article is considered as an improvident concession of British property; nor is there suggested the slightest distinction in the nature of the grant between the right of fishing on the banks and the liberty of the fishery on the coasts. Still more explicit are the words of Lord Loughborough, in the House of Peers. 'The fishery,' says he, '*on the shores retained by Britain* is, in the next article, not ceded but recognized as a right inherent in the Americans, which, though no longer British subjects, they are *to continue to enjoy unmolested*, no right, on the other hand, being reserved to British subjects to approach their shores, for the purpose of fishing, in this reciprocal treaty.'"

Mr. J. Q. Adams, The Fisheries and the Mississippi, 189, 190.

"The treaty of '83 was an instrument of a peculiar character. It differed in its most essential characteristics from most of the treaties made between nations. *It was a treaty of partition*, or treaty to ascertain the boundaries and the right of the nations the mother country acknowledged to be created by that instrument."

1 Lyman's Diplomacy of the U. S., 117.

"From the very moment the United States became a sovereign power they were clearly entitled to an enjoyment of these rights (to the fisheries) by the law of nations."

Mr. C. A. Rodney, opinion filed with and indorsed by President Monroe, Nov. 4, 1818; MSS. Monroe papers, Dep. of State, cited more fully *infra*. See to this effect McIlvaine *v.* Coxe, 4 Cranch, 209, and other cases cited *supra*, § 150.

As to the general questions discussed above see 1 John Adams's Works, 292, 343, 368, 370, 373, 670; 2 *ibid.*, 174; 3 *ibid.*, 263, 318, 319; 7 *ibid.*, 45, 654; 8 *ibid.*, 5, 11, 439; 9 *ibid.*, 487, 563; 10 *ibid.*, 131, 137, 160, 354, 403.

As to boundaries of the colonial interests see 3 John Adams's Works, 330; 8 *ibid.*, 11, 16, 20, 34.

(3) WAR OF 1812 DID NOT DIVEST THESE RIGHTS.

§ 303.

As has been shown in a prior section, the prevalent opinion is that a war between two sovereigns does not by itself vacate such provisions in treaties theretofore existing between them as relate to primary national prerogatives, such, for instance, as national independence, boundary, or other integral appurtenances of sovereignty (*supra*, § 135). As such appurtenances of the sovereignty of the New England States the fisheries are to be classed. The war of 1812, therefore, no more vacated the title of the United States to its common share in the northeastern fisheries than it vacated the independence of the States or the boundaries which separated their territories from those of Great Britain.

"As little did the people of the United States renounce the doctrine that all the rights and liberties recognized by the treaty of 1783 were in full force as if the war of 1812 had never occurred. The conflict of opinion was adjusted by a new article, as little liable to be abrogated by a future war as the treaty of Independence."

Mr. J. Q. Adams, The Fisheries and the Mississippi, 162.

"As a possession it was to be held by the people of the United States as it had been held before. It was not, like the lands partitioned out by the same treaty, a corporeal possession; but, in the technical language of the English law, an incorporeal hereditament, and in that of the civil law a right of mere faculty, consisting in the power and liberty of exercising a trade, the places in which it is exercised being occupied only for the purposes of the trade. Now, the right or liberty to enjoy this possession, or to exercise this trade, could no more be affected or impaired by a declaration of war than the right to the territory of the nation. The interruption to the exercise of it, during the war, could no more affect the right or liberty than the occupation by the enemy could affect the right to that. The right to territory could be lost only by abandonment or renunciation in the treaty of peace, by agreement to a new boundary line, or by acquiescence in the occupation of the territory by the enemy. The fishery liberties could be lost only by express renunciation of them in treaty, or by acquiescence, on the principle that they were forfeited, which would have been a tacit renunciation."

Mr. J. Q. Adams, The Fisheries and the Mississippi, 190; adopted in 1 Lyman's Diplomacy of the U. S., 117.

"In the case of a cession of territory, when the possession of it has been delivered, the article of the treaty is no longer a compact between the parties, nor can a subsequent war between them operate in any manner upon it. So of all articles the purport of which is the *acknowledgment* by one party of a pre-existing right belonging to another. The engagement of the acknowledging party is consummated by the ratification of the treaty. It is no longer an executory contract, but a perfect right united with a vested possession is thenceforth in one party, and the acknowledgment of the other is in its own nature irrevocable. As a bargain the article is extinct; but the right of the party in whose favor it was made is complete, and cannot be affected by a subsequent war. A grant of a facultative right or incorporeal hereditament, and specifically of a right of fishery, from one sovereign to another, is an article of the same description. * * * In the debates in Parliament on the peace of Amiens, Lord Auckland said: 'He had looked into the works of the first publicists on these subjects, and had corrected himself in a mistake still prevalent in the minds of many, who state, in an unqualified sense, that all treaties between nations are annulled by war, and must be specially renewed if meant to be in force on the return of peace. It is true that treaties in the nature of compacts or concessions, the enjoy-

ment of which has been interrupted by the war, and has not been renewed by the pacification, are rendered null by the war. But compacts not interrupted by the course and effect of hostilities, *such as the regulated exercise of a fishery on the respective coasts of the belligerent powers*, the stipulated right of cutting wood in a particular district, or possessing rights of territory *heretofore ceded by treaty*, are *certainly not destroyed or injured by war*.' The Earl of Carnarvon, a member of the opposition, said, in the same debate, * * * 'war does not abrogate any right, or interfere with the right, though it does with the exercise, but such as it professes to litigate by war.' The same position was taken by Lord Eldon and Mr. Fox."

Mr. J. Q. Adams, The Fisheries and the Mississippi, 195, citing 23 Hansard, 1147.

"On the subject of the fisheries, within the jurisdiction of Great Britain, we have certainly done all that could be done. If, according to the construction of the treaty of 1783, which we assumed, the right was not abrogated by the war, it remains entire, since we most explicitly refused to renounce it, either directly or indirectly."

Mr. Gallatin to the Sec. of State, Ghent, 25 Dec., 1814; MSS. Dept. of State; I Gallatin's writings, 646; printed in full in The Fisheries and the Mississippi, 58.

Mr. C. A. Rodney, who had been Attorney-General under Mr. Jefferson, and had since then filled important public offices, was consulted (being then a Senator of the United States) by Mr. Monroe in November, 1818, on the fishery question. From his reply, heretofore unpublished, the following passages are extracted:

"When the treaty of Amiens in 1802, between Great Britain, France, Spain, and Holland, was under discussion in Parliament, it was objected by some members that there was a culpable omission in consequence of the non-renewal of certain articles in former treaties or conventions securing to England the gum trade of the river Senegal and the right to cut logwood at the Bay of Honduras, etc. In answer to this objection in the House of Lords it was well observed by Lord Auckland 'that from an attentive perusal of the works of the publicists, he had corrected, in his own mind; an error, still prevalent, that all treaties between nations are annulled by a war, and to be re-enforced must be specially renewed on the return of peace. It was true that treaties in the nature of compacts or concessions the enjoyment of which has been interrupted by the war are thereby rendered null; but compacts which were not impeded by the course and effect of hostilities, such as *the rights of a fishery on the coasts of either of the powers*, the stipulated right of cutting logwood in a particular district—compacts of this nature were not affected by war. * * * It had been intimated by some that by the non-renewal of the treaty of 1786 our right to cut logwood might be disputed; but those he would remind of the principle already explained, that treaties the exercise of which was not impeded by the war were re-established with peace. * * * He did not consider our rights in India or at Honduras in the least affected by the non-renewal of certain articles in former treaties.'

"Lord Ellenborough (chief justice of the court of King's bench) 'felt surprise that the non-renewal of treaties should have been urged as a serious objection to the definitive treaty. * * * He was astonished to hear men of talents argue that the public law of Europe was a dead letter because certain treaties were not renewed.'

"Lord Eldon (then and at present the high chancellor of England and a member of the cabinet) 'denied that the rights of England in the Bay of Honduras or the river Senegal were affected by the non-renewal of treaties.'

"In the House of Commons, in reply to the same objection made in the House of Lords, it was stated by Lord Hawkesbury, the present Earl of Liverpool, then secretary of state for the foreign department and now prime minister of England, which post he occupied when the treaty of Ghent was concluded, 'that to the definitive treaty two faults had been imputed, of omission and commission. Of the former

the chief was the non-renewal of certain treaties and conventions. He observed the principle on which treaties were renewed was not understood. He affirmed that the separate convention relative to our East India trade, and relative to our right of cutting logwood in the Bay of Honduras, had been altogether misunderstood. Our sovereignty in India was the result of conquest, not established in consequence of stipulations with France, but acknowledged by her as the foundation of them; our rights in the Bay of Honduras remained inviolate, the privilege of cutting logwood being unquestionably retained. * * * He did not conceive our rights in India or at Honduras were affected by the non-renewal of certain articles in former treaties.'

"It is remarked in the Annual Register that Lord Hawkesbury's speech contained the ablest defense of the treaty. The chancellor of the exchequer, Mr. Addington, the present Lord Sidmouth, and the late Mr. Pitt supported the same principles in the course of debate. I presume our able negotiators at Ghent entertained the same opinions when they signed the late treaty of peace.

"It may be recollected that during the Revolutionary war, when the British Parliament were passing the act to prohibit the colonies from using the fisheries, some members urged with great force and eloquence 'that the absurdity of the bill was equal to its cruelty and injustice; that its object was to take away a trade from the colonies which all who understood its nature knew they could not transfer to themselves; that God and nature had given the fisheries to New and not to Old England.'"

Opinion of C. A. Rodney on the Fisheries, Nov. 3, 1818. Monroe MSS., Dept. of State. See this opinion referred to *supra*, § 135. See App., § 303.

That, for the same reason that rights to fisheries are not extinguished by war, fishing boats are ordinarily exempt from seizure in war, see *supra*, § 345.

As sustaining the text may be cited an important English ruling on the question how far territorial rights given by the treaty of 1794 were abrogated by the war of 1812.

Article IX of the treaty of 1794, on which the question arose, is as follows:

"It is agreed that British subjects who now hold lands in the territories of the United States, and American citizens who now hold lands in the dominions of His Majesty, shall continue to hold them according to the nature and tenure of their respective estates and titles therein, and may grant, sell, or devise the same to whom they please, in like manner as if they were natives; and that neither they nor their heirs or assigns shall, so far as may respect the said lands and the legal remedies incident thereto, be regarded as aliens."

In 1830 the question came up before the master of the rolls whether this article giving territorial rights in the United States to British subjects was abrogated by the war of 1812. After elaborate argument the master of the rolls, Sir J. Leach, decided the point as follows:

"The relations which had subsisted between Great Britain and America *when they formed one empire* led to the introduction of the ninth section of the treaty of 1794, and made it highly reasonable *that the subjects of the two parts of the divided empire should, notwithstanding the separation, be protected in the mutual enjoyment of their landed property; and the privileges of natives being reciprocally given* not only to the actual possessors of lands but to their heirs and assigns, it is a reasonable construction *that it was the intention of the treaty that the operation of the treaty should be permanent, and not depend upon the continuance of a state of peace.*"

Sutton *v.* Sutton, 1 Rus. & M., 675. This decree was not appealed from.

It is worthy of notice that the claim of British settlers to the use of the coast and waters of the Belize for the purpose of cutting and shipping logwood and mahogany, which claim was based on a remote informal grant from Spain when sovereign of those shores, has always

been asserted by Great Britain to have adhered to the British crown unaffected by intermediate wars between Great Britain and Spain. See Lord Hawkesbury's speech, quoted above by Mr. Rodney.

(4) TREATY OF 1818 RECOGNIZES THE EXISTENCE OF THESE TERRITORIAL RIGHTS AND AFFIRMS THEIR CONTINUANCE.

§ 304.

During the negotiations which preceded the treaty of Ghent the title of the United States to the Northeast Atlantic fisheries was one of the main subjects of discussion, and during this discussion the positions above taken were maintained by the United States as among the essentials of a permanent settlement of the questions at issue between the countries. In order, however, to relieve the issue of peace from all incidents which were not necessary to its immediate determination, the question of the fisheries was remanded to a subsequent distinct negotiation. This negotiation took place in London in 1817–'18, Messrs. Gallatin and Rush being negotiators on behalf of the United States, and Mr. Goulburn, under-secretary of state, and Mr. Robinson, treasurer of the navy, negotiators on the part of Great Britain. The article which, in the treaty settled by them, as finally ratified, relates to the fisheries, is as follows:

"ARTICLE I. Whereas differences have arisen respecting the liberty claimed by the United States, for the inhabitants thereof, to take, dry, and cure fish on certain coasts, bays, harbors, and creeks of His Britannic Majesty's dominions in America, it is agreed between the high contracting parties that the inhabitants of the said United States *shall have forever, in common with the subjects of His Britannic Majesty*, the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands, on the western and northern coast of Newfoundland, from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the coasts, bays, harbors, and creeks, from Mount Joly on the southern coast of Labrador, to and through the Streights of Belleisle, and thence northwardly indefinitely along the coast, without prejudice, however, to any of the exclusive rights of the Hudson Bay Company: And that the American fishermen shall also have liberty forever to dry and cure fish in any of the unsettled bays, harbors, and creeks of the southern part of the coast of Newfoundland, hereabove described, and of the coast of Labrador; but so soon as the same, or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground. And the United States hereby renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbors of His Britannic Majesty's dominions in America not included within the above-mentioned limits: Provided, however, that the American fishermen shall be admitted to enter such bays or harbors for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them."

There is in this convention not only a scrupulous avoidance of any expressions from which it might be inferred that the right to use the fisheries was or had ever been a grant from Great Britain to the United States, but the terms selected show that this right was recognized by

both parties as one of prior unbroken existence. The United States "renounce" certain incidents of a right of territoriality in the British waters and coast, which right of territoriality by the very acceptance of this "renunciation" Great Britain reaffirms. For this purpose the word "renounce" was introduced by the United States negotiators, and with a knowledge of this purpose it was finally acceded to by the British. It would have been easy to say, "the British Government grants to the United States the right to enter the northeastern British waters for shelter, wood, and water;" and, if so, there would be ground to argue, not merely that the war of 1812 had so far destroyed the prior title as to make a new grant necessary, but that the title to be thus granted was restricted by the limitations which are regarded as attaching to all grants of sovereignty. The article just quoted, however, excludes such a contention. It points to the fisheries as held in common by two sovereignties—the sovereignty of Great Britain and the sovereignty of the United States. It declares, not that Great Britain cedes any part of her sovereignty in the fisheries to the United States (for the sovereignty of the United States it recognizes as existing in the fisheries), but that the United States cedes certain incidents of its sovereignty in these fisheries to Great Britain. The term "renounce," as here used, is, it must be recollected, not merely a term of law, with its distinctive legal meaning, but it is a term invested by history with certain incidents which the British negotiators would have been among the first to remember and the last to dispute. "Renounce" had been the term used in numerous treaties in which Great Britain had been a party, in which one sovereign surrendered a portion of his rights to another sovereign, who, by accepting the renunciation, recognized as valid all other rights to the territory out of which the portions renounced were taken. Such renunciations are common when, after war, one of the contending sovereigns agrees to give up a portion of his title, such renunciation, with its correlative recognition of the remainder of the title, being accepted by the other sovereign as part of the bargain. (See *supra*, § 133.) We have illustrations of this in the various renunciations in the treaties of Westphalia, of Ryswick, of Utrecht, in which it was never questioned that the "renunciation" made by one sovereign and accepted by the other was a recognition by the latter of the former's sovereignty as to the particular title, claimed by him, except so far as concerns the part carved out by the renunciation; nor is there any doubt that the renunciation is, in such cases, to be strictly construed in favor of the sovereign renouncing. To the renunciation in the treaty of 1818 this rule is peculiarly applicable, for the following reasons:

The British commissioners were aware of the American claim:—

(1) That the fisheries were conquered from France in a large measure by the colonies.

(2) That they were held by the colonies in common with the parent country, and that this tenancy in common, from the fact that the colonies were endowed at the time with distinct local government, made the fisheries, in such tenancy, the appurtenances of the colonies as distinct political entities.

(3) That this tenancy in common was recognized by the treaty of peace of 1783, and the same rights in the fisheries were assigned to the United States (incorporating as they did the colonies) as were assigned to Great Britain, the United States continuing to enjoy these fisheries in common with Great Britain.

(4) That the tenancy of these fisheries, being an appurtenance of the United States, constituting its marine boundaries (subject to such interest of Great Britain), was no more disturbed by the war of 1812 than were the land boundaries which separated the United States from the British possessions, the rule being that war between two sovereigns does not disturb their boundaries and appurtenances unless there be an express cession in the pacification with which the war concludes (*supra*, § 135).

(5) That the application in the treaty of peace of the doctrine of partition to the fisheries was a part of a system the assertion of which was then, in view of British interests in America, far more important to Great Britain than to the United States.

This was the basis on which rested the claim of the United States at the negotiations prior to the treaty of 1818. Those negotiations resulted in a compromise which that treaty embodied. The United States gained a recognition of a more extended area than that recognized by the treaty of 1783; they renounced, on behalf of their fishermen, what they till then possessed —"any liberty heretofore enjoyed or claimed * * to take, dry, or cure fish" within three marine miles of any of the coasts, bays, creeks, or harbors of His Britannic Majesty's dominions in America, not included within the above-mentioned limits; provided, however, that the American fishermen shall be admitted to enter such bays or harbors for the purpose of shelter, of repairing damages therein, and of obtaining water, and for no other purpose whatever; with the further proviso "that they shall be under such restrictions as shall be necessary to prevent their taking or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them." Great Britain, therefore, recognized their rights to the fisheries outside of the three-mile belt, and within that belt recognized their territorial rights as existing prior to the revolution, the United States, however, agreeing to place themselves under such restrictions as would "prevent their taking or drying or curing fish therein," or "abusing the privileges hereby reserved to them." And the right of territoriality in Canada waters and shores thus recognized as existing in our fishermen brings with it the incidents of such territoriality. They may purchase, as may any other visitor to whom territorial rights are given, whatever is needed for their use. They must not "abuse" these "privileges." They must not smuggle, and what they buy must not be bought for the purpose of shore fishing. In other words, the treaty is not a grant of fisheries by Great Britain to the United States, but a grant by the United States to Great Britain of certain restrictions on fisheries which the United States already owned. Great Britain did not say to the United States, "Come here only for shelter, wood, and water"; but the United States said to Great Britain, "We, being here as tenants in common of these fisheries, agree not to take, cure, or dry fish within certain limits, or otherwise abuse the privileges hereby reserved to us."

Of similar rights of territoriality we have numerous illustrations:

(1) Diplomatic agents, by the law of nations, and sometimes by treaty, possess certain rights of territoriality. This territoriality is restricted; yet it carries with it all incidents to its enjoyment. No one would argue that a diplomatic agent, when entering on or conducting his mission, is obliged to bring with him food and raiment for his entire stay, and is not permitted to buy new supplies when his original supplies are exhausted. No one would argue that while on such mission he is precluded

from visiting old or new friends, or is debarred from any ordinary rights of civilized humanity. No one will pretend that if he traversed the United States in transit to another mission he would be precluded from making in the United States all purchases suitable for such mission. The territoriality granted to him brings with it all proper incidents, except when expressly restricted. (*Supra*, §§ 92 *ff*).

(2) Of consuls the same position may be taken. By the law of nations the limited territoriality granted to consuls has, in most countries, been defined, as is the case with the territoriality recognized in fishermen, by express treaty stipulations (*supra*, §§ 120 *ff*). Consuls, for instance, in certain treaties (*e. g.*, that with France), are entitled to exercise certain functions without being subject to be disturbed by the local law (*supra*, §§ 98, 120, 121). As if to emphasize this, and to prevent the commingling of allegiances, it is provided in many treaties, and when not provided it is generally understood, that a consul is not to be a citizen of the state to which he is accredited (*supra*, § 113). But while, as is the case with the fishermen under the treaty of 1818, this territoriality is limited to the objects for which it is granted, in the one case as in the other, it carries with it all privileges incidental to such objects. No one disputes the right of consuls to purchase their supplies in the country in which this territoriality is granted to them, although, as in the case of the fishermen before us, while they can "purchase," they cannot "take."

(3) The officers and crews of foreign ships of war have certain territorial rights in our ports. They are privileged to the hospitality of these ports; they may visit the shore, as may our fishermen on the Canada coasts, for specific purposes. Yet no one would pretend that when they thus visit the shore they are not entitled to make such purchases as are suitable, not merely for their immediate supply, but for their use in any future cruise they may desire to undertake. In certain portions of our coast, where fishing may be a pastime, it would be considered a strange thing to suggest that they could not buy bait on shore for such a pastime because they might throw out their lines within the three-mile zone. Be this as it may, there are few cruises on which a British man-of-war may expect to enter in which fishing may not become merely a pastime, but a useful means of obtaining fresh food. No one would imagine, however, that because the United States forbids the intrusion of foreign fishermen within its marine belt it would say to officers of British men-of-war to whom it grants the privilege of territoriality in its ports, "When you are on shore you must not buy bait, because fishing within three miles of the coast is forbidden." Yet buying bait is not a necessary incident to the life of the navy officer in whom the privilege of territoriality is recognized by international law if not by treaty, though it is a necessary incident to the life of the fishermen in whom the privilege of territoriality is recognized by the treaty of 1818. And this brings us again to the general proposition that a grant of territoriality for a specific purpose carries with it all the privileges incidental to the due exercise of such territoriality.

(4) Territorial rights in the United States given by treaty to British subjects have been regarded as carrying with them the necessary incidents in like manner as those now claimed as belonging to United States fishermen when in Canada.

By Article III of the treaty of Great Britain and the United States of 1794—

"It is agreed that it shall at all times be free to His Majesty's subjects and to the citizens of the United States, and also to the Indians dwell-

ing on either side of the said boundary line, freely to pass and repass, by land or inland navigation, into the respective territories and countries of the two parties on the continent of America (the country within the limits of the Hudson's Bay Company only excepted), and to navigate all the lakes, rivers, and waters thereof, and freely to carry on trade and commerce with each other."

By Article XXX of the treaty of Great Britain and the United States of 1871—

"It is agreed that, for the terms of years mentioned in Article XXXIII of this treaty, subjects of Her Britannic Majesty may carry in British vessels, without payment of duty, goods, wares, or merchandise from one port or place within the territory of the United States, upon the Saint Lawrence, the Great Lakes, and the rivers connecting the same, to another port or place within the territory of the United States as aforesaid: Provided, That a portion of such transportation is made through the Dominion of Canada by land carriage and in bond, under such rules and regulations as may be agreed upon between the Government of Her Britannic Majesty and the Government of the United States."

Such provisions are common to treaties between neighboring powers, rights of territoriality between their subjects being exchanged. Yet under such treaties it was never conceived that the persons exercising such rights of territoriality were precluded from purchasing provisions in their exercise of these rights. If this is the case with rights granted by treaty, *a fortiori* must it be the case with rights of original possession merely affirmed by treaty.

The rule thus stated is expressly declared in the last sentence of Article I of the convention of 1818, which, by an ordinary rule of treaty construction, qualifies and explains all that precedes (see *supra*, § 133). Territoriality is recognized as belonging to the fishermen of the United States when visiting the designated coasts, and then the exceptions to this territoriality are precisely stated. Fish are not to be "taken" or "dried" or "cured" in British territory by these fishermen, or the privileges hereby reserved abused. The latter exception is but an expression of the principle of the law of nations which forbids an abuse of territoriality assigned by such law. The former exception is to be also noted for the significance of its terms. Had the word "obtain" fish been used, it might be argued (though even in this case with little plausibility, since the object of these privileges was to further fishermen in their calling) that this precludes purchase of fish either for bait or for food. But this construction is excluded by the terms "take" and "cure." Both relate to the catching and preparation of fish as a part of a fisherman's trade, and this part of a fisherman's trade is not to be exercised in British territory. But since fishermen are admitted *as* fishermen, entitled to fish on the deep seas, their right of buying bait, as well as all other provisions for their support in their present and coming ventures, is affirmed by the very terms here used. And another word in this connection is here important. This right is not here "granted." It is, on the contrary, "reserved." It is part of an old right, theretofore existing, recognized as such. And this old right is to be taken as it had previously been taken. In Article I of the provisional articles of 1782, His Britannic Majesty, after acknowledging "the said United States, viz, New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut" (proceeding to enumerate the other nine States) "to be free, sovereign, and independent States," "relinquishes (to them) all claim to the Government, propriety (*sic*), *and territorial rights of the*

*same and every part thereof.*" The same provision is part of article first of the definitive treaty of 1783. "These territorial rights" which the treaties of 1782 and 1783 recognize as belonging to the United States are again "reserved" to the United States by the treaty of 1818.

"It will also be perceived that we insisted on the clause by which the United States renounce their right to the fisheries relinquished by the convention, that clause having been omitted in the first British counter-project. We insisted on it with the view, 1st, of preventing any implication that the fisheries secured to us were a new grant and of placing the permanence of the rights secured and of those renounced precisely on the same footing; 2d, of its being expressly stated that our renunciation extended only to the distance of three miles from the coasts. This last point was the more important, as, with the exception of the fishery in open boats within certain harbors, it appeared from the communications above mentioned that the fishing ground on the whole coast of Nova Scotia is more than three miles from the shores, whilst, on the contrary, it is almost universally close to the shore on the coasts of Labrador. It is in that point of view that the privilege of entering the ports for shelter is useful, and it is hoped that with that provision a considerable portion of the actual fisheries on that coast (Nova Scotia) will, notwithstanding the renunciation, be preserved."

Messrs. Gallatin and Rush to Mr. Adams, Sec. of State, Oct. 20, 1818. MSS. Dispatches, Gr. Brit.; 4 Am. St. Pap. (For. Rel.), 380.

"Mr. Robinson said (at the conference of the negotiators of October 9, 1818) that there would be no insuperable objection, he believed, to granting us, or rather *securing* to us (as we never admitted the propriety of the term grant), as much extent of fishing ground as we asked, *with the privileges appurtenant;* but he feared that the principle of permanence which we were desirous of incorporating with the stipulation could not be assented to."

Mr. Rush's notes of negotiation, Monroe papers, Dept. of State.

That the right of free purchase on shore was meant by the negotiators to be affirmed by the treaty is shown (1) by the discussions of the negotiators, as detailed in the prior notes and (2) by the action of the British Government from the period of the ratification of the treaty to the present day. In the legislation adopted by the British Parliament for the purpose of carrying into effect the treaty, there is a conspicuous abstention from the imposition of penalties on the obtaining of bait and supplies by United States fishermen on the fishery coasts. Such an abstention is not merely a parliamentary declaration that such privileges are in accordance with the treaty, but it is a parliamentary contemporaneous construction of the treaty to the same effect. No parliamentary draftsmen are more accurate than those who frame British statutes; by no government counsel are the rights of sovereign and subject more closely guarded than by those who advise the British Crown. That by these high authorities the acts of Parliament, drawn to execute the treaty of 1818, impose no penalty on purchase of supplies and bait by United States fishermen on Canadian shores, shows that the construction given by the Crown authorities to the treaty was that these privileges the treaty confirmed. And the same may be said of the judicial construction given to the treaty.

The right to enter Canadian "bays or harbors for the purpose of shelter *and of repairing damages therein*" includes in itself the right to procure whatever supplies are necessary for the successful continuance

of the voyage. The statute 3 and 4 Vict., c. 65, s. 6, gives the Admiralty Court jurisdiction to decide "all claims and demands whatsoever * * * *for necessaries supplied to any foreign ship or sea-going vessel.*" In The Riga (L. R. 3 Ad. and Ec., 516, 522), Sir R. Phillimore said: "I am unable to draw any solid distinction (especially since the last statute) between necessaries for the ship and necessaries for the voyage. * * * I am of opinion that whatever is fit and proper for the service on which a vessel is engaged, whatever the owner of that vessel, as a prudent man, would have ordered if present at the time, comes within the meaning of the term 'necessaries' as applied to those repairs done or things provided for the ship by order of the master, for which the owners are liable." Under this ruling obtaining supplies necessary for the continuance of the voyage would be obtaining "necessaries," and, *a fortiori*, "repairing damages."

The usage, also, of buying, by American fishermen, of bait and other necessary supplies in British North American ports has been unbroken, and such usage is regarded by English courts as authoritative in such cases.

See remarks of Chambre, J., in Fennings *v.* Grenville, 1 Taunt., 248.

Careful search has failed to supply a single case in which British courts have sustained the confiscation of American fishing vessels on the ground of purchase of supplies in Canadian ports. Yet, as is shown in the proceedings of the Halifax Commission, the running, by American fishing vessels, into Canadian ports to obtain supplies has been in conformity with ancient usage; a usage which still continues; and this usage is recognized in the Canadian adjudications hereafter noticed.

"Almost the very last witness we had on the stand told your honors that before the reciprocity treaty was made we were buying bait in Newfoundland, and several witnesses from time to time have stated that it is a very ancient practice for us to buy bait and supplies and to trade with the people along the shore, not in merchandise as merchants, but to buy supplies of bait and pay the sellers in money or trade, as might be most convenient. Now, that is one of those natural trades that grow up in all countries; it is older than any treaty; it is older than civilized states or statutes. Fisheries have but one history. As soon as there are places peopled with inhabitants fishermen go there."

Mr. Dana, Halifax Com., 1573.

In the White Fawn case, as cited at large in 3 Halifax Com., 3382, Judge Hazen (vice-admiralty court) said: "The construction sought to be put upon the statutes by the Crown officers would appear to be thus: A foreign vessel being in British waters and purchasing from a British subject any article which may be used in prosecuting the fisheries, without its being shown that such article is to be used in illegal fishing in British waters, is liable to forfeiture as preparing to fish in British waters. I cannot adopt such a construction. I think it harsh and unreasonable and not warranted by the words of the statutes. It would subject a foreign vessel, which might be of great value, as in the present case, to forfeiture, with her cargo and outfit, for purchasing (while she was pursuing her voyage in British waters, as she lawfully might do, within three miles of our coast) of a British subject any article, however small its value (a cod line or net, for instance), without its being shown that there was any intention of using such articles in illegal fishing in British waters before she reached the fishing ground to which she might legally resort for fishing under the terms of the statutes. I construe the statutes simply thus: If a foreign vessel is found, 1st, having taken fish; 2d, fishing, although no fish have been taken; 3d, preparing to fish, *i. e.*, with her crew arranging her nets, lines, and fishing tackle for fishing, though not actually applied to fishing in British waters, in either of these cases specified in the statutes the forfeiture attaches. I think the words 'preparing

to fish' (in the statutes) were introduced for the purpose of preventing the escape of a foreign vessel which, though with intent of illegal fishing in British waters, had not taken fish or engaged in fishing by setting nets and lines, but was seized in the very act of putting out her lines, nets, etc., into the water, and so preparing to fish." This opinion is valuable merely as an authority that buying bait in the three-mile zone is not by itself held illegal in the Canada waters. So far as the statute construed expands the operation of the treaty it has no extraterritorial force.

The opinion in the case of the J. H. Nickerson, by Sir William Young (vice-admiralty, Halifax, 1871), contains a dictum that "to purchase or procure bait" is "a preparing to fish." This, to say the least, is badly put, since "procuring" includes "catching," which would not only be "preparing to fish," but actually "fishing." But, aside from the badness of the phraseology, the law of the proposition is bad. As "preparing to commit a crime" is an indictable attempt, there are many cases in which, sometimes by very able judges, the question has been determined in what such preparation consists. These cases establish the principle that unless the preparation be such that if not interrupted by extraneous force it would result in the crime alleged, it is not an indictable attempt; and it is a settled principle that purchasing poison or a deadly weapon is not indictable as a "preparation" for homicide. (See cases cited in Whart. Cr. Law § 180.) The reason is that where a thing purchased can be used either for a lawful or an unlawful purpose there can be no conviction of an attempt unless the unlawful purpose be shown. In the case here cited there ought to have been no conviction, even under the statute, unless it could have been shown that the purchase was a preparation to fish within the forbidden belt, and that this was put in process of execution. Sir W. Young's dictum on this point, therefore, cannot be sustained as a matter of municipal law. As a ruling of international law it is of no authority, since preparing to fish without fishing is in any view not a contravention of the treaty of 1818. But Sir W. Young's ruling, on the merits, coincides with that of Judge Hazen, since he concedes that merely buying fish within the three miles is not a violation of the treaty.

In the Halifax Commission it was asserted, as part of the British case, that "freedom to transfer cargoes, to outfit vessels, buy supplies, obtain bait, and traffic generally in British ports and harbors, or to transact other business ashore, not necessarily connected with fishing pursuits, are secondary privileges which materially enhance the principal concessions to United States citizens. These advantages are indispensable to the success of foreign fishing on Canadian coasts; without such facilities, fishing operations, both inside and outside of the inshores, cannot be conducted on an extensive and remunerative scale." The commission, however, in discharge of the duty assigned to it of determining the balance of indebtedness between the two powers on the fishery question, unanimously decided that "it was not within the competence of this tribunal to award compensation for commercial intercourse between the two countries, nor for purchasing bait, ice, supplies, etc., nor for permission to transship cargoes on British waters." As the submission in this case covered all cases of claims by either power, the only basis on which this decision can stand is the privileges thus exercised which were secured to them by treaty as well as by the law of nations; for on both sides it was agreed that these privileges were valuable. We must, therefore, understand that the commission—a tribunal the majority of which cannot be charged with undue partiality to the United States—held that the enjoyment of these privileges by fishermen of the United States was a matter of right. The claim in the British argument, it must be recollected, was put on strong ground: "In all those instances where it has come out in evidence that they (the United States fishermen) come in and get our fishermen to catch bait for them and pay them for doing so, in all such cases the act is that of the United States fishermen themselves." (Halifax Com., 1556.) Yet even for acts such as these, verging so closely on fishing within the three-miles zone, the Halifax tribunal held that the British Government, acting for itself and for Canada, had no cause for complaint.

"At the first conference (of the Ghent negotiators), on the 8th of August (1814), the British plenipotentiaries had notified to us that the British Government did not intend henceforth to allow to the people of the United States, without an equivalent, the liberties to fish, and to dry and cure fish, within the exclusive British jurisdiction stipulated in their favor by the latter part of the third article of the treaty of peace of 1783; and in their note of the 19th of August the British plenipotentiaries had demanded a new stipulation to secure to British subjects the right of navigating the Mississippi, a demand which, unless warranted by another article of that same treaty of 1783, we could not perceive that Great Britain had any colorable pretext for making. Our instructions had forbidden us to suffer our right to the fisheries to be brought into discussion, and had not authorized us to make any distinction in the several provisions of the third article of the treaty of 1783, or between that article and any other of the same treaty. We had no equivalent to offer for a new recognition of our right to any part of the fisheries, and we had no power to grant any equivalent which might be asked for it by the British Government. We contended that the whole treaty of 1783 must be considered as one entire and permanent compact, not liable, like ordinary treaties, to be abrogated by a subsequent war between the parties to it; as an instrument recognizing the rights and liberties enjoyed by the people of the United States as an independent nation, and containing the terms and conditions on which the two parts of one empire had mutually agreed thenceforth to constitute two distinct and separate nations. In consenting, by that treaty, that a part of the North American continent should remain subject to the British jurisdiction, the people of the United States had reserved to themselves the liberty, which they had ever before enjoyed, of fishing upon that part of the coasts, and of drying and curing fish upon the shores; and this reservation had been agreed to by the other contracting party. We saw not why this liberty, then no new grant, but a mere recognition of a prior right always enjoyed, should be forfeited by a war any more than any other of the rights of our national independence, or why we should need a new stipulation for its enjoyment more than we needed a new article to declare that the King of Great Britain treated with us as free, sovereign, and independent States. We stated this principle, in general terms, to the British plenipotentiaries, in the note which we sent to them with our project of the treaty; and we alleged it as the ground upon which no new stipulation was deemed by our Government necessary to secure to the people of the United States all the rights and liberties stipulated in their favor by the treaty of 1783. No reply to that part of our note was given by the British plenipotentiaries; but, in returning our project of a treaty, they added a clause to one of the articles stipulating a right for British subjects to navigate the Mississippi. Without adverting to the ground of prior and immemorial usage, if the principle were just that the treaty of 1783, from its peculiar character, remained in force in all its parts, notwithstanding the war, no new stipulation was necessary to secure to the subjects of Great Britain the right of navigating the Mississippi, as far as that right was secured by the treaty of 1783; as, on the other hand, no stipulation was necessary to secure to the people of the United States the liberty to fish, and to dry and cure fish, within the exclusive jurisdiction of Great Britain. If they asked the navigation of the Mississippi as a new claim, they could not expect we should grant it without an equivalent; if they asked it because it had been granted in 1783, they must recognize the claim of the people of the United States to the liberty to fish, and to dry and cure fish, in question. To place both points beyond all future controversy, a majority of us determined to offer to admit an article confirming both rights, or we offered at the same time to be silent in the treaty upon both, and to leave out altogether the article defining the boundary from the Lake of the Woods westward. They finally agreed to this last proposal, but not until they had proposed an article stipulating for a future negotiation for an equivalent to be given by Great Britain for the navigation of the Mississippi, and by the United States for the liberty as to the fisheries within the British jurisdiction. This article was unnecessary, with respect to

its professed object, since both Governments had it in their power, without it, to negotiate upon these subjeccts, if they pleased. We rejected it, although its adoption would have secured the boundary of the forty-ninth degree of latitude west of the Lake of the Woods, because it would have been a formal abandonment on our part of our claim to the liberty as to the fisheries recognized by the treaty of 1783.

"You will perceive by the correspondence that the ninth article was offered us as a *sine qua non* and an ultimatum. We accepted it, not without much hesitation, as the only alternative to a rupture of the negotiation, and with a perfect understanding that our Government was free to reject it, as we were not authorized to subscribe to it."

Letter of the Am. plenip. to Scc. of State, Ghent, Dec. 25, 1814, given in The Fisheries and the Mississippi, 54 *ff.*

"The principle (that of the continuous right of the United States to the northeastern fisheries and the non-abrogation of these rights by the war of 1812) asserted by the American plenipotentiaries at Ghent has been still asserted and maintained through two long and arduous negotiations with Great Britain, and has passed the ordeal of minds of no inferior ability. It has terminated in a new and satisfactory arrangement of the great interest connected with it, and in a substantial adu ission of the principle asserted by the American plenipotentiaries at Ghent."

Mr. J. Q. Adams, The Fisheries and the Mississippi, 97, 98.

"In that instrument (the treaty of 1818) the United States have renounced forever that part of the fishing liberties which they had enjoyed or claimed in certain parts of the exclusive jurisdiction of the British provinces, and within three marine miles from the shore. This privilege, without being of much use to our fishermen, had been found very inconvenient to the British, and in return we have acquired an enlarged liberty, both of fishing and of dryiug fish, within the other parts of the British jurisdiction forever. The first article of the convention affords a signal testimonial of the correctness of the principle assumed by the American plenipotentiaries at Ghent; for, by accepting the express renunciation of the United States of a small portion of the privilege in question, and by confirming and enlarging all the remainder of the privilege *forever*, the British Government have implicitly acknowledged that the liberties of the third article of the treaty of 1783 had *not* been abrogated by the war. * * * It is not the word *forever* in this convention which will secure to our fishermen for all time the liberties stipulated and recognized in it, but it was introduced by our negotiators and admitted by those of Great Britain as a warning that we shall never consider the liberties secured to us by it as abrogated by mere war. * * * They and we are aware forever that nothing but our *own renunciation* can deprive us of this right."

*Ibid*, 109.

"The nature of the rights and liberties consisted in the free participation in a *fishery*. That fishery, covering the bottom of the banks which surround the island of Newfoundland, the coasts of New England, Nova Scotia, the Gulf of Saint Lawrence, and Labrador, furnishes the richest treasure and the most beneficent tribute that ocean pays to earth on this terraqueous globe. By the pleasure of the Creator of earth and seas, it had been constituted in its physical nature *one* fishery, extending in the open seas around that island, to little less than five degrees of latitude from the coast, spreading along the whole northern coast of this continent and insinuating itself into all the bays, creeks, and harbors to the very borders of the shores. For the full enjoyment of an equal share in this fishery it was necessary to have a nearly general access to every part of it, the habits of the game which it pursues being so far migratory that they were found at different periods most abundant in different places, sometimes populating the banks and at others swarming close upon the shores. The latter portion of the fishery had, however, always been considered as the most

valuable, inasmuch as it afforded the means of drying and curing the fish immediately after they were caught, which could not be effected upon the banks.

"By the law of nature this fishery belonged to the inhabitants of the regions in the neighborhood of which it was situated. By the conventional law of Europe it belonged to the European nations which had formed settlements in those regions. France, as the first principal settler in them, had long claimed the *exclusive* right to it. Great Britain, moved in no small degree by the value of the fishery itself, had made the conquest of all those regions upon France, and had limited by treaty, within a narrow compass, the right of France to any share in the fishery. Spain, upon some claim of prior discovery, had for some time enjoyed a share of the fishery on the banks, but at the last treaty of peace prior to the American Revolution had expressly renounced it.

"At the commencement of the American Revolution, therefore, this fishery belonged exclusively to the *British nation*, subject to a certain limited participation in it reserved by treaty stipulations to France."

*Ibid.*, 184.

"The most important matter adjusted at this negotiation (that of 1818) was the fisheries. The position assumed at Ghent, that the fishery rights and liberties were not abrogated by war, was again insisted on, and those portions of the coast fisheries relinquished on this occasion were renounced by express provision, fully implying that the whole right was not considered a new grant."

2 Lyman's Diplomacy of the U. S., 88.

"During the conferences which preceded the negotiation of the convention of 1818, the British commissioners proposed to expressly exclude the fishermen of the United States from 'the privilege of carrying on trade with any of his Britannic Majesty's subjects residing within the limits assigned for their use;' and also that it should not be 'lawful for the vessels of the United States engaged in said fishery to have on board any goods, wares, or merchandise whatever, except such as may be necessary for the prosecution of their voyages to and from the said fishing grounds; and any vessel of the United States which shall contravene this regulation may be seized, condemned, and confiscated with his cargo.'

"This proposition, which is identical with the construction now put upon the language of the convention, was emphatically rejected by the American commissioners, and thereupon was abandoned by the British plenipotentiaries, and Article I, as it stands in the convention, was substituted."

President Grant, Second Annual Message, 1870.

On the subject of the Northeastern fisheries generally see the following Congressional documents:

Articles of the treaty of 1871 with Great Britain. Resolution of Massachusetts favoring their abrogation. Feb. 28, 1879. Senate Mis. Doc., 80, 45th Cong., 3d sess.

Abrogation of the fishery articles of the treaty of May 8, 1871, with Great Britain recommended. Apr. 28, 1880. House Rep. 1275, 46th Cong., 2d sess.

Recommendation that duties be reimposed upon fish and fish oil, the product of Canada, as British Government insists that local laws are superior to stipulation of treaty of 1871. President's message. May 17, 1880. Senate Ex. Doc. 180, 46th Cong., 2d sess.

Provisions of the treaty of May 8, 1871, with Great Britain. Report in favor of paying damages sustained by American fishermen on account of the acts of

the people of Newfoundland and the abrogation of the treaty. June 9, 1880. House Rep. 1746, 46th Cong., 2d sess.

Certain provisions of the treaty of Washington on. Report that they be terminated. Feb. 4, 1882. House Rep. 235, 47th Cong., 1st sess.

Protection of, in waters of United States and Canada. Resolution of Vermont favoring legislation for that purpose. Jan. 15, 1877. Senate Mis. Doc. 28, 44th Cong., 2d sess.

Protection of, on Atlantic coast. Proposed legislation not antagonistic with treaty obligations with Great Britain. Mar, 24, 1884. Senate Rep. 365, 48th Cong., 1st sess.

As to Canada fisheries in general, see Senate Ex. Doc. No. 100, 32d Cong., 1st sess.

On Sir E. Thornton's proposal of a fisheries commission, and in relation to the Alabama claims, see Mr. Fish, Sec. of State, to Mr. Thornton, Jan. 30, 1871. For. Rel., 1871, 497.

On the subject of the negotiations attending the treaty of 1818, the following documents may be consulted:

Message of President Monroe, Feb. 18, 1825, with papers as to "the capture and detention of American fishermen during the last season." House Doc. 405, 18th Cong., 2d sess. 5 Am. St. Pap. (For. Rel.), 675.

Letter of Mr. Rush to Mr. Monroe, Oct. 22, 1818, Monroe Pap. See also in same, important argument of Mr. Rodney, Nov. 4, 1818, in same collection.

Mr. Rush's dispatch to Mr. J. Q. Adams, Sec. of State, of July 28, 1823, narrating the incidents of the then closing negotiations with the British ministry, is given in Senate. Ex. Doc. No. 396, 18th Cong., 2d sess. 5 Am. St. Pap. (For. Rel.), 529. See *ibid.*, 548, 580, as to passages in respect to Newfoundland fisheries.

Mr. Gallatin's dispatch to Mr. J. Q. Adams, Nov. 6, 1818. 2 Gallatin's Writings, 82.

As to course of commissioners at Ghent, in respect to the fisheries, see Mr. Gallatin to Mr. Monroe, Dec. 25, 1814. 1 Gallatin's Writings, 345. See further, 1 Phillimore Int. Law (3d ed.), 270.

In the British and Foreign State Papers for 1818–'19, vol. 6, p. 69 *ff.*, will be found the proceedings of the commissioners by whom the treaty of 1818 was negotiated.

(5) UNDER THE TREATIES OF 1783 AND 1812 THE THREE MILES BELT FOLLOWS THE SINUOSITIES AND INDENTATIONS OF THE COAST.

§ 305.

The general doctrine of the law of nations as to marginal seas has been already discussed (*supra*, § 32). That territorial jurisdiction over the North East Atlantic is limited to three miles, following the sinuosities and indentations of the coast, is shown by the action of the British and United States Governments under the treaties of 1783 and of 1818. As in some aspects this question may become the matter of future negotiations, the publication in the present shape of a summary of the correspondence in this relation is deferred.

(6) BAY OF FUNDY AND OTHER LARGE BAYS ARE OPEN SEAS.

§ 305*a*.

On November 30, 1845, Lord Stanley, then British Colonial Secretary, after saying that "Her Majesty's Government feel satisfied that the Bay of Fundy has been rightly claimed by Great Britain as a bay within

the treaty of 1818," but that the "relaxation of this claim would be attended with benefits," etc., declares that "it has accordingly been announced to the United States Government that American citizens would henceforward be allowed to fish in any part of the Bay of Fundy, provided they do not approach, except in cases specified in the treaty of 1818, within three miles of the entrance of any bay on the coast of Nova Scotia or New Brunswick."

As to meaning of the word "bay," in the convention of 1818, Mr. Cass, in his speech in the Senate on August 3, 1852, after showing that there are "bays" (*e. g.*, Bay of Biscay, Baffin's Bay, etc.) which are really open seas, proceeds to notice that the "bays" specified in the convention are of another class, being grouped with "harbors and creeks," and are convertible, not with such seas as the Bay of Biscay or the Bay of Fundy, but simply with indentations of the coast into which fishing vessels are accustomed to run. "That such was the understanding of our negotiators is rendered clear by the terms they employ in their report upon this subject. They say: 'It is in that point of view that the privilege of entering the ports for shelter is useful,' etc. Here the word 'ports' is used as a descriptive word, embracing both the bays and harbors within which shelter may be legally sought, and shows the kind of bays contemplated by our framers of the treaty. And it is not a little curious that the legislature of Nova Scotia have applied the same meaning to a similar term. An act of that province was passed March 12, 1836, with this title: 'An act relating to the fisheries in the province of Nova Scotia and the coasts and harbors thereof,' which act recognizes the convention, and provides for its execution under the authority of an imperial statute. It declares that harbors shall include bays, ports, and creeks. Nothing can show more clearly their opinion of the nature of the shelter secured to the American fishermen."

Congressional Globe (Appendix), vol. 25, 895.

In a speech of the same date Mr. Hamlin said: "The bays and harbors which are surrendered up by the Americans are *the* bays and harbors into which the American fishermen may go to find a *shelter*, *repair damages*, purchase wood, and obtain water. All these things could only be done in the small harbors, which would afford shelter, and where damage could be repaired. But to allow fishermen to go into the Gulf of St. Lawrence or the Bay of Fundy for repair or shelter! They might with far greater propriety seek the open sea for shelter, for with sufficient sea room they might be safe, while in such bays as the Bay of Fundy they would be sure of destruction upon a lee shore. Better, far better, to seek the broad and trackless ocean for a shelter, to repair, for wood, or water. The very uses to which these bays and harbors are to be appropriated must show what was intended—such harbors and bays as could be used for the purposes named. The same interpretation of the word bay in the treaty, when applied to Fundy, Chaleur, or St. Lawrence, should be understood as when applied to the Bay of Biscay or the Gulf of Mexico."

*Ibid*, 900.

The right of United States fishermen to enter and fish in the Bay of Fundy was "decided by arbitration in the case of the schooner Washington, and Her Majesty's Government have uniformly acquiesced in that decision."

Mr. Foster, Halifax Com., 1590.

As to the Bay of Chaleur, in its proper sense, conflicts as to fishing, judging from the evidence before the Halifax tribunal, are not likely to arise. In the old popular use of the title it is not, outside of the three-mile band, territorial water. "A good deal of factitious importance has been given to the Bay of Chaleur from the custom among fishermen, and almost universal a generation ago, of which we have heard so much, to speak of the whole of the Gulf of Saint Lawrence by that term."

*Ibid.*

"What men on the face of the earth have a better right to plow with their keels the waters of the Gulf of Saint Lawrence than the descendants of the fishermen of New England, to whose energy and bravery, a century and a quarter ago, it is chiefly owing that there is any Nova Scotia to-day under the British flag?"

*Ibid.*, 1591.

A construction of the terms "coasts, bays, creeks, or harbors," in the treaty of 1818, was given by the mixed commission under the convention of 1853, in the case of the United States fishing schooner Washington, which was seized while fishing in the Bay of Fundy, ten miles from shore, taken to Yarmouth, Nova Scotia, and adjudged forfeited, on the charge of violating the treaty of 1818 by fishing in waters in which the United States had, by that convention, renounced the right of its citizens to take fish. A claim of the owners of the Washington for compensation came before the commission above mentioned, and, the commissioners differing, the case was referred to Mr. Joshua Bates, the umpire, who, referring to the theory that "bays and coasts" were to be defined by "an imaginary line drawn along the coast from headland to headland, and that the jurisdiction of Her Majesty extends three marine miles outside of this line, thus closing all the bays on the coast or shore and that great body of water called the Bay of Fundy," pronounced it a "new doctrine," and, repudiating the decision of the provincial court based thereon, awarded the owners of the vessel compensation for an illegal condemnation. The umpire also decided that as the Bay of Fundy is from sixty-five to seventy-five miles wide, and from one hundred and thirty to one hundred and forty miles long, with several "bays" on its coasts, and has one of its headlands in the United States, and must be traversed for a long distance by vessels bound to Passamaquoddy Bay, and contains one United States island, Little Menan, on the line between headlands, the Bay of Fundy could not be considered as an exclusively British bay. (See President's message communicating proceedings of commission to Senate; also Dana's Wheaton, § 274, note 142.) The "headland" theory was again rejected by the umpire in the case of the schooner Argus, which was seized while fishing on Saint Ann's Bank, twenty-eight miles from Cape Smoke, the nearest land, taken to Sydney, and sold for violation of the treaty of 1818 by fishing within headlands. The owners were awarded full compensation.

Mr. Dana, in this connection, quotes (Dana's Wheat., § 274, note 142) from the treaty between Great Britain and France of 1839 the following provisions: "It is agreed that the distance of three miles, fixed as the general limit of the exclusive right of fishing upon the coasts of the two countries, shall, with respect to bays, the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland."

As to British concession that the Bay of Fundy is an open sea, see papers connected with message of President Fillmore, Feb. 28, 1853, with Senate Confid. Doc. No. 4, special session, 1853, and see particularly Mr. Everett, Sec. of State, to Mr. Ingersoll, Dec. 4, 1852, MSS. Inst. Gr. Brit., appended to message aforesaid.

As to detention of fishermen in the Bay of Fundy, see President Monroe's message of Feb. 26, 1825; House Doc. No. 408; 18th Cong., 2d sess.; 5 Am. St. Pap. (For. Rel.), 735.

Mr. Rush's notes of negotiation, Monroe papers, Dept. of State.

"To the clause about Hudson's Bay we did not object, as, on examining the charter to that company, which we did, it was clear that we should still fish as before the Revolution."

Mr. Rush's notes of negotiation, Monroe papers, Dept. of State, conference of Oct. 19.

(7) PORTS OF ENTRY NOT AFFECTED BY LIMITATIONS IMPOSED BY TREATY OF 1818.

§ 306.

Whatever may be the limitations of the treaty of 1818 as to trading by fishermen in the British possessions bordering on the fisheries, they do not apply to ports of entry in which fishing vessels, if having proper papers, can enter for commercial purposes. On the other hand, no British municipal regulations as to ports of entry can affect, so far as concerns the United States, the right of fishermen, under treaties and under the law of nations, to visit ports, bays, and harbors of that coast to obtain shelter, wood, and water, and to obtain provisions and supplies in the exercise of the territorial privileges they thus possess.

(8) BRITISH MUNICIPAL LEGISLATION MAY RESTRICT, BUT CANNOT EXPAND, BRITISH RIGHTS UNDER THESE TREATIES.

§ 307.

It is conceded that there is no British legislation making it penal for United States fishermen to purchase bait or supplies on Canadian shores when visiting them in pursuance of their rights as confirmed by this treaty. This, as has been said (*supra*, § 304), is a cotemporaneous construction of the treaty, since the statutes go back to the period when the treaty was framed. But in the aspect of the present section the statutes may be regarded as a statutory statement of treaty rights in this connection, whatever these rights might be. The British Government, with whom exclusively the United States has to deal in this matter, prescribes by statute that the seizures under the treaty of 1818 are to be only for certain specified causes, among which buying provisions is not included. And the rule is well settled, that while a municipal law cannot expand an international right, it may so contract it for municipal purposes that municipal prosecutions under it can only be brought in submission to the statutory terms.

"If, however, it be said that this claim (to exclude United States fishermen from these rights) is founded on provincial or colonial statutes, and not upon the convention, this Government cannot but regard them as unfriendly, and in contravention of the spirit, if not of the letter, of the treaty, for the faithful execution of which the imperial Government is alone responsible.

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

laws whereby the vessels of the Dominion of Canada are permitted to enter the waters of the United States."

President Grant, Second Annual Message, 1870. *Infra*, § 319.

(9) GREAT BRITAIN AND NOT HER PROVINCES IS THE SOVEREIGN TO BE DEALT WITH FOR INFRACTIONS OF LAW OF NATIONS AND OF TREATIES IN THIS RELATION.

§ 308.

It has been already seen (*supra*, §§ 8, 9) that the treaty-making power of a Government is the power which is to answer to the other contracting power for infractions of the treaty. It has also been seen that the organ of a Government which is charged with its foreign relations is that which is to be addressed by foreign Governments in respect to foreign relations, and that in federal systems this prerogative is assigned to the federal executive acting through his secretary for foreign affairs (*supra*, § 78, *ff*). To appeals of this class, based either upon treaty or the law of nations, no municipal statute, federal, state, or provincial, can be set up as a defense; and this has been repeatedly admitted in the United States in respect to international duties and to treaties executed by President and Senate within the range of their constitutional power (*supra*, §§ 9, 21, 138). This principle is conceded by Great Britain in respect to Canadian statutes and Canadian adjudications in this very relation.

See 2 Halifax Com., 1544.

"This Government conceives that the fishery rights of the United States, conceded by the treaty of Washington, are to be exercised wholly free from the restraints and regulations of the statutes of Newfoundland."

Mr. Evarts, Sec. of State, to Mr. Welsh, Feb. 17, 1879. MSS. Inst., Gr. Brit.

As to further assertions of this responsibility of Great Britain for provincial invasions of United States fishing rights, see Mr. Evarts to Sir E. Thornton, March 2, 1878. This responsibility was conspicuously claimed and accepted in connection with the injuries received by United States fishermen in Fortune Bay in January, 1878.

See papers contained in part in the message of President Hayes, May 17, 1880. House Ex. Doc. 84, 46th Cong., 2d sess.

"With Great Britain there are still unsettled questions, growing out of the local laws of the maritime provinces and the action of provincial authorities deemed to be in derogation of rights secured by treaty to American fishermen. The United States minister in London has been instructed to present a demand for $105,305.02 in view of the damages received by American citizens at Fortune Bay, on the 6th day of January, 1878. The subject has been taken into consideration by the British Government, and an early reply is anticipated."

President Hayes, Third Annual Message, 1879. See Fourth Annual Message of same, 1880. See House Ex. Doc. 84, 46th Cong., 2d sess.

"Early in the year the Fortune Bay claims were satisfactorily settled by the British Government paying in full the sum of £15,000, most of which has been already distributed. As the terms of the settlement

included compensation for injuries suffered by our fishermen at Aspee Bay, there has been retained from the gross award a sum which is deemed adequate for those claims."

President Arthur, First Annual Message, 1881.

The settlement is detailed in instructions from Mr. Blaine, Sec. of State, to Mr. Lowell, July 30, 1881, where Great Britain's responsibility in such cases is further asserted.

As to Halifax Fishery Commission see further, Appointmen of third commissioner. President's message March 21, 1878, Senate Ex. Doc. 44, 45th Cong., 2d sess. President's message May 17, 1878, House Ex. Doc. 89, 45th Cong., 2d sess. Appointment of Maurice Delfosse as third commissioner. President's message June 17, 1878, Senate Ex. Doc. 100, 45th Cong., 2nd sess. Alleged frauds in the proofs before, Feb. 22, 1881, House Rep. 329, 46th Coug., 3d sess. Resolution approving the report of the Committee on Foreign Relations, May 28, 1878, Senate Mis. Doc. 73, 45th Cong., 2d sess. Award. Report in favor of its payment, May 28, 1878, Senate Rep. 439, 45th Cong., 2d sess.

For Mr. Evarts' criticism of action of Halifax award, see Mr. Evarts, Sec. of State, to Mr. Welsh, Sept. 27, 1878. MSS. Inst., Gr. Brit.

III. *BY PURCHASE OF ALASKA THE UNITED STATES IS ENTITLED TO THE JOINT RIGHTS OF RUSSIA AND OF THE UNITED STATES IN THE NORTHWESTERN PACIFIC.*

§ 309.

The conditions of the purchase of Alaska, and the nature of the controversy between the United States, Great Britain, and Russia, in reference to the Northwestern Pacific, as settled by the convention of 1824 between Russia and the United States, are considered in prior sections.

*Supra*, §§ 27, 33, 159.

See also Mr. Forsyth, Sec. of State, to Mr. Dallas, May 4, 1837. MSS. Inst., Russia.

As to construction of convention, see same to same, Nov. 3, 1837.

It is sufficient here to state that the joint rights of Russia and of the United States to those waters are now held by the United States.

As to fisheries in Alaska, see Senate Ex. Doc. 50, 40th Cong., 2d sess.

Mr. Cutts' report on the commerce in the products of the sea, and other papers connected with fishing grounds on the North Pacific, are given in Senate Ex. Doc. 34, 42d Cong., 2d sess.

As to correspondence as to admission of British Columbian fish under treaty of 1871, see Brit. and For. St. Pap. 1874–'75, vol. 66.

# CHAPTER XIV.

## GUANO ISLANDS.

I. TITLE IN INTERNATIONAL LAW.
Based on discovery, § 310.
II. TITLE UNDER UNITED STATES STATUTE.
(1) Discovery of guano deposits gives title, § 311.
(2) Aves Islands, § 312.
(3) Lobos Islands, § 313.
(4) Other islands, § 314.

### I. *TITLE IN INTERNATIONAL LAW.*

BASED ON DISCOVERY.

§ 310.

As has been already stated, title to territory, whether insular or continental, in America, is based on discovery or conquest, and not on transfer from the aborigines.

*Supra*, §§ 2, 3, 200.

### II. *TITLE UNDER UNITED STATES STATUTE.*

(1) DISCOVERY OF GUANO DEPOSITS GIVES TITLE.

§ 311.

The Revised Statutes of the United States provide as follows:

SEC. 5570. Whenever any citizen of the United States discovers a deposit of guano on any island, rock, or key, not within the lawful jurisdiction of any other Government, and not occupied by the citizens of any other Government, and takes peaceable possession thereof, and occupies the same, such island, rock, or key may, at the discretion of the President, be considered as appertaining to the United States.

SEC. 5571. The discoverer shall, as soon as practicable, give notice, verified by affidavit, to the Department of State of such discovery, occupation, and possession, describing the island, rock, or key, and the latitude and longitude thereof, as near as may be, and showing that such possession was taken in the name of the United States; and shall furnish satisfactory evidence to the State Department that such island, rock, or key was not, at the time of discovery thereof, or of the taking possession and occupation thereof by the claimants, in the possession or occupation of any other Government or of the citizens of any other Government, before the same shall be considered as appertaining to the United States.

SEC. 5572. If the discoverer dies before perfecting proof of discovery or fully complying with the provisions of the preceding section, his widow, heir, executor, or administrator, shall be entitled to the benefits of such discovery upon complying with

the provisions of this title; but nothing herein shall be held to impair any rights of discovery or any assignment by a discoverer heretofore recognized by the United States.

SEC. 5573. The discoverer, or his assigns, being citizens of the United States, may be allowed, at the pleasure of Congress, the exclusive right of occupying such island, rocks, or keys, for the purpose of obtaining guano, and of selling and delivering the same to citizens of the United States, to be used therein, and may be allowed to charge and receive for every ton thereof delivered alongside a vessel, in proper tubs, within reach of ship's tackle, a sum not exceeding $8 per ton for the best quality, or $4 for every ton taken while in its native place of deposit.

SEC. 5574. No guano shall be taken from any such island, rock, or key, except for the use of the citizens of the United States or of persons resident therein. The discoverer, or his widow, heir, executor, administrator, or assigns, shall enter into bond, in such penalty and with such sureties as may be required by the President, to deliver the guano to citizens of the United States, for the purpose of being used therein, and to none others, and at the price prescribed, and to provide all necessary facilities for that purpose within a time to be fixed in the bond; and any breach of the provisions thereof shall be deemed a forfeiture of all rights accruing under and by virtue of this title. This section shall, however, be suspended in relation to all persons who have complied with the provisions of this title, for five years from and after the fourteenth day of July, eighteen hundred and seventy-two.

SEC. 5575. The introduction of guano from such islands, rocks, or keys, shall be regulated as in the coasting trade between different parts of the United States, and the same laws shall govern the vessels concerned therein.

SEC. 5576. All acts done, and offenses or crimes committed, on any such island, rock, or key, by persons who may land thereon, or in the waters adjacent thereto, shall be deemed committed on the high seas, on board a merchant ship or vessel belonging to the United States, and shall be punished according to the laws of the United States relating to such ships or vessels and offenses on the high seas, which laws for the purpose aforesaid are extended over such islands, rocks, and keys.

SEC. 5577. The President is authorized, at his discretion, to employ the land and naval forces of the United States to protect the rights of the discoverer or of his widow, heir, executor, administrator, or assigns.

SEC. 5578. Nothing in this title contained shall be construed as obliging the United States to retain possession of the islands, rocks, or keys, after the guano shall have been removed from the same.

"The act of Congress of August 18, 1856 (P. L., 110) confers a discretionary power on the President of the United States to decide whether an island which has not been appropriated by any other nation, and on which guano has been discovered, shall 'be considered as appertaining to the United States,' and whether he shall 'employ the land and naval forces of the United States to protect the rights' of the discoverers of such an island. This is manifestly a grave and important duty, to be performed by the President only after all the prerequisites of the law shall have been complied with."

Mr. Cass, Sec. of State, to Messrs. Fabens and Stearns, June 29, 1857. MSS. Dom. Let.

"The act of Congress of August 18, 1856, authorizes the President, after certain prerequisites have been performed, to determine that islands upon which guano deposits have been discovered, appertain to the United States. It is only after this preliminary decision has been

made that it becomes necessary to determine whether the discoverers may have exclusive possession of the islands for the purpose of taking off the guano and selling it; and the bond and securities provided for in the second section of the act are not required except with reference to the exclusive possession. In your case there has been no decision by the President recognizing the island of Sombrero as the property of the United States, and of course none authorizing exclusive possession in the discoverers or their assignees. Before these decisions can be properly made, the prerequisites already referred to must have been complied with. There must be sufficient proof of the discovery of a guano deposit by an American citizen; that it is not within the lawful jurisdiction of any other Government; that it is not occupied by the citizens of any other Government; that the discoverer has taken and kept peaceable possession thereof in the name of the United States; that these facts have been communicated on oath to the Department of State, with a description of the island, its latitude and longitude, and that the deposit in question has not been taken out of the possession of any other Government or people. When the President has been satisfied on these points, he may in his discretion, regard the islands containing the discovered deposits as belonging to the United States, but he is not obliged to do so. The object of the law is to benefit American agriculture by promoting the supply of guano at a reasonable price. Before assuming, therefore, the grave responsibility involved in declaring a guano island to belong to the United States, he must be satisfied that the guano found upon it is sufficient in quantity and quality to justify the measure. And it is only, moreover, when he shall be fully informed with respect to the value of the deposit that he can fix correctly the penalty of the bond required, and determine the securities contemplated by the law."

Mr. Cass, Sec. of State, to Messrs. Wood and Grant, July 1, 1857; *ibid.*

To enable an alleged discoverer of a guano deposit to make title, it is necessary, under the act of Congress of May 10, 1867, to prove (1) citizenship; (2) that the deposit had not been previously discovered by another; (3) that the island was at the time not in occupation or possession or jurisdiction of any other Government. A specific description of the position of the island must be given.

Mr. Seward, Sec. of State, to Mr. Daggett, Sept. 4, 1867; *ibid.* See also Mr. Seward to Mr. Phillips, Mar. 2, 1868; Mr. Seward to Mr. Clark, July 1, 1868; *ibid.*

The Department has no power to adjudicate in cases of "conflict by citizens of the United States in respect to their rights in a guano island," "and the claimants must vindicate their title before the legal tribunals of the country."

Mr. Fish, of State, to Mrs. Stevens, June 21, 1869. MSS. Dom. Let. See Mr. J. C. B. Davis, Acting Sec. of State, to Mr. Gray, Aug. 21, 1869; *ibid.*

"The ground upon which, under section 5570 of the Revised Statutes, the right of citizens of the United States to the use and control of deposits of guano on islands, rocks, or keys is based, is the discovery, not of the island or other place named, but of the deposit of guano. But it must also be shown that the place of the deposit is 'not within the lawful jurisdiction of any other Government.' * * *

"If it be shown that the place of the deposit is not subject to the jurisdiction of any other Government the determination of the conflicting claims of citizens of the United States belongs exclusively to this Government. But it may not be improper to observe that the point of most importance to be ascertained, as between citizens of the United States, is whether the pretensions of the person laying claim to the discovery of a deposit conflict with the rights of any other citizen. And it is conceived that a disallowed or abandoned claim would not be a bar to the subsequent acquirement of rights under the act of Congress by another claimant."

Mr. Bayard, Sec. of State, to Mr. Romero, Feb. 26, 1886. MSS. Notes, Mex.

By the act of 1856 (Rev. Stat., § 5570) it is essential that, before an island whereon guano is discovered shall be deemed as appertaining to the United States, that the island shall be taken possession of and actually occupied; conditions which are not complied with by a mere symbolical possession or occupancy.

No claim, also under the act, can have an earlier inception than the actual discovery of guano deposit, possession taken, and actual occupation of the island, rock, or key whereon it is found. It is requisite, also, that in determining the proper party to give the bond required by the act, the political department of the Government should only look to the party complying with the conditions of the statute, without considering the legal or equitable rights of other parties to share in the profits of the speculation, which are to be left for the determination of the proper judicial tribunals.

9 Op., 364, Black, 1859.

The President can, under the statute, take no action in respect to an application by the sureties in a bond given to the United States from under the guano-island act of 1856 (Rev. Stat., § 5574), to be released their obligation, in consequence of a breach of the bond by their principal.

11 Op., 30, Bates, 1863.

Section 8 of the act of 1865 (13 Stat. L., 494) repeals that part of the act of 1856 (11 Stat. L., 119) which requires the trade in guano from guano islands to be carried on in coasting-vessels, and for two years from and after July 14, 1865, all persons who have complied with section 2 of the

act of 1856 (Rev. Stat., §§ 5572, 5573) may export guano in any vessel which may lawfully export merchandise from the United States.

11 Op., 514, Speed, 1866.

On the general topic see further Mr. Fish, Sec. of State, to Mr. Samson, Apr. 12, 1870. MSS. Dom. Let. Mr. Fish, Sec. of State, to Mr. Preston, Dec. 31, 1872. MSS. Notes, Hayti. Mr. Fish, Sec. of State, to Mr. Lander, May 20, 1874. MSS. Dom. Let. Mr. Evarts, Sec. of State, to Messrs. Beebe, Nov. 26, 1877; *ibid.* Mr. Evarts, Sec of State, to Mr. Fisher, July 7, 1880; *ibid.* Mr. Frelinghuysen, Sec. of State, to Mr. McCulloch, Dec. 5, 1884; *ibid.*

The report of Mr. Clayton, Sec. of State, of June 29, 1850, in reference to guano, is contained in Senate Ex. Doc. 59, 31st Cong., 1st sess. See further report respecting the guano trade; Senate Ex. Doc. 25, 35th Cong., 2d sess. See for correspondence as to seizure, by Peru, of American vessels engaged in the guano trade, Brit. and For. St. Pap. for 1859–'60, vol. 50, 1126.

For articles on guano, see 19 De Bow's Rev., 219; 1 Chamber's Jour., 135, 383; 36 Living Age, 199.

As to guano legislation, see Calvo droit int. (3d ed.), vol. 3, 361.

As to good offices on guano contracts, see Mr. Marcy, Sec. of State, to Mr. Eames, June 20, 1855. MSS. Inst., Venez.

As to claims against Peru on alleged contract with guano discoverers, see *supra*, § 157.

(2) AVES ISLANDS.

§ 312.

"The Aves Islands have been known, probably, more than three hundred years, but have ever been regarded as uninhabitable and valueless. No nation has deemed them of sufficient importance to be reduced to possession. As we understand the case, they were not embraced within the sovereignty of any power, but were derelict. While in this state, American citizens discovered that on one of them there was a deposit of guano of some value, and they took actual possession of it. Their right to retain it was, in our opinion, good against the whole world, and they could not be rightfully disturbed by any power. But it now seems that Venezuela has forcibly driven them away under some claim of sovereignty over the island. This act has resulted in a serious injury to them, and they have, as you will perceive by the correspondence, applied for the interposition of this Government to assert their claim against Venezuela for molesting them and breaking up their business. You are instructed to bring this case to the notice of the Venezuelan Government."

Mr. Marcy, Sec. of State, to Mr. Eames, Jan. 24, 1855. MSS. Inst., Venezuela.

"The conflicting claims of the Venezuelan Government to the Aves Islands, discovered by American citizens in 1854, and occupied by them for the purpose of taking guano, but from which they were expelled by the authority of Venezuela, were, after being the subject of diplomatic discussion, settled by the payment by Venezuela to the United States

Government of a stipulated indemnity for the private claimants. (34th Cong., 3d sess., Senate Ex. Doc. 25; *ibid.*, 36th Cong., 2d sess., 10.)"

Lawrence's Wheaton (ed. 1863), 319, 320.

A report of Mr. Marcy, Sec. of State, Jan. 12, 1857, as to the Aves or Bird Islands, and the title thereto, is given in Senate Ex. Doc. 28, 24th Cong., 3d sess.

Further information will be found in instructions by Mr. Marcy, Feb. 3, 1857; by Mr. Cass Aug. 31, 1857, Dec. 15, 1857, Aug. 24, 1858, Sept. 15, 1858, Dec. 10, 1858; and by Mr. Seward July 30, 1862. MSS. Inst., Venez.

As to indemnity in respect to, see Mr. Cass to Mr. Sanford, Oct. 22, 1859, quoted *supra*, § 132.

The title of Mr. Shelton and his associates to the use of the Aves Islands is held good, and he is entitled to damages from Venezuela for his forcible ejection. Mr. Cass, Sec. of State, to Mr. Rihas, Sept. 11, 1857. MSS. Notes, Venez. Same to same, Mar. 4, 1858.

The report of Mr. Black, Sec. of State, Feb. 23, 1861, with the accompanying documents, is given in Senate Ex. Doc. 10, 36th Cong., 2d sess.

As to Aves Island convention, see Mr. Seward, Sec. of State, to Mr. Culver, Jan. 24, 1863. MSS. Inst., Venez.

As to mode of remitting payments received, see Mr. Fish, Sec. of State, to Mr. Partridge, Dec. 7, 1869; *ibid.* See also a pamphlet entitled "The Aves Island case, with the correspondence relative thereto, and discussion on law and facts; H. S. Sanford, attorney for claimants, Washington, 1861."

### (3) Lobos Islands.

### § 313.

The dominion of the Lobos guano islands, west of the coast of Peru, depends, so far as the title of the United States is concerned, on the discovery of the islands by Monell, a citizen of the United States, in 1823.

Mr. Webster, Sec. of State, to Mr. Jewett, June 5, 1852. MSS. Dom. Let.

As to title to the Lobos Islands, finally conceded to Peru, see Mr. Webster, Sec. of State, to Mr. Osma, Aug. 21, 1852, and following letters, Mr. Everett, Sec. of State, to Mr. Osma, Nov. 16, 1852, Nov. 19, 1852. MSS. Notes, Peru.

"Upon the present state of the facts and the evidence, this Government cannot admit the right of Peru to drive away United States vessels from the Lobos Islands. * * *

"Whatever may be the exclusive rights of Peru to the Lobos or other islands near the Peruvian coast, abounding with deposits of guano, the conviction is deep and general among the consumers of the article in foreign countries, or at least in the United States, that the high price of guano is occasioned by the policy which that Government has thought proper to adopt in reference to its exportation, and that that policy tends to the advantage of a few individuals at the expense of the consumers. If, therefore, the Peruvian Government expects its exclusive claims to be assented to, it will be necessary that its policy upon the subject should be changed."

Mr. Webster, Sec. of State, to Mr. Clay, Aug. 30, 1852. MSS. Inst., Peru.

"It is proper to add, also, that prior to the receipt of this dispatch, in consequence of the information contained in the one that preceded it, dated 24th June, the President was induced to believe that the claim of Peru to exclusive dominion over these islands was better founded than he had been led to suppose. The orders that had been dispatched to the commander of our naval forces on the Pacific to protect such of our vessels as might wish to take cargoes of guano from these islands were accordingly countermanded some weeks since."

Mr. Conrad, Acting Sec. of State, to Mr. Clay, Sept. 21, 1852; *ibid.*

Mr. Webster's report of Aug. 21, 1852, with accompanying papers, in Senate Ex. Doc., 109, 32d Cong., 1st sess. See further, 2 Curtis' Webster, 652 *ff*; President Pierce's message, House Ex. Doc. 70, 33d Cong., 1st sess.; Mr. Wade's report on the Benson claim, in connection with these islands, Senate Rep. 397, 34th Cong., 3d sess.

(4) OTHER ISLANDS.

§ 314.

The President cannot annex a guano island (Cayo Verde) to the United States while a diplomatic question is pending between this Government and that of a foreign nation, growing out of a claim of dominion by the latter, over the island.

9 Op., 406, Black, 1859.

For a summary of the action of the Government of Peru towards the guano islands on its coast, see report of Mr. Seward, Sec. of State, Mar. 30, 1861. MSS. Report Book.

As maintaining the title of the United States to the island of Navassa, see Mr. Fish to Mr. Preston, Dec. 4, 1872. MSS. Notes, Hayti. Same to same, Jan. 10, 1873; *ibid.*

A paper relative to occupation of Navassa Island in 1857, is in Senate Ex. Doc. 37, 36th Cong., 1st sess. See for the occupation, under the act of 1866, of Navassa, the title to which was claimed by Hayti, 30th Cong., 1st sess., Senate Ex. Doc. 37. Lawrence's Wheaton (ed. 1863), 319, 320.

Correspondence as to guano claimed by citizens of the United States in Peru, in 1857–'58, is given in Senate Ex. Doc. 69, 35th Cong., 1st sess.

As to Mr. Brissot's alleged discovery of guano, and as to guano on the Galapagos Islands, see Mr. Marcy, Sec. of State, to Mr. White, Aug. 4, 1854. MSS. Inst., Ecuador.

As to Alta Vela Island, see House Mis. Doc. 10, 40th Cong., 3d sess.

Mr. Frelinghuysen, in his correspondence with the Mexican legation at Washington, at 1882, concerning Arenas Key, neither asserted nor renounced the proprietorship of the United States over that island; nor did he affirm that the title thereto rests with the Government of Mexico. He left the question open for lack of evidence sufficient to lead to a satisfactory conclusion in the premises. No such evidence had as yet been submitted to the Department.

See Mr. Adee, Acting Sec. of State, to Mr. Romero, Jan. 30, 1886. MSS. Notes, Mex.

# CHAPTER XV.

## PACIFIC METHODS OF REDRESS.


I. Apology, reparation, satisfaction, and indemnity.
  (1) Apology and saluting flag, § 315.
  (2) Cession of territory, § 315*a*.
  (3) Case of Chesapeake and Leopard, § 315*b*.
  (4) Case of the Dartmoor prisoners, § 315*c*.
  (5) Case of the Prometheus, § 315*d*.
II. Arbitration, § 316.
III. Withdrawal of diplomatic relations, § 317.
IV. Retorsion and reprisal, § 318.
V. Non-intercourse, § 319.
VI. Embargo, § 320.
VII. Display of force, § 321.


### I. *APOLOGY, REPARATION, SATISFACTION, AND IDEMNITY.*

#### (1) Apology and saluting flag.

#### § 315.

The apologies and reparation offered in the cases of seizure within neutral territorial waters of the Chesapeake (1863) and of the Florida, are detailed *supra*, § 27, and *infra*, 315*b*; the apology in the Trent case and the surrender of Messrs. Mason and Slidell are discussed *infra*, §§ 325, 328, 374.

The delays in the action of Great Britain in making amends for the attack by the Leopard on the Chesapeake are noticed *infra*, § 315*b*.

The explanations offered of the bombardment of Greytown are considered *supra*, §§ 50*a*, 224*a*. See also *infra*, § 315*d*.

Lawrence com. sur droit int., 3, 130, 132.

As to redress in connection with the attack on the Prometheus, see *infra*, § 315*d*.

Saluting the flag of a country to which an affront has been offered may be a mode of apology accepted as satisfactory. As an illustration of this topic may be mentioned the saluting of flag after the affront assumed to have been offered to the French consul at San Francisco in 1854, (*supra*, § 98,) and that after the seizure of the Florida in Brazilian waters. (*Supra*, § 27).

In the Virginius case, elsewhere noticed (*infra*, § 327), where a vessel bearing the flag of the United States was captured by a Spanish cruiser as a "filibuster," and carried to Cuba, and a number of those on board were shot, reparation was demanded by the Government of the United States, and also a salute to the flag. The reparation was

granted; but on its afterwards appearing that the papers of the Virginius were based on a false affidavit of United States ownership, the demand for a salute to the flag was withdrawn.

As to saluting flag, see Blackwood's Mag. for Dec. 1873 (vol. 114, 682). The rules, it is said, "of the United States are singularly minute. With reference to the last, it may be observed as an odd fact that, while the American President is saluted in his own fleets with a fixed number of twenty-one guns, the official salutes of the United States to foreigners is made up of as many shots as there are States" in the Union.

(2) CESSION OF TERRITORY.

§ 315*a*.

France, by the convention of 1803 (*supra*, § 148*b*), ceded Louisiana to the United States, part of the consideration being the satisfaction by the United States of the claims of the United States on France for certain spoliations.

See *supra*, §§ 148, 248.

In the treaty of February 22, 1819, Spain ceded the Floridas to the United States, and as an equivalent in part for this cession the United States agreed to renounce all the claims of her citizens against Spain for damages and injuries suffered until the time of the signing of the treaty. The claims thus renounced included those "on account of prizes made by French privateers, and condemned by French consuls within the territory and jurisdiction of Spain," and also those "arising from the unlawful seizures at sea and in the ports and territories of Spain or the Spanish colonies." The United States were to make satisfaction for the claims thus renounced to the extent of five million of dollars. A board of three commissioners sat in Washington to distribute this fund, and under the express terms of the treaty rejected all claims which had been previously compensated by France.

A convention entered into July 4, 1831, by the United States and France opened with these words: "The French Government, in order to liberate itself completely from all the reclamations preferred against it by citizens of the United States for unlawful seizures, captures, sequestrations, confiscations, or destructions of their vessels, cargoes, or other property, engages to pay a sum of twenty-five millions of francs to the Government of the United States, who shall distribute it among those entitled in the manner and according to the rules which it shall determine."

The cession of Florida in satisfaction of spoliation claims on Spain is discussed *supra*, § 161*a*. See further as to this treaty *infra*, § 318.

In the same line may be mentioned the cession of California and other territory by Mexico, *supra*, § 154.

(3) CASE OF CHESAPEAKE AND LEOPARD.

§ 315*b*.

The main features of the outrage by the Leopard on the Chesapeake in 1807, are elsewhere noticed. (See *infra*, § 331.) It has also been noticed that when President Jefferson was advised of this outrage he issued a proclamation excluding British ships-of-war from our ports, and requiring

that they should not be visited from the shore. (See *supra*, §§ 27 *ff.*; *infra*, § 319.) The effect of this was to make it necessary for them to resort to Halifax for water, provisions, and other conveniences, and this exclusion was set up by the British authorities as a grievance of their own. They refused, therefore, to negotiate as to the reparation to be made for the attack on the Chesapeake until this proclamation was withdrawn. Mr. Madison was willing to promise that the proclamation should be withdrawn as soon as satisfactory reparation was made; but he declined to withdraw the proclamation in advance.

It was argued by Mr. Rose, special envoy sent by Great Britain to the United States in 1807, for the settlement of the Chesapeake question, that "if, when a wrong is committed, retaliation is immediately resorted to by the injured party, the door to pacific adjustment is closed and the means of conciliation are precluded." Mr. Madison did not, as Secretary of State, contest this proposition when the retaliation was immediate and effective, but denied that an act of caution, such as was the excluding of British cruisers from our waters, induced by a series of wrongs of which that complained of was only one, could be regarded as such a retaliation. (See correspondence in 3 Am. St. Pap. (For. Rel.), 213 *ff.*) Mr. Madison subsequently agreed that if reparation be "tendered spontaneously" by Great Britain, "on the receipt of the act of reparation here, the proclamation of July 2 shall be revoked."

Mr. Madison to Mr. Pinkney, April 4, 1808. MSS. Inst., Ministers. 3 Am. St. Pap. (For. Rel.), 221. *Supra*, § 107 *ff.*, 150*b*; *infra*, § 331.

Mr. Rose, being instructed to make the withdrawal of the proclamation an essential preliminary, broke off the negotiations at this point, and returned to England. (See *supra*, §§ 107, 108.)

On October 27, 1809, Mr. F. J. Jackson, British minister at Washington, announced to Mr. Smith, Secretary of State, that on the annulling of the President's proclamation, excluding British men-of-war from the harbors of the United States, "His Majesty is willing to restore the seamen taken out of the Chesapeake, on reserving to himself a right to claim in a regular way" the discharge of such as were native-born British subjects or deserters. Support was also tendered for the families of such persons slain on the Chesapeake as were not native-born British subjects or deserters. As it was impossible for the British Government to comply with this pledge from the fact that one of the persons taken had been hung under its direction, and as the whole plan of "satisfaction" assumed the right of the British Government to seize on board an American man-of-war native-born British subjects or deserters, the proposition could not be entertained. And Mr. Jackson's conduct towards the Government in other respects was so insolent, and his cause so flagrantly in violation of the obligations imposed by international law on diplomatic agents, that it became necessary for Mr. Madison to demand his recall. (*Supra*, §§ 84, 107, 150*b*.)

The following is the correspondence in 1811 on the same topic between Mr. Foster, British minister at Washington, who succeeded Mr. Jackson, and Mr. Monroe, Secretary of State:

"In pursuance of the orders which I have received from His Royal Highness the Prince Regent, in the name and on the behalf of His Majesty, for the purpose of proceeding to a final adjustment of the differences which have arisen between Great Britain and the United States in the affair of the Chesapeake frigate, I have the honor to acquaint you:

"First. That I am instructed to repeat to the American Government the prompt disavowal made by His Majesty (and recited in Mr. Erskine's note of April 17, 1809, to Mr. Smith) on being apprised of the unauthorized act of the officer in command of his naval forces on the coast of America, whose recall from a highly important and honorable command immediately ensued, as a mark of His Majesty's disapprobation.

"Secondly. That I am authorized to offer, in addition to that disavowal on the part of His Royal Highness, the immediate restoration, as far as circumstances will admit, of the men who, in consequence of Admiral Berkeley's orders, were forcibly taken out of the Chesapeake to the vessel from which they were taken; or, if that ship should be no longer in commission, to such sea-port of the United States as the American Government may name for the purpose.

"Thirdly. That I am also authorized to offer to the American Government a suitable pecuniary provision for the sufferers in consequence of the attack upon the Chesapeake, including the families of those seamen who unfortunately fell in the action, and the wounded survivors.

"These honorable propositions, I can assure you, sir, are made with the sincere desire that they may prove satisfactory to the Government of the United States, and I trust they will meet with that amicable reception which their conciliatory nature entitles them to. I need scarcely add how cordially I join with you in the wish that they might prove introductory to a removal of all the differences depending between our two countries."

Mr. Foster, British minister at Washington, to Mr. Monroe, Sec. of State, Nov. 1, 1811. 3 Am. St. Pap. (For. Rel.), 499.

"I have had the honor to receive your letter of the 1st November, and to lay it before the President.

"It is much to be regretted that the reparation due for such an aggression as that committed on the United States frigate, the Chesapeake, should have been so long delayed; nor could the translation of the offending officer from one command to another be regarded as constituting a part of a reparation otherwise satisfactory. Considering, however, the existing circumstances of the case, and the early and amicable attention paid to it by His Royal Highness the Prince Regent, the President accedes to the proposition contained in your letter, and, in so doing, your Government will, I am persuaded, see a proof of the conciliatory disposition by which the President has been actuated.

"The officer commanding the Chesapeake, now lying in the harbor of Boston, will be instructed to receive the men who are to be restored to that ship."

Mr. Monroe, Sec. of State, to Mr. Foster, Nov. 12, 1811. 3 Am. St. Pap. (For. Rel.), 500. See further, *supra*, §§ 107 *ff.*, 150*b*; *infra*, § 33.

### (4) Case of the Dartmoor prisoners.

### § 315*c*.

On April 6, 1815, after the proclamation of the peace of Ghent, certain prisoners of war, citizens of the United States, who were confined in Dartmoor prison, becoming restless at what they may have regarded

as a detention when entitled to be discharged, showed what the captain of the guard considered symptoms of insubordination. They were unarmed and defenseless, but he called out a squad of soldiers, and, after some altercation, as to the extent of which the evidence subsequently taken differed, ordered, or at least sanctioned, firing by the soldiers on the prisoners. The consequence was that seven of the prisoners were killed and sixty wounded. The British Government did not bring the offenders to trial, but expressed "distress" at the conduct of its troops, communicating, at the same time, in a letter by the British chargé d'affaires to the Secretary of State, the fact that the Prince Regent had visited the offenders with the information of his "disapprobation," making at the same time an offer of "compensation to the widows and families of the sufferers." This offer, Mr. Monroe, Sec. of State, on Dec. 11, 1815, declined.

As to treatmont of Dartmoor prisonors, see further *infra*, § 348*c*.

(5) CASE OF THE PROMETHEUS.

§ 315*d*.

The Prometheus, a steamboat engaged by the American Atlantic and Pacific Ship Canal Company in the work of the then projected canal, was attached, when about to leave the harbor of Greytown, in November, 1851, by a writ purporting to have been issued by the "Mosquito King" for certain port charges. These charges the commander refused to pay, on the ground of their exorbitancy and illegality; but, on the Prometheus undertaking to leave the harbor without payment, she was fired into by the Express, a British armed cutter, under orders of Mr. Greene, British vice-consul at Greytown, claiming also to be regent of the Mosquito territory. The charges being then paid by the Atlantic and Pacific Ship Company under protest, the company complained of this outrage to Mr. Webster, who at once instructed Mr. Lawrence, our then minister at London, to inquire of Lord Palmerston, the foreign secretary, whether the attack on the Prometheus was under British authority, and whether it was approved by the British Government. Lord Palmerston having gone out of office before a reply was made, inquiries were instituted by his successor, Lord Granville, who, as soon as he received an official report from Greytown, disavowed and apologized for the action of the Express.

For subsequent attack on Greytown, see *supra*, § 224*a*. Reference to documents relative to the attack on the Prometheus is made *supra*, § 224*a*.

II. *ARBITRATION.*

§ 316.

Arbitration, in reference to private claims, has been already considered. (*Supra*, § 221.) National disputes as to boundaries, or to other public issues, are, in like manner, submitted to arbitration. As illustrations may be mentioned the reference of some of the questions arising under the Treaty of Ghent to the Emperor of Russia (*supra*, § 150); that of the northeastern boundary to the King of the Netherlands; that of the Alabama spoliations to certain eminent statesmen. In all these cases the questions involved were questions of public law, and in

this sense distinct from those heretofore discussed as falling under the head of private claims. (*Supra*, § 271.)

By the fifth article of the Treaty of Ghent it was stipulated that commissioners should be respectively appointed by the contracting parties for the purpose of ascertaining, surveying, and finally determining the northeastern boundary of the United States; but in case of their disagreement, their reports should be referred to the arbitration of some friendly sovereign or state. If the commissioners should agree, then their "map and declaration fixing the boundary" were to be considered by both parties "as finally and conclusively fixing the said boundary." In case of their disagreement, then "His Britannic Majesty and the Government of the United States engage to consider the decision of such friendly sovereign or state to be final and conclusive on all the matters so referred." The following papers show the proceedings under the award of the King of the Netherlands, whom both parties agreed on as arbitrator:

"His Britannic Majesty's Government is too well acquainted with the division of powers in that of the United States to make it necessary to enter into any explanation of the reasons which rendered it obligatory on the President to submit the whole subject to the Senate for its advice. The result of that application is a determination on the part of the Senate not to consider the decision of the King of the Netherlands as obligatory, and a refusal to advise and consent to its execution. But they have passed a resolution advising 'the President to open a negotiation with His Britannic Majesty's Government for the ascertainment of the boundary between the possessions of the United States and those of Great Britain on the northeastern frontier of the United States, according to the treaty of peace of 1783.' This resolution was adopted on the conviction felt by the Senate that the sovereign arbiter had not decided the question submitted to him, or had decided it in a manner unauthorized by the submission.

"It is not the intention of the undersigned to enter into an investigation of the argument which has led to this conclusion; the decision of the Senate precludes it, and the object of this communication renders it unnecessary; but it may be proper to add that no question could have arisen as to the validity of the decision had the sovereign arbiter determined on, and designated, any boundary as that which was intended by the treaty of 1783. He has not done so. Not being able, consistently with the evidence before him, to declare that the line he has thought the most proper to be established was the boundary intended by the treaty of 1783, he seems to have abandoned the character of arbiter and assumed that of a mediator, advising both parties that a boundary which he describes should be accepted as one most convenient to them. But this line trenches, as is asserted by one of the States of the Union, upon its territory, and that State controverts the constitutional power of the United States to circumscribe its limits without its assent. If the decision had indicated this line as the boundary designated by the treaty of 1783, this objection could not have been urged,

because then no part of the territory to the north or the east of it could be within the State of Maine, and however the United States or any individual State might think itself aggrieved by the decision, as it would in that case have been made in conformity to the submission, it would have been carried into immediate effect. The case is now entirely different, and the necessity for further negotiation must be apparent to adjust a difference which the sovereign arbiter has, in the opinion of a co-ordinate branch of our executive powers, failed to decide. That negotiation will be opened and carried on by the President with the sincerest disposition to bring to an amicable, speedy, and satisfactory conclusion a question which might otherwise interrupt the harmony which so happily subsists between the two countries, and which he most earnestly wishes to preserve. * * *

"Presuming that the state of things produced by the resolution of the Senate above referred to, and the desire expressed by the President to open, carry on, and conclude the negotiation recommended by that body in the most frank and amicable manner, will convince His Britannic Majesty's Government of the necessity of meeting the offers now made with a correspondent spirit, the undersigned is directed to propose for consideration the propriety of carrying on the negotiation at this place. The aid which the negotiators on both sides would derive from being in the vicinity of the territory in dispute, as well as the information with respect to localities from persons well acquainted with them which they might command, are obvious considerations in favor of this proposition.

"Until this matter shall be brought to a final conclusion the necessity of refraining, on both sides, from any exercise of jurisdiction beyond the boundaries now actually possessed, must be apparent, and will, no doubt, be acquiesced in on the part of the authorities of His Britannic Majesty's province as it will be by the United States."

Mr. Livingston, Sec. of State, to Mr. Bankhead, July 21, 1832. MSS. Notes, For. Leg. Brit. and For. St. Pap., 1833–'34, vol. 22, p. 788.

As to finality of arbitrations, see *supra*, §§ 291, 238.

As to Ashburton treaty, settling the above controversy, see *supra*, § 150*e*.

"By that convention (that of September 29, 1827) it was agreed to submit the question, which was the true boundary according to the treaty of 1783, to the decision of an arbitrator to be chosen between them. The arbitrator selected, having declared himself unable to perform the trust, it is as if none had been selected, and it would seem as if the parties to the submission were bound by their contract to select another; but this would be useless, if the position assumed by the Government of His Britannic Majesty be correct, that it would be utterly hopeless at this time of day to attempt to find out, by means of a new negotiation, an assumed line of boundary, which successive negotiators and which commissioners employed on the spot have, during so many years, failed to discover. The American Government, however, while

they acknowledge that the task is not without its difficulties, do not consider its execution as hopeless. They still trust that a negotiation opened and conducted in a spirit of frankness, and with a sincere desire to put an end to one of the few questions which divide two nations whose mutual interest it will always be to cultivate the relations of amity and a cordial good understanding with each other, may, contrary to the anticipations of His Britannic Majesty's Government, yet have a happy result; but if this should unfortunately fail, other means, still untried, remain. It was, perhaps, natural to suppose that negotiators of the two powers coming to the discussion with honest prejudices, each in favor of the construction adopted by his own nation, on a matter of great import to both, should separate without coming to a decision. The same observations may apply to commissioners, citizens, or subjects of the contending parties, not having an impartial umpire to decide between them; and, although the selection of a sovereign arbiter would seem to have avoided these difficulties, yet this advantage may have been more than countervailed by the want of local knowledge. All the disadvantages of these modes of settlement heretofore adopted might, as it appears to the American Government, be avoided by appointing a new commission, consisting of an equal number of commissioners, with an umpire selected by some friendly sovereign from among the most skillful men in Europe, to decide on all points on which they disagree, or by a commission entirely composed of such men so selected, to be attended in the survey and view of the country by agents selected by the parties. Impartiality, local knowledge, and high professional skill would thus be employed, which, although heretofore separately called into the service, have never before been combined for the solution of the question. This is one mode, and, perhaps, others might occur in the course of the discussion, should the negotiators fail in agreeing on the true boundary. An opinion, however, is entertained, and has been hereinbefore expressed, that a view of the subject not hitherto taken might lead to another and more favorable result."

Mr. Livingston, Sec. of State, to Sir C. R. Vaughan, Apr. 30, 1833. MSS. Notes, For. Leg. Brit. and For. St. Pap., 1833–'34, vol. 22, p. 804.

Sir C. R. Vaughan's reply, dated May 11, 1833, is in Brit. and For. St. Pap., 1833–'34, vol. 22, p. 806. In it he says:

"This rejection of the decision of the arbitrator by the Government of the United States has thrown the parties, as Mr. Livingston observes, into the situation in which they were prior to the selection of His Netherland Majesty to be the arbitrator between them. It may be observed, also, that though the tracing of the boundary line according to the treaty of 1783 appeared from the statements delivered by the respective parties to be the principal object of arbitration, the King of the Netherlands was invited, in general terms, 'to be pleased to take upon himself the office of arbitration of the difference between the two Governments,'

"It was a measure adopted in order to put an end to tedious and unsatisfactory negotiations which had occupied the attention of the two Governments for more than forty years, and by the seventh article of the convention it was agreed 'that the decision of the arbiter, when given, shall be taken as *final* and *conclusive*, and shall be carried, without reserve, into immediate effect.'

"The undersigned cannot but regret the rejection of the decision of the King of the Netherlands, when he sees, throughout the note of Mr. Livingston, all the difficulties which attend the endeavors of the two Governments, actuated by the most frank and friendly spirit, to devise any reasonable means of settling this question.

"Mr. Livingston seems to be persuaded that a renewed negotiation may yet have a happy result, and the undersigned observes with satisfaction that the Government of the United States has consented not now to insist upon the navigation of the Saint John's River, a claim which the British Government refused to consider in connection with the boundary question.

"But the arrangement in progress last summer having failed, which was to result in enabling the Government of the United States to treat for a more convenient boundary, that Government, in the present state of things, can only treat on the basis of the establishment of the boundary presented by the treaty.

"The undersigned is convinced that it is hopeless to expect a favorable result from a renewed negotiation upon that basis. With regard to Mr. Livingston's proposal, that in the event of negotiation failing, the two Governments may have recourse to a commission of boundary, composed of equal numbers selected by each party, to be attended by an umpire, chosen by a friendly sovereign, to decide at once all disputed points, or that a commission of some of the most skillful men in Europe should be selected by a friendly sovereign, and should be sent to view and survey the disputed territory, attended by agents appointed by the parties, the undersigned can only express his conviction that after the expense, delay, and unsatisfactory result of the commission of boundary under the fifth article of the Treaty of Ghent, it must be with great reluctance that the British Government consents to have recourse to such a measure.

"Though the Constitution of the United States holds out to foreign powers that treaties are to be effected by ministers acting under instructions from the President, yet the Senate is invested with a control over all subjects arising out of intercourse with foreign powers. Their participation in the making of treaties has generally been limited, since the administration of General Washington, to advising and consenting to ratify a treaty; but their agency has been admitted by the President, formerly, by advising on the instructions to be given previously to opening a negotiation. When the Senate, in the month of July last year, advised the rejection of the decision of the King of the Netherlands, they took the initiative in the process of the negotiation which they directed the President to offer to open at Washington for the settlement of the boundary, as they restricted the Executive to treat only for a boundary according to the description in the treaty of 1783.

"I am persuaded that there will be great difficulty in constituting a joint commission upon the plan of Mr. Livingston. To insure proper skill and impartiality, it should be selected in Europe. From the nature of the country the commissioners can be actively employed only

during the summer months; the undertaking will last, therefore, in all probability, more than one year.

"Should His Majesty's Government reject the proposition of Mr. Livingston, Mr. McLane has stated that, without the consent of Maine, the General Government cannot treat for a conventional line of boundary. It may be inferred from Mr. McLane's note of 28th May, that the failure of the commission to discover the highlands to be sought after, would give ground of greater public necessity for that consent than at present exist.

"The rejection of Mr. Livingston's proposition, and the impossibility of engaging the Government of the United States to treat for a conventional line, must have the effect, I presume, of leaving the disputed territory in the possession of His Majesty, unless it should still be left at the option of this Government to acquiesce in the boundary suggested by the King of the Netherlands."

Sir C. R. Vaughan to Lord Palmerston, July 4, 1833. Brit. and For. St. Pap., 1833–'34, vol. 22, p. 823.

Lord Palmerston, in an instruction to Sir C. R. Vaughan, dated December 21, 1833, says:

"His Majesty's Government trust that they gave a proof of this [conciliatory] disposition on their part when they intimated to the Government of the United States that not only were they prepared to abide, as they consider both parties bound to do, by the decisions of the King of the Netherlands upon such of the points referred to him upon which he has pronounced a decision; but that they were willing to agree to the compromise which that sovereign has recommended, upon the single point on which he found it impossible to make a decision strictly conformable with the terms of the treaty.

"The Government of the United States has not hitherto concurred with that of His Majesty in this respect; but as such a course of proceeding on the part of the two Governments would lead to the speediest and easiest settlement, it is the wish of His Majesty's Government to draw the attention of the American Cabinet to some considerations on this subject, before they advert to the new proposition made to you by Mr. Livingston.

"It is manifest that nothing but a sincere spirit of conciliation could induce His Majesty's Government to agree to the adoption of the arrangement recommended by the King of the Netherlands; because the boundary which he proposes to draw between the two parties would assign to the United States more than three-fifths of that disputed territory, to the whole of which, according to the terms of the award itself, the title of the United States is defective in the same degree as that of Great Britain.

"But it seems important, in the first place, to consider what the reference was which the two parties agreed to make to the King of the Netherlands, and how far that sovereign has determined the matters which were submitted for his decision.

"Now, that which the two Governments bound themselves to do by the convention of the 29th of September, 1827, was to submit to an arbiter certain 'points of difference which had arisen in the settlement of the boundary between the British and American dominions,' and to abide by his decision on those points of difference; and they subsequently agreed to name the King of the Netherlands as their arbiter. The arbiter then was called upon to decide certain questions, and if it

should appear that he has determined the greater part of the points submitted to him his decisions on those points cannot be rendered invalid by the mere circumstance that he declares that one remaining point cannot be decided in any manner that shall be in strict conformity with the words of the treaty of 1783, and that he, consequently, recommends to the two parties a compromise on that particular point."

This position is then vindicated at length.

For this instruction in full, see Brit. and For. St. Pap., 1833–'34, vol. 22, p. 826.

By the Treaty of Ghent "all attempts to settle the boundary ended in making provision for referring the question to the arbitrament of a friendly sovereign. This was done, the King of the Netherlands being agreed upon as the arbiter. He accepted the trust, executed it, and made an award nearly satisfactory to the British Government, because it cut off a part of the northern projection of Maine, and so admitted a communication, although circuitous, between Halifax and Quebec; but still leaving the highland boundary opposite that capital. The United States rejected the award, because it gave up part of the boundary of 1783; and thus the question remained for nearly thirty (twelve?) years longer, until the treaty of 1842, Great Britain demanding the execution of the award, the United States refusing it."

2 Benton's Thirty Years, &c., 438.

As to Treaty of Ghent, see *supra*, § 150*c*.

Mr. Webster, in his speech of April 6 and 7, 1846, in defense of the Treaty of Washington, thus speaks (5 Webster's Works, 84):

"The King of the Netherlands was appointed arbitrator under this convention, and he made his award on the 10th of January, 1831. This award was satisfactory to neither party; it was rejected by both, and the whole matter was thrown back upon its original condition. This happened during the first term of General Jackson's administration. He immediately addressed himself to new efforts for the adjustment of the controversy."

Mr. Webster then proceeds to notice the several messages of General Jackson bearing on this question, closing with that of December, 1835, where he said: "In the settlement of the question of the northeastern boundary little progress has been made. Great Britain has declined acceding to the proposition of the United States, presented in accordance with the resolution of the Senate, unless certain preliminary conditions are admitted, which I deem incompatible with a satisfactory and rightful adjustment of the controversy."

See *supra*, §§ 150*c*, 150*d*.

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

Mr. Marcy, Sec. of State, to Mr. Conkling, May 18, 1853. MSS. Inst., Mex.

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

Mr. Bayard, Sec. of State, to Mr. Morris, May 12, 1886. MSS. Dom. Let.

"When there is a persistent refusal on the part of one Government to pay damages claimed by another on behalf of one of its citizens, the only method of redress that exists, if arbitration be not resorted to, is by reprisal, which, in a case such as the present, would inevitably produce war. It certainly would not be claimed that at this period, when the refusal of the British Government to pay the claim has been acquiesced in by Administration after Administration without even a suggestion of reprisals, reprisals could now be threatened."

Mr. Bayard, Sec. of State, to Messrs. Benedict, Taft, and Benedict, May 18, 1886; *ibid.*

"The interest of peace and good will among nations are so transcendent, and the practice of international mediation and arbitration is so essential to those interests, that a proud and self-respecting people would always submit to the consequences of very great errors of judgment, and sometimes even to those of bias and prejudice in international arbitration, rather than to refuse to execute an award; but it should be kept in mind that there are occasions when such obedience would be a crime against the true interests of peace and good neighborhood, and destructive of international arbitration as the best of their safeguards. If, as Vattel tersely states it, 'the arbitrators, by pronouncing a sentence evidently unjust and unreasonable, should forfeit the character with which they are invested, their judgment would deserve no attention.' A just nation, however, in whose favor an award has been made, should be willing to forego the advantage of a victory on far less evident grounds than those which would justify a refusal by the losing party to perform, and to readjust and retry the matter in dispute, if it had reason to think that any serious error had been committed, or that anything of corruption or unfairness had played a part in the affair, for no honorable Government could consent to profit by a success so gained. Upon such principles Congress at its last session authorized the President to reopen, if he should see cause, certain awards in favor of citizens of the United States against the Government of Mexico. * * *

"But the Treaty of Washington was a written agreement between two parties, and not a statute; and the history and language of previous treaties between them may be justly resorted to to throw light upon a disputed interpretation. The fifth article of the treaty of 1794 provided for three commissioners to decide upon the river intended by the 'Saint Croix,' named by the treaty of 1783, but was silent as to the power of a majority. The same treaty created five commissioners to ascertain certain damages to British subjects, and conferred decisive power upon three of them. It also established a similar commission of five to ascertain certain losses of Americans, and conferred full power upon a majority. Can it be doubted that in that case both Governments intended, for obvious reasons, to make different and more elastic provisions respecting decisions touching private claims from those relating to their boundaries? The article as to the Saint Croix was followed by Article V of the Treaty of Ghent on the same general sub-

ject, which provided for two commissioners and the umpirage of a friendly power. The treaty of 1822 created a commission to ascertain the value of slaves, etc., under the award of the Emperor of Russia, and provided for the decision of 'the majority.' The decision of the Emperor on the subject in dispute referred to him is worthy of notice, as declaring a wholesome rule in interpreting treaties. He says that, with the concurrence of the two powers, he has 'given an opinion founded solely upon the sense which results *from the text of the article.*' The claims treaty of 1853 provided for two commissioners and an umpire. The same was done on the fishery question in the treaty of 1854. By the slave-trade treaty of 1862, the judges of the mixed courts and the arbitrator were authorized to decide by 'a majority of the three.' It appears, then, from the history and language of the long series of treaties between the two Governments, that they never treated upon the idea that by the rules of public law, as between them, a majority of commissioners or arbitrators, or even of members of a court, had decisive powers unless the contrary was expressed, and that, on the contrary, they had treated in conformity with the well-known rules of both countries that the decision of conventional arbitrators, commissioners, or courts must be unanimous to be valid, unless the instrument of their creation provided otherwise, and that, as in the article of the treaty of 1871, respecting places excepted from fishery, when they were willing that a difference between two commissioners of their own appointment should be decided by a single other person or power, they knew how to say so, and did say so. * * *

"What are the principles of ordinary procedure in arbitration? In Germany, France, and other countries whose jurisprudence is founded on the Roman law, they are one thing—allowing a majority to decide. In Great Britain and the United States, where the common law prevails, they are and always have been the opposite—not allowing a majority to decide without a stipulation to that end. Halleck's statement, then, is practically correct; but the rule he lays down does not apply between all states, and the structure of his sentence does not import that it does so. Thus Heffter, the accuracy and precision of whose writings has made his work a universal authority, states the complete rule. Bluntschli, also cited by Lord Salisbury (whose book was published in 1868 without notes or citations), states boldly that 'the decree of the majority serves as the decree of the entire tribunal' (sec. 493, German edition). He, too, was a civil law writer in a civil law country, and in that light states the rule correctly without, like Heffter, giving the foundation of it, viz, the principles of ordinary procedure. * * *

"On a full view, then, of the authorities referred to in connection with the observations of other writers on the subject, and its history, is it not a just and inevitable conclusion that international law, so far as any such thing exists, lays down no other rule on the subject than that, in the absence of an intention to be drawn from the text of the treaty, the powers of the arbitrators or commissioners are to be measured by the principles of ordinary procedure of the treating nations?"

Hon. George F. Edmunds in North Am. Rev., Jan., 1879, p. 6 *ff.* See *supra*, § 221. See App., Vol. III, § 316.

On June 12, 1848, Lord Palmerston earnestly opposed a proposition in Parliament that Great Britain should pledge herself to abide the result of arbitration, on the ground that "there is no country which, from its political and commercial circumstances, from its maritime interests,

and from its colonial possessions, excites more anxious and jealous feelings in different quarters than England does, and there is no country that would find it more difficult to obtain really disinterested and impartial arbitrators."

Creasy's Int. Law, 698.

For notice of the arbitration of the Emperor of Germany in reference to the San Juan boundary, see 3 Phill. Int. Law (3d ed.), 5.

The award of the President of the United States as arbiter in the contention between Great Britain and Portugal as to island of Bulama is given in the Brit. and For. St. Pap., 1870–'71, vol. 61.

The award of the Emperor of Austria in the controversy between Great Britain and Nicaragua is given *supra*, § 293.

As to Genava award, see *infra*, § 402*a*.

As to Halifax award, see *supra*, §§ 301 *ff*.

"In the arbitrations under Jay's treaty, it seemed to be supposed that a party had the right to withdraw from the commission under directions from the political department of the Government. Great Britain claimed the same right in the notices to the arbitrators in the late arbitration at Geneva, which were given on the 15th of April, 1872. It may be questioned whether this is in accordance with the idea of an independent and impartial judicial tribunal.

"A mixed commission is competent to decide upon the extent of its jurisdiction.

"The proceedings of the mixed commission, held in London under the provisions of the convention of 1853 with Great Britain, have been made public. In several cases they appear to have considered and passed upon the question of their own jurisdiction. In a few cases they were required to construe the treaties between the two countries. In the case of the John, captured by Great Britain after the time when, by the terms of the 2d article of the Treaty of Ghent, hostilities should have ceased, and wrecked by the captor, it was held that the owners were entitled to compensation, as restitution could not be made. In the case of the Washington, it was held that American fishermen were not excluded by the convention of 1818 from fishing in the open waters of the Bay of Fundy."

Mr. J. C. B. Davis, Notes, &c. *Supra*, §§ 150 *ff*, 221.

### III. *WITHDRAWAL OF DIPLOMATIC RELATIONS.*

### § 317.

The practice as to the dismissal or withdrawal of ministers is considered *supra*, §§ 81, 83, 84, 85.

Notices of the suspension of diplomatic intercourse with France in 1796 are given *supra*, §§ 83 *ff*., 148 *ff*., and with Great Britain in 1809 *supra*, §§ 84, 107, 150*b*.

"A hope was for a short time entertained that a treaty of peace, actually signed between the Governments of Buenos Ayres and Brazil, would supersede all further occasions for those collisions between belligerent pretensions and neutral rights which are so commonly the result of maritime war, and which have unfortunately disturbed the harmony of the relations between the United States and the Brazilian Govern-

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

"In the diplomatic discussion at Rio de Janeiro of these wrongs sustained by citizens of the United States, and of others which seemed as if emanating immediately from that Government itself, the chargé d'affaires of the United States, under an impression that his representations in behalf of the rights and interests of his countrymen were disregarded and useless, deemed it his duty, without waiting for instructions to terminate his official functions, to demand his passports and return to the United States. This movement, dictated by an honest zeal for the honor and interest of his country, motives which operated exclusively upon the mind of the officer who resorted to it, has not been disapproved by me. The Brazilian Government, however, complained of it as a measure for which no adequate intentional cause had been given by them; and, upon an explicit assurance, through their chargé d'affaires residing here, that a successor to the late representative of the United States near that Government, the appointment of whom they desired, should be received and treated with the respect due to his character, and that indemnity should be promptly made for all injuries inflicted on citizens of the United States, or their property, contrary to the laws of nations, a temporary commission as chargé d'affaires to that country has been issued, which, it is hoped, will entirely restore the ordinary diplomatic intercourse between the two Governments and the friendly relations between their respective nations."

President J. Q. Adams, Third Annual Message, 1827.

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

Mr. Cass, Sec. of State, to Mr. Dana, Oct. 31, 1860. MSS. Dom. Let.

The imposition by Mexico of a tax unduly discriminating against citizens of the United States, if not a breach of the treaty between the United States and Mexico, is an unfriendly act to be noticed by the United States.

Mr. Cass, Sec. of State, to Mr. Forsyth, June 23, 1858. MSS. Inst., Mex. Same to same, July 15, 1858; *ibid.*

For this and for other reasons, Mr. Forsyth, minister to Mexico, under instructions, suspended diplomatic relations with that country.

Same to same, July 18, 1858; *ibid.*

### IV. *RETORSION AND REPRISAL.*

### § 318.

"The making a reprisal on a nation is a very serious thing. Remonstrance and refusal of satisfaction ought to precede; and when reprisal follows, it is considered an act of war, and never failed to produce it in the case of a nation able to make war; besides, if the case were important and ripe for that step, Congress must be called upon to take it; the right of reprisal being expressly lodged with them by the Constitution, and not with the Executive."

Opinion of Mr. Jefferson, Sec. of State, May 16, 1793. 7 Jeff. Works, 628.

As to proposed reprisals on the then Spanish possessions of the Floridas, see Mr. Jefferson, President, to the Secretary of State, Aug. 16, 1807. 5 Jeff. Works, 164.

To a formal declaration of war may be preferred "*general* letters of marque and reprisal, because, on a repeal of their edicts by the belligerent, a revocation of the letters of marque restores peace without the delay, difficulties, and ceremonies of a treaty."

President Jefferson to Mr. Lincoln, Nov. 13, 1808. 5 Jeff. Works, 387.

"Having been called upon by the governor-general of the Canadas to aid him in carrying into effect measures of retaliation against the inhabitants of the United States for the wanton destruction committed by their army in Upper Canada, it has become imperiously my duty, conformably with the nature of the governor-general's application, to issue to the naval force under my command an order to destroy and lay waste such towns and districts upon the coast as may be found assailable.

"I had hoped that this contest would have terminated without my being obliged to resort to severities which are contrary to the usage of civilized warfare, and as it has been with extreme reluctance and concern that I have found myself compelled to adopt this system of devastation, I shall be equally gratified if the conduct of the Executive of the United States will authorize my staying such proceedings by making reparation to the suffering inhabitants of Upper Canada, thereby manifesting that if the destructive measures pursued by their army were ever sanctioned they will no longer be permitted by the Government."

Vice-Admiral Cochrane to Mr. Monroe, Sec. of State, Aug. 18, 1814. 3 Am. St. Pap. (For. Rel.), 693. See as to Admiral Cochrane's subsequent action, *infra*, § 348*b*.

As to British burning of Washington, see *infra*, § 349.

"I have had the honor of receiving your letter of the 18th of August, stating that, having been called on by the governor-general of the Canadas to aid him in carrying into effect measures of retaliation against the inhabitants of the United States for the wanton desolation com-

mitted by their army in Upper Canada, it has become your duty, conformably with the nature of the governor-general's application, to issue to the naval force under your command an order to destroy and lay waste such towns and districts upon the coast as may be found assailable.

"It is seen, with the greatest surprise, that this system of devastation, which has been practiced by the British forces, so manifestly contrary to the usages of civilized warfare, is placed by you on the ground of retaliation. No sooner were the United States compelled to resort to war against Great Britain than they resolved to wage it in a manner most consonant to the principles of humanity and to those friendly relations which it was desirable to preserve between the two nations after the restoration of peace. They perceived, however, with the deepest regret that a spirit alike just and humane was neither cherished nor acted on by your Government. Such an assertion would not be hazarded if it was not supported by facts, the proof of which has, perhaps, already carried the same conviction to other nations that it has to the people of these States. Without dwelling on the deplorable cruelties committed by the savages in the British ranks and in British pay at the river Raisin, which to this day have never been disavowed or atoned for, I refer, as more immediately connected with the subject of your letter, to the wanton desolation that was committed at Havre de Grace and at Georgetown, early in the spring of 1813. These villages were burnt and ravaged by the naval forces of Great Britain, to the ruin of their unaided inhabitants, who saw with astonishment that they derived no protection to their property from the laws of war. During the same season scenes of invasion and pillage, carried on under the same authority, were witnessed all along the waters of the Chesapeake to an extent inflicting the most serious private distress and under circumstances that justified the suspicion that revenge and cupidity, rather than the manly motives that should dictate the hostility of a high-minded foe, led to their perpetration. The late destruction of the houses of the Government in this city is another act which comes necessarily into view. In the wars of modern Europe no example of the kind, even among nations the most hostile to each other, can be traced. In the course of ten years past the capitals of the principal powers of the continent of Europe have been conquered and occupied alternately by the victorious armies of each other, and no instance of such wanton and unjustifiable destruction has been seen. We must go back to distant and barbarous ages to find a parallel for the acts of which I complain.

"Although these acts of desolation invited, if they did not impose on the Government the necessity of retaliation, yet in no instance has it been authorized.

"The burning of the village of Newark, in Upper Canada, posterior to the early outrages above enumerated, was not executed on that principle. The village of Newark adjoined Fort George, and its de-

struction was justified by the officers who ordered it, on the ground that it became necessary in the military operations there. The act, however, was disavowed by the Government. The burning which took place at Long Point was unauthorized by the Government, and the conduct of the officer subjected to the investigation of a military tribunal. For the burning of Saint David's, committed by the stragglers, the officer who commanded in that quarter was dismissed without a trial for not preventing it.

"I am commanded by the President distinctly to state, that it as little comports with any orders which have been issued to the military and naval commanders of the United States as it does with the established and known humanity of the American nation, to pursue a system which it appears you have adopted. This Government owes it to itself, to the principles which it has ever held sacred, to disavow, as justly chargeable to it, any such wanton, cruel, and unjustifiable warfare.

"Whatever unauthorized irregularities have ever been committed by any of its troops, it would have been ready, acting on these principles of sacred and eternal obligation, to disavow, and as far as might be practicable, to repair. But in the plan of desolating warfare which your letter so explicitly makes known, and which is attempted to be excused on a plea so utterly groundless, the President perceives a spirit of deep-rooted hostility, which, without the evidence of such facts, he could not have believed existed, or would have been carried to such an extremity.

"For the reparation of injuries of whatever nature they may be, not sanctioned by the law of nations, which the military or naval force of either power may have committed against the other, this Government will always be ready to enter into reciprocal arrangements. It is presumed that your Government will neither expect nor propose any which are not reciprocal.

"Should your Government adhere to a system of desolation, so contrary to the views and practice of the United States, so revolting to humanity, and repugnant to the sentiments and usages of the civilized world, whilst it will be seen with the deepest regret, it must and will be met with a determination and constancy becoming a free people contending in a just cause for their essential rights and their dearest interests."

Mr. Monroe, Sec. of State, to Vice-Admiral Cochrane, Sept. 6, 1814. 3 Am. St. Pap. (For. Rel.), 693.

As to reprisals in war of 1812, see further *infra*, 348*b*, 349.

"I have had the honor to receive your letter of the 16th instant this morning in reply to the one which I addressed to you in the Patuxent.

"As I have no authority from my Government to enter upon any kind of discussion relative to the points contained in your letter, I have only to regret that there does not appear to be any hope that I shall be authorized to recall my general order, which has been further sanc-

tioned by a subsequent request from Lieutenant-General Sir George Prevost.

"A copy of your letter will this day be forwarded by me to England, and, until I receive instructions from my Government, the measures which I have adopted must be persisted in, unless remuneration be made to the inhabitants of the Canadas for the injuries they have sustained from the outrages committed by the troops of the United States."

Vice-Admiral Cochrane to Mr. Monroe, Sec. of State, Sept. 19, 1814. 3 Am. St. Pap. (For. Rel.), 694. *Infra*, § 348*b*.

The treaty of July 4, 1831, negotiated by Mr. Rives, in Paris, fixed the spoliation indebtedness of France to the United States at 25,000,000 francs, payable in six annual installments, with interest. The treaty, however, could not be executed or the money paid without the action of the House of Deputies. This the then ministers hesitated to propose to the house, though the United States, in discharge of a stipulation made in the treaty as an equivalent, modified by act of Congress the duty on French wines. So little prepared was the United States Government for the failure on the part of France to fulfill her treaty obligations that Mr. McLane, on January 7, 1833, drew on the French minister of finance for the first installment of the debt, the draft maturing Febuary 7, 1833, the day of payment. The draft, in the hands of a European indorsee, was refused payment on the ground that no appropriation had been made. Mr. Edward Livingston, then Secretary of State, was, on May 24, 1833, commissioned as minister to France, where he arrived in September, 1833, the mission having been vacant since the return of Mr. Rives in 1831. The King (Louis Philippe) received Mr. Livingston with great courtesy, but showed great unwillingness to direct his ministry to bring up the question of the debt before the House of Deputies. It was suggested that in the negotiation of the treaty Mr. Rives had obtained an undue advantage from a superior knowledge of the facts; but, as Mr. Livingston well replied, this could not with any propriety be alleged, since the United States in making up its case had to depend almost exclusively on papers obtained in France. General Jackson was much irritated at this and other evasions of duty, but his confidence in Mr. Livingston led him to intrust that eminent statesman with full discretion. This discretion to its entire extent was necessary to avoid a rupture. Twice within the six months following Mr. Livingston's arrival was the question postponed by the House of Deputies; and then payment was refused by a majority of eight. When a new House of Deputies was organized in 1834, the matter was again postponed; and so indignant was President Jackson at these succesive breaches of treaty obligation that in his annual message of December, 1834, he recommended reprisals. This message, coupled with certain dispatches of Mr. Livingston which had been imprudently published by the United States Government, produced a feeling of great anger in France. The French minister of foreign affairs at once informed Mr. Livingston that while the King would apply to the House of Deputies for an appropriation for payment of the debt, he considered, after the language used by the Government of the United States, that he could not permit his minister, M. Serrurier, to leave for Washington. Mr. Livingston was then offered his own passports. Mr. Livingston, in, reply, stated that on the question of voluntarily leaving France he would await the instructions of his own Government. This course was ap-

proved by the President, who directed Mr. Livingston that if the appropriation was rejected he was to leave France in a United States ship-of-war then waiting his orders; while if the appropriation was made Mr. Livingston was to leave France for England and place the legation in the hands of the chargé d'affaires. The House of Deputies resolved at last, when the crisis came, to pass the appropriation, but it attached to the resolution the proviso that the money should not be paid until satisfactory explanation had been made of those portions of the President's message above referred to which reflected on France. Mr. Livingston, being placed in a position for which he had no instructions, and feeling that he could not, under any circumstances, consent to treat an Executive message to Congress, which is a matter exclusively of domestic concern (see *supra*, § 79), as subject to the criticisms of a foreign power, called for his passports, leaving the legation in charge of Mr. Barton as chargé d'affaires, and addressing to the Duc de Broglie, then French minister of foreign affairs, a vindication of his position in regarding the President's message as not the subject of explanation or criticism. (For extracts, see *supra*, § 79.)

Mr. Barton's instructions, when left as chargé d'affaires in Paris on Mr. Livingston's withdrawal, were, in case of a refusal of the French Government to pay the installment due, to surrender his mission and return home. The Duc de Broglie, French minister of foreign affairs, having informed Mr. Barton that the money would not be paid until there was an expression of regret from the President of the United States at the misunderstanding that had existed, accompanied with what was tantamount to an apology, Mr. Barton left France to obtain direct instructions from the President as to the course to be pursued. He was joined, when he returned to New York, by Mr. Livingston, who went with him when he went to Washington. President Jackson, when the facts were reported to him, drafted a special message which he sent to Mr. Livingston for revision. Mr. Livingston considered the terms too peremptory, and on January 11, 1836, wrote to the President as follows:

"The message about to be delivered is of no ordinary importance; it may produce war or secure peace. Should the French Government be content to receive your last message, they will not do so until they have seen this. There should not, therefore, be anything in it unnecessarily irritating. You have told them home truths in the past. You have made a case which will unite every American in feeling on the side of our country. It cannot be made stronger, and to repeat it would be unnecessary. The draft you did me the honor to show me would make an admirable manifesto or declaration of war; but we are not yet come to that. The world would give it that character, and issued before we know the effect of the first message, it would be considered as precipitate. The characteristics of the present communication ought, in my opinion, to be moderation and firmness. * * * Moderation in language, firmness in purpose, will unite all hearts at home, all opinions abroad in our favor. Warmth and recrimination will give arguments to false friends and real enemies, which they may use with effect against us. On these principles I have framed the hasty draft which I inclose. You will with your usual discernment determine whether it suits the present emergency."

This draft, thus submitted, was made the basis of the President's message of January 15, 1836. The tone of this message, together with that of the message immediately preceding, was such as to induce the

French Government, as hereinafter stated, to pay the installments due without further reservation.

"Our institutions are essentially pacific. Peace and friendly intercourse with all nations are as much the desire of our Government as they are the interest of our people. But these objects are not to be permanently secured by surrendering the rights of our citizens, or permitting solemn treaties for their indemnity in cases of flagrant wrong to be abrogated or set aside.

"It is undoubtedly in the power of Congress seriously to affect the agricultural and manufacturing interests of France by the passage of laws relating to her trade with the United States. Her products, manufactures, and tonnage may be subjected to heavy duties in our ports, or all commercial intercourse with her may be suspended. But there are powerful, and, to my mind, conclusive objections to this mode of proceeding. We cannot embarrass or cut off the trade of France without at the same time, in some degree, embarrassing or cutting off our own trade. The injury of such a warfare must fall, though unequally, upon our own citizens, and could not but impair the means of the Government, and weaken that united sentiment in support of the rights and honor of the nation which must now pervade every bosom. Nor is it impossible that such a course of legislation would introduce once more into our national councils those disturbing questions in relation to the tariff of duties which have been so recently put to rest. Besides, by every measure adopted by the Government of the United States with the view of injuring France, the clear perception of right which will induce our own people, and the rulers and people of all other nations, even of France herself, to pronounce our quarrel just, will be obscured, and the support rendered to us, in a final resort to more decisive measures, will be more limited and equivocal. There is but one point in the controversy, and upon that the whole civilized world must pronounce France to be in the wrong. We insist that she shall pay us a sum of money which she has acknowledged to be due, and of the justice of this demand there can be but one opinion among mankind. True policy would seem to dictate that the question at issue should be kept thus disemcumbered, and that not the slightest pretense should be given to France to persist in her refusal to make payment by any act on our part affecting the interests of her people. The question should be left as it is now, in such an attitude that when France fulfills her treaty stipulations all controversy will be at an end.

"It is my conviction that the United States ought to insist on a prompt execution of the treaty, and in case it be refused, or longer delayed, take redress into their own hands. After the delay on the part of France, of a quarter of a century, in acknowledging these claims by treaty, it is not to be tolerated that another quarter of a century is to be wasted in negotiating about the payment. The laws of nations provide a remedy for such occasions. It is a well-settled principle of the international

code that where one nation owes another a liquidated debt, which it refuses or neglects to pay, the aggrieved party may seize on the property belonging to the other, its citizens or subjects, sufficient to pay the debt, without giving just cause of war. This remedy has been repeatedly resorted to, and recently by France herself toward Portugal, under circumstances less unquestionable."

President Jackson, Sixth Annual Message, 1834.

Senate Doc. 40, 23d Cong., 2d sess., contains a report of Mr. Clay, from the Committee on Foreign Relations, on the President's message of December, 1834, closing with the resolution "that it is inexpedient, at this time, to pass any law vesting in the President authority for making reprisals on French property in the contingency of provision not being made for paying to the United States the indemnity stipulated by the treaty of 1831, during the present session of the French Chambers." The report begins by stating an "entire concurrence with the President as to the justice of the claims." The report proceeds to examine Mr. Rives' negotiations with the French minister of foreign affairs, and states that in this negotiation "the King manifested the most friendly feeling toward the United States." It explains the unfriendly action of the House of Delegates as due in part to "deep-rooted prejudice," in part to indiscreet publication of dispatches of the American negotiators. The failure on the part of the French Government to secure favorable action was held by the committee to be attributable to the fact that "during certain seasons of the year legislative labors are habitually suspended;" that the Government was obliged to proceed with "great circumspection;" "that a special call of the Chambers would not be attended with the benefits expected from it at Washington." The committee then say that "if these reasons are not sufficient to command conviction, * * * they ought to secure acquiescence in the resolution of the King not to hazard the success of the bill by a special call of the French legislature at an unusual season of the year." "It is conceded that the refusal of one portion of a foreign Government, whose concurrence is necessary to carry into effect a treaty with another, may be regarded, in strictness, as tantamount to a refusal of the whole Government." But it is argued that a refusal by a majority of 8 in a house of 344 members ought not to be treated as final. On the subject of reprisals in general the report proceeds to say:

"In recommending adherence yet longer to negotiation for the purposes indicated, the committee are encouraged by the past experience of this Government. Almost every power of Europe, especially during the wars of the French Revolution, and several of those of the new states on the American continent, have, from time to time, given to the United States just cause of war. Millions of treasure might have been expended, and countless numbers of human beings been sacrificed, if the United States had rashly precipitated themselves into a state of war upon the occurrence of every wrong. But they did not; other and more moderate and better counsels prevailed. The result attested their wisdom. With most of the powers, by the instrument of negotiation, appealing to the dictates of reason and of justice, we have happily compromised and accommodated all difficulties. Even with respect to France, after negotiations of near a quarter century's duration; after repeated admissions, by successive Governments of France, of the justice of some portion of our claims, but after various repulses, under one pretext or

another, we have advanced, not retrograded. France, by a solemn treaty, has admitted the justice, and stipulated to pay a specific sum in satisfaction, of our claims. Whether this treaty is morally and absolutely binding upon the whole French people or not, it is the deliberate act of the royal executive branch of the French Government, which speaks, treats, and contracts with all foreign nations for France. The execution of the stipulations of such a treaty may be delayed—postponed, as we have seen—contrary to the wishes of the King's Government; but sooner or later they must be fulfilled, or France must submit to the degrading stigma of bad faith.

"Having expressed these views and opinions, the committee might content themselves and here conclude; but they feel called upon to say something upon the other branch of the alternative, stated in the outset, as having been presented by the President of the United States to the consideration of Congress. The President is under a conviction that the United States ought to insist on a prompt execution of the treaty; and, in case it be refused, or longer delayed, take redress in their own hands. He accordingly recommends that a law be passed, authorizing reprisals upon French property in case provision shall not be made for the payment of the debt at the approaching session of the French Chambers. This measure he deems of a pacific character, and he thinks it may be resorted to without giving just cause of war.

"It is true that writers on the public law speak and treat of reprisals as a peaceful remedy, in cases which they define and limit. It is certainly a very compendious one, since the injured nation has only to authorize the seizure and sale of sufficient property of the debtor nation, or its citizens, to satisfy the debt due; and, if it quietly submit to the process, there is an end of the business. In that case, however, we should feel some embarrassment as to the exact amount of the French debt for which we should levy, because, being payable in six installments, with interest, computed from the day of the exchange of the ratifications of the treaty (February, 1832), only two of those installments are yet due. Should we enforce payment of those two only, and resort to the irritating, if not hazardous, remedy of reprisals, as the others shall successively fall due; or, in consequence of default in the payment of the first two, consider them all now due and levy for the whole?

"Reprisals do not of themselves produce a state of public war; but they are not unfrequently the immediate precursor of it. When they are accompanied with an authority, from the Government which admits them, to employ force, they are believed invariably to have led to war in all cases where the nation against which they are directed is able to make resistance. It is wholly inconceivable that a powerful and chivalrous nation, like France, would submit, without retaliation, to the seizure of the property of her unoffending citizens, pursuing their lawful commerce, to pay a debt which the popular branch of her legislature had refused to acknowledge and provide for. It cannot be supposed that France would tacitly and quietly assent to the payment of a debt to the United States, by a forcible seizure of French property, which, after full deliberation, the Chambers had expressly refused its consent to discharge. Retaliation would ensue, and retaliation would inevitably terminate in war. In the instance of reprisals made by France upon Portugal, cited by the President, the weakness of this power, convulsed and desolated by the ravages of civil war, sufficiently accounts for the fact of their being submitted to, and not producing a state of general hostilities between the two nations.

"Reprisals so far partake of the character of war, that they are an appeal from reason to force; from negotiation, devising a remedy to be applied by the common consent of both parties, to self-redress carved out and regulated by the will of one of them; and, if resistance be made, they convey an authority to subdue it by the sacrifice of life, if necessary.

"The framers of our Constitution have manifested their sense of the nature of this power, by associating it in the same clause with grants to Congress of the power to declare war, and to make rules concerning captures on land and water.

"Without dwelling further on the nature of this power, and under a full conviction that the practical exercise of it against France would involve the United States in war, the committee are of opinion that two considerations decisively oppose the investment of such a power in the President, to be used in the contingency stated by him.

"In the first place, the authority to grant letters of marque and reprisal, being specially delegated to Congress, Congress ought to retain to itself the right of judging of the expediency of granting them, under all the circumstances existing at the time when they are proposed to be actually issued. The committee are not satisfied that Congress can, constitutionally, delegate this right. It is true that the President proposes to limit the exercise of it to one specified contingency. But if the law be passed, as recommended, the President might, and probably would, feel himself bound to execute it, in the event, no matter from what cause, of provision not being made for the fulfillment of the treaty by the French Chambers, now understood to be in session. The committee can hardly conceive the possibility of any sufficient excuse for a failure to make such provision. But, if it should unfortunately occur, they think that, without indulging in any feeling of unreasonable distrust towards the Executive, Congress ought to reserve to itself the constitutional right, which it possesses, of judging of all the circumstances by which such refusal might be attended; of hearing France, and of deciding whether, in the actual posture of things, as they may then exist, and looking to the condition of the United States, of France, and of Europe, the issuing of letters of marque and reprisal ought to be authorized, or any other measure adopted.

"In the next place, the President, confiding in the strong assurances of the King's Government of its sincere disposition to fulfill, faithfully, the stipulations of the treaty, and of its intention, with that view, of applying again to the new Chambers for the requisite appropriation, very properly signified during the last summer, through the appropriate organs at Washington and Paris, his willingness to await the issue of this experiment. Until it is made, and whilst it is in progress, nothing, it seems to the committee, should be done, on our part, to betray suspicions of the integrity and fidelity of the French Government; nothing, the tendency of which might be to defeat the success of the very measure we desire. This temporary forbearance is the more expedient, since the French Government has earnestly requested that we should avoid 'all that might become a cause of fresh irritation between the two countries, compromit the treaty, and raise up an obstacle, perhaps insurmountable, to the views of reconciliation and harmony which animate the King's council.'"

"The people of the United States are justly attached to a pacific system in their intercourse with foreign nations. It is proper, therefore, that they should know whether their Government has adhered to

it. In the present instance it has been carried to the utmost extent that was consistent with a becoming self-respect. The note on the 29th of January, to which I have before alluded, was not the only one which our minister took upon himself the responsibility of presenting on the same subject and in the same spirit. Finding that it was intended to make the payment of a just debt dependent on the performance of a condition which he knew could never be complied with, he thought it a duty to make another attempt to convince the French Government that, while self-respect and regard to the dignity of other nations would always prevent us from using any language that ought to give offense, yet we could never admit a right in any foreign Government to ask explanations of or interfere in any manner in the communications which one branch of our public councils made with another; that in the present case no such language had been used, and that this had, in a former note, been fully and voluntarily stated before it was contemplated to make the explanation a condition; and that there might be no misapprehension, he stated the terms used in that note, and he officially informed them that it had been approved by the President, and that therefore every explanation which could reasonably be asked or honorably given had already been made; that the contemplated measure had been anticipated by a voluntary and friendly declaration, and was, therefore, not only useless but might be deemed offensive, and certainly would not be complied with if annexed as a condition. * * *

"The result of this last application has not yet reached us, but is daily expected. That it may be favorable is my sincere wish. France having now, through all the branches of her Government, acknowledged the validity of our claims, and the obligation of the treaty of 1831, and there really existing no adequate cause for further delay, will at length, it may be hoped, adopt the course which the interests of both nations, not less than the principles of justice, so imperiously require. The treaty being once executed on her part, little will remain to disturb the friendly relations of the two countries; nothing, indeed, which will not yield to the suggestions of a pacific and enlightened policy and to the influence of that mutual good will and those generous recollections which we may confidently expect will then be revived in all their ancient force. In any event, however, the principle involved in the new aspect which has been given to the controversy, is so vitally important to the independent administration of the Government that it can neither be surrendered nor compromitted without national degradation. I hope it is unnecessary for me to say that such a sacrifice will not be made through any agency of mine. The honor of my country shall never be stained by an apology from me for the statement of truth and the performance of duty; nor can I give any explanation of my official acts, except such as is due to integrity and justice, and consistent with the principles on which our institutions have been framed. This determination will, I am confident, be approved by my constitutents. I have, indeed, studied

their character to but little purpose if the sum of twenty-five millions of francs will have the weight of a feather in the estimation of what appertains to their national independence, and if, unhappily, a different impression should at any time obtain in any quarter, they will, I am sure, rally round the Government of their choice with alacrity and unanimity, and silence forever the degrading imputation."

President Jackson, Seventh Annual Message, 1835.

"While France persists in her refusal to comply with the terms of a treaty, the object of which was, by removing all causes of neutral complaint, to renew ancient feelings of friendship, and to unite the two nations in the bonds of amity and of a mutually beneficial commerce, she cannot justly complain if we adopt such peaceful remedies as the law of nations and the circumstances of the case may authorize and demand. Of the nature of these remedies I have heretofore had occasion to speak, and, in reference to a particular contingency, to express my conviction that reprisals would be best adapted to the emergency then contemplated. Since that period, France, by all the departments of her Government, has acknowledged the validity of our claims, and the obligations of the treaty, and has appropriated the moneys which are necessary to its execution; and though payment is withheld on grounds vitally important to our existence as an independent nation, it is not to be believed that she can have determined permanently to retain a position so utterly indefensible. In the altered state of the questions in controversy, under all existing circumstances, it appears to me, that, until such a determination shall have become evident, it will be proper and sufficient to retaliate her present refusal to comply with her engagements, by prohibiting the introduction of French products and the entry of French vessels into our ports. Between this and the interdiction of all commercial intercourse, or other remedies, you, as the representatives of the people, must determine. I recommend the former in the present posture of our affairs, as being the least injurious to our commerce, and as attended with the least difficulty of returning to the usual state of friendly intercourse, if the Government of France shall render us the justice that is due; and also as a proper preliminary step to stronger measures should their adoption be rendered necessary by subsequent events."

President Jackson's "French" message, Jan. 15, 1836. See *supra*, § 148.
For the correspondence of Mr. Livingston, minister to France, with the French Government, see *supra*, § 79.

"The Government of Great Britain has offered its mediation for the adjustment of the dispute between the United States and France. Carefully guarding that point in the controversy which, as it involves our honor and independence, admits of no compromise, I have cheerfully accepted the offer. It will be obviously improper to resort even to the mildest measures of a compulsory character, until it is ascer-

tained whether France has declined or accepted the mediation. I, therefore, recommend a suspension of all proceedings on that part of my special message of the 15th of January last which proposes a partial non-intercourse with France."

President Jackson, special message, Feb. 8, 1836. See as to mediation, *supra*, § 49.

Mr. Bankhead, British chargé d'affaires at Washington, on February 15, 1836, addressed the following note to Mr. Forsyth, Secretary of State:

"The undersigned, His Britannic Majesty's chargé d'affaires, with reference to his note of the 27th of last month, has the honor to inform Mr. Forsyth, Secretary of State of the United States, that he has been instructed by his Government to state that the British Government has received a communication from that of France, which fulfills the wishes that impelled His Britannic Majesty to offer his mediation for the purpose of effecting an amicable adjustment of the difference between France and the United States.

"The French Government has stated to that of His Majesty that the frank and honorable manner in which the President has, in his recent message, expressed himself with regard to the points of difference between the Governments of France and of the United States, has removed those difficulties upon the score of national honor which have hitherto stood in the way of the prompt execution by France of the treaty of the 4th July, 1831, and that, consequently, the French Government is now ready to pay the installment which is due on account of the American indemnity whenever the payment of that installment shall be claimed by the Government of the United States.

"The French Government has also stated that it made this communication to that of Great Britain, not regarding the British Government as a formal mediator, since its offer of mediation had then reached only the Government of France, by which it had been accepted, but looking upon the British Government as a common friend of the two parties, and, therefore, as a natural channel of communication between them.

"The undersigned is further instructed to express the sincere pleasure which is felt by the British Government at the prospect thus afforded of an amicable termination of a difference which has produced a temporary estrangement between two nations which have so many interests in common, and who are so entitled to the friendship and esteem of each other; and the undersigned has also to assure Mr. Forsyth that it has afforded the British Government the most lively satisfaction to have been, upon this occasion, the channel of a communication which, they trust, will lead to the complete restoration of friendly relations between the United States and France."

House Ex. Doc. 116, 24th Cong., 1st sess.

"Our Government are in a great alarm lest this dispute between the French and Americans should produce war, and the way in which we should be affected is this: Our immense manufacturing population is dependent upon America for a supply of cotton, and in case of any obstruction to that supply multitudes would be thrown out of employment and incalculable distress would follow. They think that the French would blockade the American ports, and then such obstruction would be inevitable. A system like ours, which resembles a vast piece of machinery, no part of which can be disordered without danger to the

whole, must be always liable to interruption or injury from causes over which we have no control, and this danger must always attend the extension of our manufacturing system to the prejudice of other interests; so that in case of a stoppage or serious interruption to the current in which it flows, the consequences would be appalling; nor is there in any probability a nation on the continent (our good ally, Louis Philippe, included) that would not gladly contribute to the humiliation of the power and diminution of the wealth of this country."

Greville's Journal, Dec. 10, 11, 1855.

"In every case, particularly where hostilities are contemplated or appear probable, no Government should commit itself as to what it will do under certain future contingencies. It should prepare itself for every contingency—launch ships, raise men and money, and reserve its final decision for the time when it becomes necessary to decide and simultaneously to act. The proposed transfer by Congress of its constitutional powers to the Executive, in a case which necessarily embraces the question of war or no war, appears to me a most extraordinary proposal, and entirely inconsistent with the letter and spirit of our Constitution, which vests in Congress the power to declare war and to grant letters of marque and reprisal."

Mr. Gallatin to Mr. Everett, Jan. 5, 1838. 2 Gallatin's Writings, 475.

As to Mr. Gallatin's views, see further, *supra*, § 222. See also criticism in 3 Phill. Int. Law (3d ed.), 41.

"The President (General Jackson), has recommended a law authorizing reprisals upon French property. Such property can be captured or seized only on the high seas, or within our own jurisdiction."

Mr. Gallatin to Mr. Everett, Jan. 5, 1835. 2 Gallatin's Writings, 475.

For the opinion of Mr. Wheaton on this topic, see *supra*, § 9.

For a summary of the proceedings under the treaty of 1832, see *supra*, § 148*c*.

President Buchanan, in his annual message on December 9, 1859, in view of the political chaos then existing, and which had for so long existed, in Mexico, and of the enormous indebtedness of Mexico to the United States for spoliations, recommended Congress to pass a law authorizing the sending to Mexico a sufficient military force to secure indemnity, which could not be enforced by diplomatic pressure, and to produce security on the border line. Such a step, he argued, would tend, incidentally, to sustain the constitutional Government of Juarez against such aggressions of European sovereigns as the helpless condition of Mexico would be likely to invite. Congress, however, did not act upon this proposal, and shortly afterwards began the intrigues of Napoleon III, which, after our own civil war had relieved him from our active antagonism, resulted in the expedition of Maximilian. On December 14, 1859, however, before the interference began to be perceptible, Mr. McLane, then United States minister at Mexico, signed, under instructions from the President, a treaty of transit and of commerce, which was followed by a convention to enforce treaty obligations, and to aid in producing such order on the border as would best promote the friendly relations of the two countries. Neither treaty nor convention, however, was approved by the Senate of the United States.

"A convention was made at London, on the 31st October, 1861, between Great Britain, France, and Spain, professedly for the purpose of obtaining redress and security from Mexico for citizens of the con-

tracting powers. The claim was declared to be, that bonds of the Mexican Government were held by citizens of those countries, for which the Mexican Government had neglected to provide payment, and which it was doubtful if Mexico had either the ability or willingness to pay. Injuries, it was declared, had been inflicted on citizens of those countries residing in Mexico, in their persons and property, by powers in possession of the Government, for which no redress could be obtained. In general, the object of the convention was declared to be 'to demand more efficacious protection for the persons and property of their subjects, as well as the fulfillment of the obligations contracted towards their Majesties.' The second article of the convention declares that the contracting parties 'engage not to seek for themselves, in the employment of the contemplated coercive measures, any acquisition of territory, or any special advantage, nor to exercise in the internal affairs of Mexico any influence of a nature to prejudice the right of the Mexican nation to choose and constitute the form of its government.' The convention provided for such occupation of territory and 'such other operations' as should be judged suitable to secure its objects.

"It is clear that this convention authorized a war of conquest upon Mexico, with no limitation except such as might be afforded by the agreement of the allies to leave the conquered people free to choose and constitute their own form of government. The payment of debts might indeed be obtained from the existing Government, but the other object—permanent protection for the persons and property of resident foreigners—could, in the opinion of the parties to the convention, be secured only by a change of Government. The second article, therefore, assumed that there would be such a change, and declared only that it should be effected by the Mexicans themselves. The convention may, therefore, be said to have contemplated an armed occupation of Mexico, until the people should have adopted such a Government as, in the opinion of the allies, would be responsible and stable.

"Provision was made in the treaty for the accession of the United States as a fourth party, but it was to become a party to a treaty the terms of which the other parties had already settled, and even after its execution had begun. The note from the three powers, inviting the United States to join, was dated a month after the date of the treaty. The United States were sensitive to the intervention of European monarchies in the internal affairs of a neighboring Republic on the American continent; and the Secretary of State, Mr. Seward, endeavored to remove the more definite and specific occasion for the enterprise, by an arrangement with Mexico, by which the United States should give her such aid as would enable her to discharge the just pecuniary demands of the three powers. The United States minister at Mexico was authorized by the President to make a treaty to that effect. In Mr. Seward's reply (bearing date Dec. 4, 1861), to the note from the three powers, inviting the co-operation of the United States, he informs them of this contemplated arrangement, and expresses the hope that it will remove the necessity for the proposed intervention. This was immediately rejected as unsatisfactory by each of the three powers. * * *

"As might have been expected from these antecedents, a question soon arose among the allies as to how far they should go in exercising coercion upon Mexico, and what should be the test and rule of their forcible interference in her internal affairs. At a conference held at Orizaba on the 9th April, 1862, the Spanish and English commissioners, objecting that the French had gone beyond the terms of the conven-

tion in giving military aid to the party in favor of establishing an Imperial Government, withdrew from further co-operation. Their course was approved by their respective Governments. The French Government, whose pecuniary claims upon Mexico were much smaller than those of the other powers and more questionable, left to itself in Mexico, proceeded, by military aid to the Imperialist party, to establish that party in possession of the capital; and, under the protection of the French forces, an assembly of notables was called, which had been selected and designated by the Imperialist party, without even the pretense of a general vote of the Mexican people; and this assembly undertook to establish an imperial form of government, and to offer the throne to the Archduke Maximilian of Austria. The Emperor of the French treated this as a conclusive expression of the will of the Mexican people, acknowledged the new sovereign at once, and entered into a treaty with him for military aid to secure his authority.

"The position taken by Mr. Seward in 1862 was that the explanations given by the French Emperor to the United States made the French intervention a war upon Mexico for the settlement of claims which Mexico had not met to the satisfaction of France. This explanation the United States relied upon, and did not intend to interfere between the belligerents. (Mr. Seward to Mr. Dayton, June 21, 1862; August 23, 1862; and November 10, 1862. U. S. Dip. Corr., 1862.)

"On the 4th of April, 1864, the House of Representatives passed a resolution, by unanimous vote, denouncing the French intervention in Mexico; but these resolves were not acted upon by the Senate, and the position of the Government continued to be that of recognizing a war made by France upon Mexico for professed international objects of which we did not assume to judge, accompanied with a military occupation of a large part of Mexico by the French, which we recognized as one of the facts of the war. But the Government steadily refused to regard the Empire as established by the Mexican people, and treated Maximilian as a kind of provisional ruler established by the French in virtue of their military occupation."

Dana's Wheaton, § 76, note 41. See further, *supra*, §§ 58, 222.

That the French Government in 1863 assured the Government of the United States that the French invasion of Mexico was only for the purpose of "asserting just claims due her (France) and obtaining payment of the debt due," see Mr. Seward, Sec. of State, to Mr. Dayton, May 8, 1863. MSS. Inst., France; For. Rel. 1863, quoted, *supra*, § 58.

In 1860 certain large sums of money having been forcibly taken by the then Government of Mexico from the British legation in Mexico, Mr. C. Wyke was authorized by Lord John Russell, in case of refusal by the succeeding (constitutional) Government to indemnify for the spoliation, to "appriso the Mexican Government that you are authorized and enjoined at once to call upon Her Majesty's naval forces to support, and if necessary to enforce, your demand for reparation."

Brit. and For. St. Pap., 1861–'62, 239. See as to this procedure, *supra*, §§ 58, 222, 232; Abdy's Kent. (1873), 75.

The joint action in 1861 of France, Spain, and England, by which they declared it was necessary to resort to "positive measures to demand a more efficacious protection for the persons and goods of their subjects, as well as for the fulfillment of the obligations contracted by Mexico to such subjects," is discussed by Calvo, droit int., 3d ed., vol.

3, 50. A divergence of opinion, according to his statement, existed between the commissioners, and England and Spain withdrew, leaving France to proceed on her own line. England secured most of her objects, but France was involved in a bootless war.

The question of extreme measures to collect international claims is discussed, *supra*, § 222.

Reprisals or war will not be resorted to in order to compel payment of damages due for tort to a citizen of the United States by a foreign nation unless no other mode of prosecution remains.

Mr. Seward, Sec. of State, report Mar. 30, 1861. MSS. Report Book. *Supra*, § 222.

As an act of reprisal may be mentioned the attack on Greytown. See *supra*, §§ 50*d*, 224, 315*d*.

"The act of March 3, 1815, having premised that the Dey of Algiers had commenced a predatory warfare against the United States, gave to the President the same authority as in the preceding case of Tripoli, to instruct the commanders of public armed vessels, and to grant commissions to the owners of private armed vessels, to subdue, seize, and make prize of all vessels, goods, and effects of or belonging to the Dey of Algiers or to his subjects. (3 Stat. L., 230.)

"There were no reprisals authorized in terms by the United States in the war with Mexico, which was declared by the law of May 13, 1846, to exist by the act of the Republic of Mexico. (9 *ibid.*, 9.) Mexican property found at sea was, of course, subject to capture by our ships of war; but no commissions were granted to privateers.

"Mr. Wheaton has referred (part i, chap. 2, § 11, iv, 57) to the successful demand against the restored Governments for indemnifications for spoliations on our commerce, in cases where the wrong was inflicted by rulers who had temporarily superseded the legitimate sovereign, and his own negotiations with Denmark (part iv, chap. 3, § 32), are another illustration of the perseverance with which the claims of their merchants were sustained by successive Administrations of the American Government."

Lawrence's Wheaton (ed. 1863), 507, 508.

The British government in 1840 made the capture of several Neapolitan vessels on account of a grant of monopoly for the sulphur produced and worked in Sicily contrary, it was alleged, to the commercial treaty between England and Naples of 1816. The difficulty was settled by the mediation of France.

Phill. Int. Law, vol. iii, 27.

"In 1847 a motion was made in the House of Commons for reprisals on account of unpaid Spanish bonds. It was conceded that such a course would be justified by the principles of international law, but it was resisted on the ground of expediency. In 1850 reprisals, which afterward became the subject of parliamentary discussion and of complaint by France, were resorted to by England on account of the claims for property alleged to have been destroyed at Athens by a mob, aided by Greek soldiers and gendarmes, belonging to one Pacifico, a British subject from being a native of Gibraltar. 'The real question of international law in this case,' says Phillimore, 'was whether the state of the

Greek tribunals was such as to warrant the English foreign minister in insisting upon M. Pacifico's demand being satisfied by the Greek Government before that person had exhausted the remedies which, it must be presumed, are afforded by the ordinary legal tribunals of every civilized state. That M. Pacifico had not applied to the Greek courts of law for redress appears to be an admitted fact.' Though Greece was compelled to accept the conditions of England the commissioners appointed to examine the claim awarded only £150 instead of £21,295 1*s.* 4*d.*, which was demanded. Phillimore, as to the point whether the state of the courts rendered it a mockery to expect justice at their hands, adds: 'The international jurist is bound to say that the evidence produced does not appear to be of that overwhelming character which alone could warrant an exception from the well known and valuable rule of international law upon questions of this description.' (*Ibid.*, 29.)"

Lawrence's Wheaton (ed. 1863), 509.

For a fuller account of the reprisals on Neapolitan vessels and of the discussion relative to the Spanish bonds, see 1 Halleck's Int. Law (Baker's ed.), 435.

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

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

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

1 Op., 30, Randolph, 1793.

As to measures to enforce international indebtedness, see *supra*, § 222.

"The law of war can no more wholly dispense with retaliation than can the law of nations, of which it is a branch. Yet civilized nations acknowledge retaliation as the sternest feature of war. A reckless enemy often leaves to his opponent no other means of securing himself against the repetition of barbarous outrage."

Instructions for the government of armies of the United States in the field. 2 Halleck's Int. Law (Baker's ed.), 38.

The King of Prussia, in 1753, "resorted to reprisals, by stopping the interest upon a loan due to British subjects, and secured by hypothecation upon the revenues of Silesia, until he actually obtained from the

British Government an indemnity for the Prussian vessels unjustly captured and condemned" by a British prize court.

2 Halleck's Int. Law (Baker's ed.), 431.

"Reprisals," says Vattel (Droit des Gens, liv. ii, chap. xviii, sec. 342), "are used between nation and nation in order to do themselves justice, when they cannot otherwise obtain it. If a nation has taken possession of what belongs to another; if it refuses to pay a debt or repair an injury, or to make a just satisfaction, the latter may seize what belongs to the former, and apply it to its own advantage, till it obtain full payment for what is due, together with interest and damages, or keep it as a pledge till the offending nation has made ample satisfaction. The effects thus seized are preserved while there is any hope of obtaining satisfaction or justice. As soon as the hope disappears they are confiscated, and then the reprisals are accomplished. If the two nations, upon this ground of quarrel, come to an open rupture, satisfaction is considered as refused from the moment that the war is declared, or hostilities commenced; and then, also, the effects seized may be confiscated." "These remarks," says General Halleck, when commenting on this passage (1 Halleck's Int. Law (Baker's ed.), 434), "are more particularly applicable to *general* reprisals, although, even then, sequestration sometimes immediately follows the seizure. Where such extreme measures are resorted to, it is not easy to distinguish between them and actual hostilities. But in *special* reprisals, made for the indemnification of injuries upon individuals, and limited to particular places and things, immediate confiscation is more frequently resorted to. Thus, Cromwell having made a demand on Cardinal Mazarin during the minority of Louis XIV, for indemnity to a Quaker, whose vessel had been illegally seized and confiscated on the coast of France, and receiving no reply within the three days specified in the demand, dispatched two ships-of-war to make prize of French vessels in the channel. The vessels were seized and sold, the Quaker paid out of the proceeds the value of his loss, and the French ambassador apprised that the residue was at his service. This substantial act of justice caused neither reclamation nor war."

"Retorsion and reprisal bear about the same relation to arbitration and war, as the personally abating a nuisance does to a suit for its removal. States as well as individuals have a right to protect themselves when injustice is done them by removing the cause of offense; and that in disputes between nations this right is more largely extended than in disputes between individuals, is to be explained by the fact that in disputes between nations there are not the modes of redress by litigation which exist in suits between individuals. 'Retorsion' and 'reprisal' are often used convertibly; though the difference is that 'retorsion' is retaliation in kind, while 'reprisal' is seizing or arresting the goods or trade of subjects of such state as set-off for the injuries received. Under this head fall embargoes, and what are called pacific blockades (*blocus pacifique*), by the former of which trade is forbidden with the offending state; by the latter of which a port belonging to the offending state is closed to foreign trade. These acts approach in character to war, to which they generally lead; yet technically they are not war, and there are cases where the remedy has been applied without war resulting."

Whart. Com. Am. Law, § 206. As to "pacific blockades," see *infra*, § 364.

## V. *NON-INTERCOURSE.*

### § 319.

After the attack on the Chesapeake, in 1807, the President issued a proclamation excluding British war-vessels from the harbors of the United States.

See *supra*, § 315 *b*, *infra*, § 331.

This was regarded by Mr. Canning as an act of retaliation.

See Mr. Canning to Mr. Monroe, Sept. 23, 1807. 3 Am. St. Pap. (For. Rel.), 200. For detail, see *supra*, § 315*b*; *infra*, § 331. See Mr. F. Jackson's attitude in this relation, *supra*, §§ 107, 150*b*. See as to invasion of territorial waters, *supra*, § 15.

The House Committee of Foreign Affairs, on November 22, 1808, after reviewing the aggressions of both Great Britain and France on the commerce of the United States, reported in favor of prohibition of admission of vessels of Great Britain or France, or of "any other of the belligerent powers having in force orders or decrees violating the lawful commerce and neutral rights of the United States; and also the importation of any goods, wares, or merchandise, the growth, produce, or manufacture of the dominions of any of the said powers, or imported from any place in the possession of either." This conclusion, it is maintained, presented the only alternative to war.

Mr. John Randolph's speech, in 1806, on the non-importation act is reviewed in the Edinburgh Review for October, 1807. (Vol. xi, 1.) Mr. Randolph's speech, which took the ground "that the only barrier between France and a universal dominion, before which America as well as Europe must fall, is the British navy," was republished and widely circulated in England. The Edinburgh Review, however, declared that Mr. Randolph was not to be regarded as representing the United States, and that he was "the orator of a party professedly in opposition to the Government."

"The non-intercourse act of the United States (of 1809) put an entire stop, for the next two years, to all commerce with that country, during the most critical and important years of the war; and in its ultimate results, contributed to produce that unhappy irritation between the two countries, which has never yet, notwithstanding the strong bonds of mutual interest by which they are connected, been allayed."

10 Alison's Hist. of Europe, 650.

"Whatever pleas may be urged for a disavowal of engagements formed by diplomatic functionaries in cases where, by the terms of the engagements, a mutual ratification is reserved, or where notice at the time may have been given of a departure from instructions, or in extraordinary cases essentially violating the principles of equity, a disavowal could not have been apprehended in a case where no such notice or violation existed, where no such ratification was reserved, and more especially where, as is now in proof, an engagement to be executed without any such ratification was contemplated by the instructions given, and where it had, with good faith, been carried into immediate execution on the part of the United States.

"These considerations not having restrained the British Government from disavowing the arrangement by virtue of which its orders in council were to be revoked, and the event authorizing the renewal of commercial intercourse having thus not taken place, it necessarily became a question of equal urgency and importance, whether the act prohibiting that intercourse was not to be considered as remaining in legal force. This question being, after due deliberation, determined in the affirmative, a proclamation to that effect was issued. It could not but happen, however, that a return to this state of things from that which had followed an execution of the arrangement by the United States would involve difficulties. With a view to diminish these as much as possible, the instructions from the Secretary of the Treasury, now laid before you, were transmitted to the collectors of the several ports. If in permitting British vessels to depart without giving bonds not to proceed to their own ports, it should appear that the tenor of legal authority has not been strictly pursued, it is to be ascribed to the anxious desire which was felt that no individuals should be injured by so unforeseen an occurrence; and I rely on the regard of Congress for the equitable interests of our own citizens to adopt whatever further provisions may be found requisite for a general remission of penalties involuntarily incurred."

President Madison, First Annual Message, 1809.

It has already been noticed that Mr. Erskine, then British Minister at Washington, wrote to Mr. Smith, then Secretary of State, on April 17, 1809, saying that considering the act passed by Congress on the 1st of March, usually termed the non-intercourse act, to have produced a state of equality in the relations of the two belligerent powers, he offered an honorable reparation for the aggression that had been committed on the United States frigate Chesapeake. This proposition having been accepted the same day by the United States, Mr. Erskine, on April 18, 1809, wrote to Mr. Smith, saying:

"'The favorable change in the relations of His Majesty with the United States, which has been produced by the act (usually termed the non-intercourse act) passed in the last session of Congress was also anticipated by His Majesty, and has encouraged a further hope that a reconsideration of the existing differences might lead to their satisfactory adjustment." The subsequent correspondence is noticed *supra*, §§ 107, 150*b*.

"The President, in his message at the opening of Congress, May 23, 1809, referred with great satisfaction to the renewal of the commercial intercourse with Great Britain, and stated that the arrangement with Mr. Erskine had been made the basis of communications to the French Government. It was, however, disavowed by the British Government, even as regarded the proposed reparation for the Chesapeake affair, and the trade, that had been opened by the President's proclamation, was again placed under the operation of the acts of Congress which had been suspended. Both Governments took measures to prevent, as far as possible, any inconvenience or detriment to the merchants who had acted on the supposed validity of the agreement.

"Mr. Canning, in communicating on 27th of May, 1809, to Mr. Pinkney, the British order in council for that purpose, added: 'Having had the honor to read to you *in extenso* the instructions with which Mr. Erskine was furnished, it is not necessary for me to enter into any explanation of those points in which Mr. Erskine has acted, not only not in conformity, but in direct contradiction to them. I forbear equally with troubling you with any comment on the manner in which Mr. Erskine's communications have been received by the American Government, or upon the terms and spirit of Mr. Smith's share of the correspondence. Such observations will be communicated more properly through the minister whom His Majesty has directed to proceed to America; not on any special mission (which Mr. Erskine was not authorized to promise, except upon conditions not one of which he has obtained), but as the successor of Mr. Erskine, whom His Majesty has not lost a moment in recalling.'"

Lawrence's Wheaton (ed. 1863), 249–251, citing Parliamentary papers relating to America, June 2, 1809, 2–4; Wait's St. Pap., vol. vii, 222, 230. See further as to negotiations in respect to the Chesapeake, *supra*, §§ 107, 180*b*, *infra*, §331.

The respective policies of the United States and of Great Britain as to maritime restrictions in 1808, are discussed with great ability by Mr. Pinkney, minister to Great Britain, in his correspondence with Mr. Madison, Secretary of State, and Mr. Canning, foreign secretary in England. Mr. Pinkney's letters, which do not fall within the scope of the present volume to analyze and digest, will be found in 3 Am. St. Pap. (For. Rel.), 221 *ff.* See for further correspondence same vol., 299 *ff.*

As to these negotiations see *supra*, §§ 107, 150*b*.

"It seems to have been forgotten that from the time when Mr. Jefferson became President till the month of August, 1807, no actual aggression on the neutral rights of America had been committed by France; whilst during the same period the nominal blockade of enemies' ports by England, and the annual actual blockade, as they have been called, of our own; the renewal, contrary to express and mutual explanations, of the depredations on the indirect colonial trade; the continued impressments of our seamen, and the attack on the Chesapeake had actually taken place. During that period the laws, the executive acts, the negotiations of the American Government could have been directed to that Government alone from whom injuries had been received. But from the time when the rights of the United States were invaded by both the belligerents, every public measure has equally embraced both; the like efforts, founded on the same basis, have uniformly, though without success, been made to obtain redress from both; and the correspondence now published furnishes at least irrefragable proofs of the earnest desire of Mr. Jefferson's administration to adjust the differences with Great Britain, and of their disposition to reserve for that purpose whatever might serve as the shadow of a pretense for a denial of justice on her part."

Mr. Gallatin to the National Intelligencer, Apr. 24, 1810; 1 Gallatin's Works, 478.

"As respects your other query, I must say that I am very adverse to restrictive commercial measures for any purpose whatever. Experience must have taught us, beginning with the non-importation restrictions and

agreement which preceded the war of Independence, and ending with the various non-intercourse laws which were enacted between December, 1807, and June, 1812, how inefficient measures of this description generally are for the purpose of forcing another country to alter its policy. It is true that they may occasionally offer a pretense for it when that country already wishes to do it and only wants a pretense. Had the official notice of the repeal of the Milan and Berlin decrees (for which repeal some law of ours had offered a pretense) reached England two months earlier, it may be that a timely repeal of the orders in council would have prevented the war. Sometimes, also, if restrictions can be applied immediately to the object in dispute (a retaliating tonnage duty) so as to operate as direct reprisal, they may prove effective. In the present instance they cannot be so applied, and I would doubt their efficacy towards obtaining a prompt execution of the treaty. It would have been much preferable to have been fully aware of the great and intrinsic difficulties which stood between the signing of the treaty and its being carried into effect, and instead of increasing these to have used some further forbearance, and, without recurring to any coercive or restrictive measures, to have suffered the King of the French to manage the affair in his own way with the Chambers. Had that course been pursued, there is no doubt that he would have continued to make every exertion for obtaining their assent; and I am confident that the treaty must infallibly have been ultimately ratified. The fundamental error, on the part of our Government, consists in not having been sensible that, in the present situation of France, the real power is not with the King, but with the popular branch."

Mr. Gallatin to Mr. Everett, Jan. 1835; 2 Gallatin's Writings, 492.

On the subject of non-intercourse with France, as suggested by General Jackson on the spoliation issue, see *supra*, § 318.

As to non-importation and non-exportation, see 1 John Adams's Works, 156, 157, 163; 2 *ibid.*, 341, 342, 344, 364, 377, 382, 383, 387, 388, 393, 451, 452, 472; 4 *ibid.*, 34; 7 *ibid.*, 299; 9 *ibid.*, 347, 453, 459, 606, 642.

The orders and decrees of the belligerent powers of Europe affecting the commerce of the United States are given in 3 Am. St. Pap. (For. Rel.), 242 *ff.*

Exclusion of offensive vessels of war from ports is vindicated by Mr. Madison, Sec. of State, to Mr. Rose, British minister, Mar. 5, 1808. MSS. Inst., Gr. Brit.; 3 Am. St. Pap. (For. Rel.), 214.

The correspondence in 1807–'08 between Mr. Armstrong, United States minister in Paris, and M. Champagny (Duc de Cadore), as to French and British restrictions of neutral commerce, are to be found in 3 Am. St. Pap. (For. Rel.), 242 *ff.*

The correspondence in 1808–'09, of Mr. Pinkney, United States minister at London, with his own Government, and with the British foreign secretary, in reference to British restrictions on the commerce of the United States, is given in 3 Am. St. Pap. (For. Rel.), 221 *ff.*, 299 *ff.*, 363 *ff.* See *supra*, § 148*b*.

The history and character of the British claim in 1805, to interdict to neutrals commerce with her enemies, is given in a memorial to Congress of Jan. 21, 1806, known to have been prepared by Mr. William Pinkney. Wheaton's Life of Pinkney, 372. *Infra*, § 388.

Mr. Calhoun's speech in the House on June 24, 1812, on the non-intercourse bill, is given in 2 Calhoun's Works, 20.

"Anticipating that an attempt may possibly be made by the Canadian authorities in the coming season to repeat their unneighborly acts towards our fishermen, I recommend you to confer upon the Executive

the power to suspend, by proclamation, the operation of the laws authorizing the transit of goods, wares, and merchandise in bond across the territory of the United States to Canada; and further, should such an extreme measure become necessary, to suspend the operation of any laws whereby the vessels of the Dominion of Canada are permitted to enter the waters of the United States."

President Grant, Second Annual Message, 1870.

Under the non-intercourse act of June 28, 1809 (2 Stat. L., 550), a vessel could not proceed to a prohibited port, even in ballast.

Ship Richmond *v.* U. S., 9 Cranch, 102.

Under the same statute, an American vessel from Great Britain had a right to lay off the coast of the United States to receive instructions from her owners in New York, and, if necessary, to drop anchor, and in case of a storm to make a harbor; and if prevented by a mutiny of her crew from putting out to sea again, might wait in the waters of the United States for orders.

The U. S. *v.* The Cargo of the Fanny, 9 Cranch, 181.

Fat cattle are provisions, or munitions of war, within the meaning of the act of Congress of the 6th of July, 1812 (2 Stat. L., 728), "to prohibit American vessels from proceeding to or trading with the enemies of the United States, and for other purposes."

U. S. *v.* Barber, *ibid.*, 243.

A British ship, coming from a foreign port, not British, to a port of the United States, did not become liable to forfeiture under the non-intercourse act of April 18, 1818, by touching at an intermediate British closed port from necessity, in order to procure provisions, and without trading there.

The Frances Eliza, 8 Wheat., 398.

The non-intercourse act of the 18th of April, 1818, did not prohibit the coming of British vessels from a British closed port, through a foreign port, not British, where the continuity of the voyage was actually and fairly broken.

The Pitt, 8 Wheat., 371.

Purchases by neutrals, though *bona fide* for value, from persons who had purchased in contravention of the statute of July 13, 1861, and the subsequent proclamation of the President, making all commercial intercourse between any part of a State where insurrection against the United States existed and the citizens of the rest of the United States "unlawful," were invalid, and the property so purchased was liable to capture.

The Ouachita Cotton, 6 Wall., 521.

The Government of the United States has the right to permit limited commercial intercourse with an enemy in time of war, and to impose such conditions thereon as it sees fit. Whether the President, who is constitutionally invested with the entire charge of hostile operations, may exercise this power alone has been questioned; but whether so or not, there is no doubt that, with the concurrent authority of the Congress, he may exercise it according to his discretion.

Hamilton *v.* Dillin, 21 Wall., 73.

### VI. *EMBARGO.*

### § 320.

The first embargo resolution adopted by Congress was that of March 26, 1794, laying an embargo on commerce for thirty days. The immediate cause was the British orders of council of November 6, 1793, followed by a reported hostile speech to Indian tribes by Lord Dorchester. The expectation was that the measure would lead to a restriction of the supply of provisions to the British West Indian fleet, though the letter of the act operated equally against the French. On April 7, 1794, a resolution for a suspension of intercourse with Great Britain, so far as concerns British productions, was introduced. This resolution, upon President Washington announcing a special mission to England (that of Jay) for redress of grievances, was dropped.

The second embargo was in 1807. The Berlin decree of Napoleon and the British orders of council having been so interpreted as to expose the shipping of the United States to risks almost destructive, President Jefferson called a special meeting of Congress on October 25, 1807, and, after reciting these menaces, and the spoliations to which they had already led, recommended "an inhibition of the departure of our vessels from the ports of the United States." The Senate at once, at a single secret session, by a vote of 22 to 6, passed a bill laying an embargo on all shipping, foreign and domestic, in the ports of the United States, with certain exceptions, ordering all vessels abroad to immediately return. The House, with closed doors, passed the act, after a debate of three days, by vote of 82 to 44. This act was repealed on March 1, 1809.

The third embargo followed a message of President Madison of April 1, 1812, and was passed as a measure preliminary to war, on April 6, 1812, and was followed on April 14 by an act prohibiting exportation by land.

The fourth embargo was passed on December 17, 1813, while the war with Great Britain was pending, and prohibited (the object being to prevent the supply of the British blockading squadron) the exportation of all produce or live stock, and for this purpose suspended the coasting trade. On January 19, 1814, the President recommended the repeal of the act, which was found very onerous, and the repeal passed Congress on April 14.

The report of the Senate committee of April 16, 1808, on British and French aggressions on American shipping, sustains the policy of the embargo, on the ground that it "withholds our commercial and agricultural property from the licensed depredations of the great maritime belligerent powers." It was, however, recommended that the President

should be authorized, on such changes in foreign affairs as might make it expedient, to suspend the embargo.

See 3 Am. St. Pap. (For. Rel.), 220 *ff.*

"When a war with England was seriously apprehended in 1794, I approved of an embargo as a temporary measure to preserve our seamen and property, but not with any expectation that it would influence England. I thought the embargo which was laid a year ago a wise and prudent measure for the same reason, namely, to preserve our seamen and as much of our property as we could get in, but not with the faintest hope that it would influence the British councils. At the same time I confidently expected that it would be raised in a few months. I have not censured any of these measures, because I knew the fond attachment of the nation to them; but I think the nation must soon be convinced that they will not answer their expectations. The embargo and the non-intercourse laws, I think, ought not to last long. They will lay such a foundation of disaffection to the National Government as will give great uneasiness to Mr. Jefferson's successor, and produce such distractions and confusions as I shudder to think of."

Mr. J. Adams to Mr. Varnum, Dec. 26, 1808. 9 John Adams's Works, 606.

For an exposition of the circumstances under which the embargo statutes were repealed, see Mr. Jefferson to Mr. Giles, Dec. 25, 1825. 7 Jeff. Works, 424.

"'To repeal the embargo altogether would be preferable to either of the other courses, but would, notwithstanding, be so fatal to us, in all respects, that we should long feel the wound it would inflict, unless, indeed, some other expedient as strong, at least, and as efficacious in all its bearings, can (as I fear it cannot) be substituted in its place.

"'War would seem to be the unavoidable result of such a step. If our commerce should not flourish in consequence of this measure, nothing would be gained by it but dishonor; and how it could be carried on to any valuable purpose it would be difficult to show. If our commerce should flourish in spite of French and British edicts, and the miserable state of the world, in spite of war with France, if that should happen, it would, I doubt not, be assailed in some other form. The spirit of monopoly has seized the people and Government of this country. We shall not, under any circumstances, be tolerated as rivals in navigation and trade. It is in vain to hope that Great Britain will voluntarily foster the naval means of the United States. Even as allies we should be subjects of jealousy. It would be endless to enumerate in detail the evils which would cling to us in this new career of vassalage and meanness, and tedious to pursue our backward course to the extinction of that very trade to which we had sacrificed everything else.

"'On the other hand, if we persevere we must gain our purpose at last. By complying with the little policy of the moment we shall be lost. By a great and systematic adherence to principle we shall find the end of our difficulties.'"

Mr. Pinkney's view of the embargo. 3 Randall's Jefferson, 257.

Mr. Clay, Speaker of the House, in a private letter, dated March 15, 1812, addressed to Mr. Monroe, Secretary of State, writes:

"Since I had the pleasure of conversing with you this morning I have concluded, in writing, to ask a consideration of the following propositions:

"That the President recommend an embargo to last, say, 30 days, by a confidential message.

"That a termination of the embargo be followed by war.

"That he also recommend provision for the acceptance of 10,000 volunteers for a short period, whose officers are to be commissioned by the President.

"The objection to the embargo is that it will impede sales. The advantages are that it is a measure of some vigor upon the heels of Henry's disclosure; that it will give tone to public sentiment, operate as a notification, repressing indiscreet speculation, and enabling the President to look to the probable period of the commencement of hostilities, and thus to put under shelter before the storm. It will, above all things, powerfully accelerate preparations for the war."

Monroe MSS., Dept. of State.

"On April 1, 1812, the President sent a message to Congress, recommending an embargo. Mr. Grundy said that he understood it was 'as a war measure, and it was meant that it should directly lead to war,' and Calhoun afterwards declared 'its manifest propriety as a prelude.'"

Von Holst's Life of Calhoun, 19.

As to embargo of 1808, see 9 John Adams's Works, 312, 604, 606, 607.

The correspondence, in 1808, of Mr. Pinkney, minister to London, with Mr. Canning, as to modification of the embargo, is given in 3 Am. St. Pap. (For. Rel.), 223 *ff*.

The objections taken by the opposition in Congress to the first embargo are given in Quincy's Speeches, 31, 53, 247.

As giving the policy of the Administration, see 5 Jeff. Works, 227, 252, 258, 271, 289, 336, 341, 352.

Curious notices of the social effect of the embargo are found in Lossing's Ency. of United States Hist., tit. "Embargo."

As to evasion of embargo by surreptitious trade with Canada, see 1 Ingersoll's Late War, 1st series, 485.

"I have read attentively your letter to Mr. Wheaton on the question whether, at the date of the message to Congress recommending the embargo of 1807, we had knowledge of the order of council of November 11; and according to your request I have resorted to my papers, as well as my memory, for the testimony these might afford additional to yours. There is no fact in the course of my life which I recollect more strongly than that of my being at the date of the message in possession of an English newspaper containing a copy of the proclamation. I am almost certain, too, that it was under the ordinary authentication of the Government; and between November 11 and December 17 there was time enough (thirty-five days) to admit the receipt of such a paper, which I think came to me through a private channel, probably put on board some vessel about sailing, the moment it appeared.

"Turning to my papers I find that I had prepared a first draft of a message in which was this paragraph: 'The British regulations had before reduced us to a direct voyage, to a single port of their enemies, and it is now believed they will interdict all commerce whatever with them. A proclamation, too, of that Government of ——— (not officially, indeed, communicated to us, yet so given out to the public as to become a rule of action with them) seems to have shut the door on all negotiation with us except as to the single aggression on the Chesapeake.' You, however, suggested a substitute (which I have now before me, written with a pencil and) which, with some unimportant amendments, I preferred to my own, and was the one I sent to Congress. It was in

these words, 'the *communications* now made, showing the great and increasing dangers with which seamen, etc., ports of the United States.' This shows that we communicated to them papers of information on the subject; and as it was our interest and our duty to give them the strongest information we possessed to justify our opinion and their action on it, there can be no doubt we sent them this identical paper."

Mr. Jefferson to Mr. Madison, July 14, 1824. 7 Jeff. Works, 373.

The embargo act of the 25th of April, 1808 (2 Stat. L., 499), related only to vessels ostensibly bound to some port in the United States, and a seizure after the termination of the voyage is unjustifiable; and no further detention of the cargo is lawful than what is necessarily dependent on the detention of the vessel. It is not essential to the determination of a voyage that the vessel should arrive at her original destination; it may be produced by stranding, stress of weather, or any other cause inducing her to enter another port with a view to terminate her voyage *bona fide*.

Otis *v.* Walter, 2 Wheat., 18.

Under the embargo act of the 22d of December, 1807 (2 Stat. L., 451), the words, "an embargo shall be laid," not only imposed upon the public officers the duty of preventing the departure of registered or sea-letter vessels on a foreign voyage, but prohibited their sailing, and consequently rendered them liable to forfeiture under the supplementary act of the 9th of January, 1808 (2 Stat. L., 453).

In such case, if the vessel be actually and *bona fide* carried by force to a foreign port, she is not liable to forfeiture; but if the capture, under which it was alleged that the vessel was compelled to go to a foreign port, was fictitious and collusive, she was liable to condemnation.

The William King, 2 Wheat., 148.

## VII. *DISPLAY OF FORCE.*

### § 321.

"In reviewing these injuries from some of the belligerent powers, the moderation, the firmness, and the wisdom of the legislature will all be called into action. We ought still to hope that time and a more correct estimate of interest, as well as of character, will produce the justice we are bound to expect. But should any nation deceive itself by false calculations, and disappoint that expectation, we must join in the unprofitable contest of trying which party can do the other the most harm. Some of these injuries may, perhaps, admit a peaceable remedy. Where that is competent it is always the most desirable. But some of them are of a nature to be met by force only, and all of them may lead to it. I cannot, therefore, but recommend such preparations as circumstances call for. The first object is to place our sea-port towns out of the dan-

ger of insult. Measures have been already taken for furnishing them with heavy cannon for the service of such land batteries as may make a part of their defense against armed vessels approaching them. In aid of these it is desirable that we should have a competent number of gunboats; and the number to be competent must be considerable. If immediately begun they may be in readiness for service at the opening of the next season. Whether it will be necessary to augment our land forces will be decided by occurrences probably in the course of your session."

President Jefferson, Fifth Annual Message, 1805.

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

"Similar motives have rendered expedient the keeping of a like force on the coasts of Peru and Chili, on the Pacific. The irregular and convulsive character of the war upon the shores has been extended to the conflicts upon the ocean. An active warfare has been kept up for years with alternate success, though generally to the advantage of the American patriots; but their naval forces have not always been under the control of their own Governments. Blockades, unjustifiable upon any acknowledged principles of international law, have been proclaimed by officers in command, and though disavowed by the supreme authorities, the protection of our own commerce against them has been made cause of complaint and of erroneous imputations against some of the most gallant officers of our Navy. Complaints equally groundless have been made by the commanders of the Spanish royal forces in those seas, but the most effective protection to our commerce has been the flag, and the firmness of our own commanding officers. The cessation of the war, by the complete triumph of the patriot cause, has removed, it is hoped, all cause of dissension with one party and all vestige of force of the other. But an unsettled coast of many degrees of latitude, forming a part of our own territory, and a flourishing commerce and fishery, extending to the islands of the Pacific and to China, still require that the

protecting power of the Union should be displayed under its flag, as well upon the ocean as upon the land."

President J. Q. Adams, First Annual Message, 1825.

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

Mr. Conrad, Acting Sec. of State, to Mr. Kennedy, Nov. 5, 1852. MSS. Notes, Special Missions.

In 1858 the Secretary of the Navy was asked to send a naval force to Java, to take measures to secure the trial of persons charged with assassinating certain American citizens.

Mr. Cass, Sec. of State, to Mr. Toucey, Aug. 10, 1858. MSS. Dom. Let. Cited *supra*, § 242. See also App., Vol. III, § 321.

As to extreme measures to exact payment of debt, see *supra*, § 222. See Mr. Cass to Mr. Toucey, July 28, 1858; *ibid.*

"In the view that the employment of other than peaceful means might become necessary to obtain 'just satisfaction' from Paraguay, a strong naval force was concentrated in the waters of the La Plata to await contingencies, whilst our commissioner ascended the river to Asuncion. The Navy Department is entitled to great credit for the promptness, efficiency, and economy with which this expedition was fitted out and conducted. It consisted of nineteen armed vessels, great and small, carrying two hundred guns and twenty-five hundred men, all under the command of the veteran and gallant Shubrick. The entire expenses of the expedition have been defrayed out of the ordinary appropriations for the naval service, except the sum of $289,000 applied to the purchase of seven of the steamers constituting a part of it, under the authority of the naval appropriation act of the 3d March last. It is believed that these steamers are worth more than their cost, and they are all now usefully and actively employed in the naval service.

"The appearance of so large a force, fitted out in such a prompt manner, in the far distant waters of the La Plata, and the admirable conduct of the officers and men employed in it, have had a happy effect in favor of our country throughout all that remote portion of the world."

President Buchanan, Third Annual Message, 1859. See *supra*, §§ 38, 57.

"The hostile attitude of the Government of Paraguay toward the United States early commanded the attention of the President. That Government had, upon frivolous and even insulting pretexts, refused to ratify the treaty of friendship, commerce, and navigation, concluded with it on the 4th March, 1853, as amended by the Senate, though this only in mere matters of form. It had seized and appropriated the property of American citizens residing in Paraguay, in a violent and arbitrary manner; and finally, by order of President Lopez, it had fired upon the U. S. S. Water Witch (1st February, 1855), under Commander

Thomas J. Page, of the Navy, and killed the sailor at the helm, whilst she was peacefully employed in surveying the Parana River, to ascertain its fitness for steam navigation. The honor as well as the interests of the country demanded satisfaction.

"The President brought the subject to the notice of Congress in his first annual message (8th December, 1857). In this he informed them that he would make a demand for redress on the Government of Paraguay in a firm but conciliatory manner, but at the same time observed, that 'this will the more probably be granted if the Executive shall have authority to use other means in the event of a refusal. This is accordingly recommended.' Congress responded favorably to this recommendation. On the 2d June, 1858, they passed a joint resolution authorizing the President 'to adopt such measures, and use such force as, in his judgment, may be necessary and advisable, in the event of a refusal of just satisfaction by the Government of Paraguay, in connection with the attack on the U. S. S. Water Witch, and with other matters referred to in the annual message.' They also made an appropriation to defray the expenses of a commissioner to Paraguay, should he deem it proper to appoint one, 'for the adjustment of difficulties' with that Republic.

"Paraguay is situated far in the interior of South America, and its capital, the city of Asuncion, on the left bank of the river Paraguay, is more than a thousand miles from the mouth of the La Plata.

"The stern policy of Dr. Francia, formerly the dictator of Paraguay, had been to exclude all the rest of the world from his dominions, and in this he had succeeded by the most severe and arbitrary measures. His successor, President Lopez, found it necessary, in some degree, to relax this jealous policy; but, animated by the same spirit, he imposed harsh restrictions in his intercourse with foreigners. Protected by his remote and secluded position, he but little apprehended that a navy from a far distant country could ascend the La Plata, the Parana, and the Paraguay and reach his capital. This was doubtless the reason why he had ventured to place us at defiance. Under these circumstances, the President deemed it advisable to send with our commissioner to Paraguay, Hon. James B. Bowlin, a naval force sufficient to exact justice should negotiation fail. This consisted of nineteen armed vessels, great and small, carrying two hundred guns and twenty-five hundred sailors and marines, all under the command of the veteran and gallant Shubrick. Soon after the arrival of the expedition at Montevideo, Commissioner Bowlin and Commodore Shubrick proceeded (30th December, 1858) to ascend the rivers to Asuncion in the steamer Fulton, accompanied by the Water Witch. Meanwhile the remaining vessels rendezvoused in the Parana, near Rosario, a position from which they could act promptly, in case of need.

"The commissioner arrived at Asuncion on the 25th January, 1859, and left it on the 10th February. Within this brief period he had ably and successfully accomplished all the objects of his mission. In addition to ample apologies, he obtained from President Lopez the payment of $10,000 for the family of the seaman (Chaney) who had been killed in the attack on the Water Witch, and also concluded satisfactory treaties of indemnity, and of navigation and commerce, with the Paraguayan Government. Thus the President was enabled to announce to Congress in his annual message (December, 1859), that 'all our difficulties with Paraguay had been satisfactorily adjusted.'

"Even in this brief summary it would be unjust to withhold from Secretary Toucey a commendation for the economy and efficiency he

displayed in fitting out this expedition. It is a remarkable fact in our history that its entire expenses were defrayed out of the ordinary appropriations for the naval service. Not a dollar was appropriated by Congress for this purpose, unless we may except the sum of $289,000 for the purchase of several small steamers of light draught, worth more than their cost, and which were afterwards usefully employed in the ordinary naval service.

"It may be remarked that the President, in his message already referred to, justly observes, 'that the appearance of so large a force, fitted out in such a prompt manner, in the far distant waters of the La Plata, and the admirable conduct of the officers and men employed in it, have had a happy effect in favor of our country throughout all that remote portion of the world.'"

Mr. Buchanan's defense, 265, 256, quoted in 2 Curtis' Buchanan, 224.

Calvo's account of this transaction is substantially as follows (droit int. (3d ed.), vol. i, 4 16):

In 1853 the United States and Paraguay concluded a convention as to the free navigation of the river, and a treaty of commerce and navigation. The treaty and convention not having been ratified in consequence of certain action of the Senate, the Government did not hesitate to send Mr. Hopkins as consul to Assomption, who was without difficulty officially received by the Governor of Paraguay. It was alleged that Mr. Hopkins added to his consular functions certain private speculations based on concessions in Paraguay. He attempted in vain to obtain funds for this purpose in Paris and London. He purchased, as part of the scheme, a ship in New York, which he called the Assomption, and which he insured for $50,000. This vessel was shipwrecked on her first voyage, and the insurance money turned as capital into a corporation entitled, Compagnie de commerce et de navigation de Paraguay. Shortly afterwards, Mr. Hopkins, in his double capacity of consul and of speculator, fell into such difficulties at Paraguay as induced the Government to recall his *exequatur*. At this time a United States ship-of-war, the Water Witch, was at Assomption, charged with the exploration of the affluents of the river La Plata. Mr. Hopkins, on the ground that his safety and that of his "compatriots" were assailed, visited the ship and obtained the aid of certain armed sailors of the ship to go ashore with him and to carry off from the consular office the papers belonging to the "company." The difficulties that then originated were aggravated in 1855 by an attempt of the Water Witch to force its way through a channel of the river Paraguay, which was generally interdicted, and which was open to the fire of the Fort Ptapira. The Government of the United States, to obtain redress, sent a squadron of twenty ships with two thousand men; but the fleet was detained on its way by an offer of mediation by the Argentine Republic. This mediation resulted in a treaty, signed February 4, 1859, which, among other things, provided that the commercial claims of Mr. Hopkins be referred to arbitrators, to be chosen by the two Governments, respectively. The arbitrators reported that Mr. Hopkins had no claim of any kind against Paraguay, and in this report the commissioner of the United States joined. Calvo maintains that the precipitate action of the Government of the United States was a wrong, not merely to Paraguay, but to the United States, which, to support an unfounded claim, got up an expedition whose mere preparation cost over seven million of dollars.

# CHAPTER XVI.

## VISIT, SEARCH, CAPTURE, AND IMPRESSMENT


I. As a belligerent right.
Visit in such cases permitted, § 325.
II. In cases of piracy.
On probable cause papers may be demanded, § 326.
III. Visit no longer permitted in peace, § 327.
IV. Action of prize court may be essential, § 328.
V. When having jurisdiction such court may conclude, § 329.
VI. But not when not in conformity with international law, § 329*a*.
VII. Proceedings of such court, § 330.
VIII. Impressment.
Its history and abandonment, § 331.


### I. *AS A BELLIGERENT RIGHT.*

#### Visit in such cases permitted.

#### § 325.

In the draft convention suggested on January 5, 1804, by Mr. Madison, Secretary of State, to Mr. Monroe, minister to England, occurs the following:

"Article III. If the ships of either of the parties shall be met with sailing either along the coasts or on the high seas by any ship-of-war or other public or private armed ships of the other party, such ships-of-war or other armed vessels shall, for avoiding all disorder in visiting and examining the same, remain out of cannon shot unless the state of the sea or the place of meeting render a nearer approach necessary, and shall in no case compel or require such vessel to send her boat, her papers, or any person from on board to the belligerent vessel, but the belligerent vessel may send her own boat to the other and may enter her to the number of two or three men only, who may in an orderly manner make the necessary inquiries concerning the vessel and her cargo; and it is agreed that effectual provision shall be made for punishing violations of any part of this article."

On this Mr. Madison makes the following observations:

"This regulation is conformable to the law of nations, and to the tenor of all treaties which define the belligerent claim of visiting and searching neutral vessels. No treaty can be cited in which the practice of compelling the neutral vessel to send its boat, its officers, its people, or its papers to the belligerent vessel, is authorized. British treaties, as well as those to which she is not a party, in every instance where a regulation of the claim is undertaken, coincide with the article here proposed.

The article is in fact almost a transcript of the —— article of the treaty of 1786 between Great Britain and France.

"The regulation is founded on the best reasons: 1st. It is sufficient for the neutral that he acquiesces in the interruption of his voyage, and the trouble of the examination imposed by the belligerent commander. To require a positive and active co-operation on his part in behalf of the latter is more than can be justified on any principle. 2d. The belligerent party can always send more conveniently to the neutral vessel than this can send to the belligerent vessel; having neither such fit boats for the purpose, especially in a rough sea, nor being so abundantly manned. 3d. This last consideration is enforced by the numerous and cruel abuses committed in the practice of requiring the neutral vessel to send to the belligerent. As an example you will find in the documents now transmitted a case where neither the smallness and leakiness of the boat, nor the boisterous state of the weather, nor the pathetic remonstrances of the neutral commander had any effect on the imperious injunctions of the belligerent, and where the task was performed at the manifest peril of the boat, the papers, and the lives of the people. The limitation of the number to be sent on board the neutral vessel is a reasonable and usual precaution against the danger of insults and pillage."

MSS. Inst., Ministers.

Another unjustifiable measure is "the mode of search practiced by British ships, which, instead of remaining at a proper distance from the vessel to be searched, and sending their own boat with a few men for the purpose, compel the vessel to send her papers in her own boat, and sometimes with great danger from the condition of the boat and the state of the weather."

Mr. Madison, Sec. of State, report, Jan. 25, 1806. MSS. Report Book. 2 Am. St. Pap. (For. Rel.), 726.

"England is allowed, when she is at war, to visit neutral vessels for the purpose of seizing merchandise either *belonging to her enemy*, or considered as contraband *destined for her enemy*, and soldiers or other *combatants in the service* of her enemy. But she never had before claimed the right of visiting or seizing, under the pretense of retaking what belonged to herself. If the right was conceded to her of seizing, on board vessels of other nations, the seamen she claims as belonging to her, she would equally have that of seizing merchandise claimed by her subjects as belonging to them, and there would no longer be any acknowledged line of demarcation which would prevent her from exercising an unlimited jurisdiction over the vessels of all other nations."

Mr. Gallatin to the Emperor of Russia; presented June 19, 1814, to the Emperor Alexander.

"The right of search has heretofore been so freely used and so much abused to the injury of our commerce that it is regarded as an odious doctrine in this country, and if exercised against us harshly in the approaching war will excite deep and widespread indignation. Caution on the part of belligerents in exercising it towards us in cases where

sanctioned by usage would be a wise procedure. As the law has been declared by decisions of courts of admiralty and elementary writers, it allows belligerents to search neutral vessels for articles contraband of war and for enemies' goods. If the doctrine is so modified as to exempt from seizure and confiscation enemies' property under a neutral flag, still the right to seize articles contraband of war on board of neutral vessels implies the right to ascertain the character of the cargo. If used for such a purpose, and in a proper manner, it is not probable that serious collisions would occur between neutrals and belligerents.

"A persistent resistance by a neutral vessel to submit to a search renders it confiscable according to the settled determinations of the English admiralty. It would be much to be regretted if any of our vessels should be condemned for this cause, unless under circumstances which compromitted their neutrality."

Mr. Marcy, Sec. of State, to Mr. Buchanan, Apr. 13, 1854. MSS. Inst., Gr. Brit. On this topic see correspondence in 1858, attached to President Buchanan's annual message, 2d sess., 35th Cong., Senate Ex. Doc., 1; correspondence in respect to the search, in 1858, of United States vessels by foreign armed cruisers in the Gulf of Mexico, is in Senate Ex. Doc. 52, 35th Cong., 1st sess., Brit. and For. St. Pap., 1864–'65, vol. 55.

"The Trent, though she carried mails, was a contract or merchant vessel—a common carrier for hire. Maritime law knows only three classes of vessels—vessels of war, revenue vessels, and merchant vessels. The Trent falls within the latter class. Whatever disputes have existed concerning a right of visitation or search in time of peace, none, it is supposed, has existed in modern times about the right of a belligerent in time of war to capture contraband in neutral and even friendly merchant vessels, and of the right of visitation and search, in order to determine whether they are neutral, and are documented as such according to the law of nations."

Mr. Seward to Lord Lyons, Dec. 26, 1861. MSS. Notes, Gr. Brit. See as to this case, *infra*, §§ 328, 374.

"When vessels belonging to citizens of the United States have been seized and are now navigated on the high seas by persons not representing any Government or belligerent power recognized by the United States, such vessels may be captured and rescued by their owners, or by United States cruisers acting for such owners; and all force which is necessary for such purposes may be used to make the capture effectual."

Report of solicitor of Department of State, affirmed by Mr. Bayard, Sec. of State, to Mr. Scruggs, May 19, 1885. MSS. Inst., Colombia.

The right of search is not a right wantonly to vex and harass neutral commerce, or to indulge the idle and mischievous curiosity of looking into neutral trade, or the assumption of a right to control it. It is a right growing out of, and ancillary to, the right of capture, and can never exist except as a means to that end.

The Nereide, 9 Cranch., 388.

As a belligerent right it cannot be questioned, but it must be conducted with as much regard to the rights and safety of the vessel detained as is consistent with a thorough examination of the character and voyage. Any detention of the vessel beyond what is necessary is unlawful, as is also any transgression of the bounds within which the examination should be confined.

The Anna Maria, 2 Wheat., 327.

To detain for examination is a right which a belligerent may exercise over every vessel, not a national vessel, that he meets with on the ocean.

The Eleanor, *ibid.*, 345.

It is lawful, in order to facilitate the exercise of the right of search, to assume the guise of a friend or of an enemy. If, in consequence of the use of this stratagem, the crew of the vessel detained abandon their duty before they are actually made prisoners of war, and the vessel is thereby lost, the captors are not responsible.

*Ibid.*

The modern usages of war authorize the bringing of one of the principal officers on board the cruising vessel, with his papers, for examination. But in a case of detention merely for search, where the vessel is never actually taken out of the possession of her own officers, the captain of the cruiser may detain the vessel by orders from his own quarter-deck, and the officers of the captured vessel must obey at their peril.

*Ibid.*

The right of search is strictly a belligerent right.

The Antelope, 10 Wheat., 66; The Marianna Flora, 11, *ibid.*, 1.

A vessel and cargo, even when perhaps owned by neutrals, may be condemned as enemy property because of the employment of the vessel in enemy trade, and because of an attempt to violate a blockade and to elude visitation and search.

The Baigorry, 2 Wall., 474.

The captain of a merchant steamer when brought to by a man-of-war, is not privileged from sending his papers on board, if so required, by the fact that he has a Government mail in his charge. On the contrary, he is bound by that circumstance to strict performance of neutral duties and to special respect for belligerent rights.

The Peterhoff, 5 Wall., 28.

A cruiser of one nation has a right to know the national character of any strange ship he may meet at sea; but this right is not a perfect one, and the violation of it cannot be punished by capture and condemnation nor even by detention. The party making the inquiry must put

up his own colors, or in some other way make himself fully known, before he can lawfully demand such knowledge from the other vessel. If this be refused, the inquiring vessel may fire a blank shot, and, in case of further delay, a shotted gun may be fired across the bows of the delinquent, by way of positive *summons*. Any measures beyond the summoning shot, which the commander of an armed ship may take for the purpose of ascertaining the nationality of another vessel, must be at his peril; for the right of a ship to pass unmolested depends upon her actual character, and not upon that which was erroneously attributed to her, even though her own conduct may have caused the mistake. The latter may affect the amount of reparation, but not the lawfulness of the act.

9 Op., 455, Black, 1860.

The right of a public ship to hail or speak with a stranger must be exercised within the same limits as that of any other authorized armed vessel. When a vessel thus interrogated answers either in words or by hoisting her flag, the response must be taken for true, and she must be allowed to keep her way. But this right of inquiring can be exercised only on the high seas, and is limited to time of peace.

*Ibid.*

The right of search, as a belligerent right, is limited as follows:

(*a*) A neutral ship is not to be ordinarily searched when on a voyage between two neutral ports.

(*b*) As a belligerent right it can only be exercised when war is raging.

(*c*) It was to be under direction of the commanding officer of the belligerent ship, and through the agency of an officer in uniform.

(*d*) It must be based on probable cause; though the fact that this cause turned out afterwards to be a mistake, does not of itself make the arrest wrongful. (See Lushington, Prize Law, §§ 25, 94. But wanton capturing without such cause subjects the captor to damages. The Thompson, 3 Wall., 155; The Dashing Wave, 5 Wall., 170.)

(*e*) Contraband goods cannot ordinarily be seized and appropriated by the captor. His duty is to take the vessel into a prize court, by whom the question is to be determined. (As to prize courts, see *infra*, § 329; as to contraband, *infra*, § 368.)

(*f*) Where the right exists, a belligerent cruiser is justified in enforcing it by all means in his power. (Lawrence on Visitation and Search.)

(*g*) In case of violent resistance to a legitimate visitation, the vessel so resisting may be open to condemnation by a prize court as prize. But this is not the case with mere attempt at flight. And there should be no condemnation of a neutral vessel whose officers, having no reasonable ground to believe in the existence of war, resisted search. (Field's Int. Law, § 871.)

(*h*) The right of search, so it is held by the powers of continental Europe, is not to be extended to neutral ships sailing under the convoy of a war ship of the same nation. This view, however, has not been accepted by Great Britain. But in any view, the commanding officer of the convoy must give assurance that the suspected vessel is of his

nationality, under his charge, and has no contraband articles on board. (Twiss, Law of Nations, part ii, § 96, maintains it to be a clear maxim of law that "a neutral vessel is bound in relation to her commerce to submit to the belligerent right of search." It is not competent, therefore, he insists, for a neutral merchant to exempt his vessel from the belligerent right of search, by placing it under the convoy of a neutral or enemy's man-of-war. See Kent Com., i, 154.)

The doctrine of our courts in this relation is stated above.

Mere evasive conduct, or subterfuges, which might be the result of ignorance or terror, are not conclusive proof of culpability.

The Pizarro, 2 Wheat., 327.

Even throwing papers overboard is open to explanation, and, without other proof, does not conclusively show that the cargo was enemy's property. (1 Kent Com., 158, Holmes's note, citing the Ella Warley, Blatch. Pr., 204, and other cases in same volume; The Johanna Emilie, Spink's Prize C., 12. And see remarks by Mansfield, C. J., in Bernardi *v.* Motteux, Dougl., 581; "The right of search," according to Dr. Woolsey (Int. Law, § 190), "is by its nature confined within narrow limits, for it is merely a method of ascertaining that certain specific violations of right are not taking place, and would otherwise be a great violation itself of the freedom of passage on the common pathway of nations. In the first place, it is only a war right. The single exception to this is spoken of in § 194, viz, that a nation may lawfully send a cruiser in pursuit of a vessel which has left its port under suspicion of having committed a fraud upon its revenue laws, or some other crime. This is merely the continuation of a pursuit beyond the limits of maritime jurisdiction with the examination conducted outside of these bounds, which, but for the flight of the ship, might have been conducted within. In the second place, it is applicable to merchant ships alone. Vessels of war, pertaining to the neutral, are exempt from its exercise, both because they are not wont to convey goods, and because they are, as a part of the power of the state, entitled to confidence and respect. If a neutral state allowed or required its armed vessels to engage in an unlawful trade, the remedy would have to be applied to the state itself. To all this we must add that a vessel in ignorance of the public character of another, for instance, suspecting it to be a piratical ship, may without guilt require it to lie to, but the moment the mistake is discovered, all proceedings must cease. (§§ 54, 195). In the third place, the right of search must be exerted in such a way as to attain its object, and nothing more. Any injury done to the neutral vessel or to its cargo, any oppressive or insulting conduct during the search, may be good ground for a suit in the court to which the cruiser is amenable, or even for interference on the part of the neutral state to which the vessel belongs." Mr. Seward, in his letter to Lord Lyons of December 26, 1861 (on the Trent case), says: "Whatever disputes have existed concerning a right of visitation or search in times of peace, none, it is supposed, has existed in modern times about the right of a belligerent in time of war to capture contraband in neutral and even friendly merchant vessels, and of the right of visitation and search, in order to determine whether they are neutral and are documented as such according to the law of nations." See Lawrence's Wheaton, pt. iv, chap. iii, § 18.

II. *IN CASES OF PIRACY.*

ON PROBABLE CAUSE PAPERS MAY BE DEMANDED.

§ 326.

The definition and limitations of piracy are hereafter independently discussed, *infra*, §§ 380 *ff.*

The right to search on suspicion of piracy is like a right to arrest a suspected felon, and subjects to damages if the charge be not substantiated.

*Infra*, §§ 327 *ff.*

"The right of visitation is by the law of nature an intercourse of mutual benefit, like that of strangers meeting in a wilderness. The right of search is for pirates in peace and for enemies in war."

11 J. Q. Adams's Mem., 142.

III. *VISIT NO LONGER PERMITTED IN PEACE.*

§ 327.

On May 16, 1811, a collision took place between the United States frigate President, and the British sloop-of-war Little Belt, near Cape Charles. Only one person was wounded on the President, though her rigging was injured. On the Little Belt there were thirteen killed, and a number wounded. Courts of inquiries were held in both countries, and with conflicting results.

The British Government took the ground that the shot fired by the President, for the purpose of salute, was a hostile attack, and was to be returned as such. On the other hand, it was maintained by Mr. Monroe, Secretary of State, in a note to Mr. Foster, British minister, October 11, 1811 (MSS. Notes, For. Leg.; 3 Am. St. Pap. (For. Rel.), 476), "that Commodore Rodgers (of the President) pursued a vessel which had at first pursued him, and hailed her as soon as he approached within suitable distance, are circumstances which can be of no avail to Captain Bingham (of the Little Belt). The United States have a right to know the national character of the armed ships which hover on their coast, and whether they visit it with friendly or illicit views; it is a right inseparable from the sovereignty of every independent state, and intimately connected with their tranquillity and peace. * * * For these reasons the conduct of Commodore Rodgers, in approaching the Little Belt to make the necessary inquiries and exchange a friendly salute, was strictly correct."

The proceedings of the court of inquiry held in the United States are given in 3 Am. St. Pap. (For. Rel.), 477 *ff.*

A number of witnesses were examined who concurred in testifying that the Little Belt did not display her colors until it was too dark to distinguish them, and that the first shot was fired by her and was returned by a single gun, and that the general fire was commenced by the Little Belt. It was also proved that when the fire in the Little Belt

was silenced, Commodore Rodgers exerted himself to save her from further injury. The findings of the court were in accordance with the evidence.

As to hauling down flag, see App., Vol. III, § 328.

As to seizure on suspicion if concerned in slave-trade, "He (Lord Castlereagh) added, that no peculiar structure or previous appearances in the vessel searched, no presence of irons, or other presumptions of criminal intention—nothing but the actual finding of slaves on board was ever to authorize a seizure or detention."

Mr. Rush, minister at London, to Mr. Adams, Sec. of State, Apr. 15, 1818. MSS. Dispatches, Gr. Brit.

It is maintained "that the admission of a right in the officers of foreign ships-of-war to enter and search the vessels of the United States, in time of peace, under any circumstances whatever, would meet with universal repugnance in the public opinion of this country; that there would be no prospect of a ratification by advice and consent of the Senate to any stipulation of that nature; that the search by foreign officers, even in time of war, is so obnoxious to the feelings and recollections of this country that nothing could reconcile them to the extension of it, however qualified or restricted, to a time of peace; and that it would be viewed in a still more aggravated light, if, as in the treaty with the Netherlands, connected with a formal admission that even vessels under convoy of ships-of-war of their own nation should be liable to search by the ships-of-war of another."

Mr. Adams, Sec. of State, to Messrs. Gallatin and Rush, Nov. 2, 1818. MSS. Inst., Ministers.

"The Government of the United States has never asserted, but has invariably disclaimed the pretension of a right to authorize the search, by the officers of the United States, in time of peace, of foreign vessels upon the high seas, without their jurisdiction."

Mr. Adams, Sec. of State, to Mr. de Neuville, Feb. 22, 1822. MSS. Notes, For. Leg.

"In the treaties of Great Britain with Spain, Portugal, and the Netherlands for the suppression of the slave trade, heretofore communicated, with the invitation to the United States to enter into similar engagements, three principles were involved, to neither of which the Government of the United States felt itself at liberty to accede. The first was the mutual concession of the right of search and capture, in time of peace, over merchant vessels on the coast of Africa. The second was the exercise of that right, even over vessels under convoy of the public officers of their own nation; and the third was the trial of the captured vessels by mixed commissions in colonial settlements under no subordination to the ordinary judicial tribunals of the country to which the party brought before them for trial should belong. In the course of the correspondence relating to these proposals it has been suggested that a substitute for the trial by mixed commissions might be agreed to, and in your letter of the 8th of April an *expectation* is

authorized that an arrangement for the adjudication of the vessels detained might leave them to be disposed of in the usual way by the sentence of a court of admiralty in the country of the captor, or place them under the jurisdiction of a similar court in the country to which they belonged; to the former alternative of which you anticipate the unhesitating admission of the United States in consideration of the aggravated nature of the crime as acknowledged by their laws, which would be thus submitted to a *foreign* jurisdiction. But it was precisely because the jurisdiction was *foreign* that the objection was taken to the trial by mixed commissions; and if it transcended the constitutional authority of the Government of the United States to subject the persons, property, and reputation of their citizens to the decisions of a court partly composed of their own countrymen, it might seem needless to remark that the constitutional objection could not diminish in proportion as its cause should increase, or that the power incompetent to make American citizens amenable to a court consisting one-half of foreigners, should be adequate to place their liberty, their fortune, and their fame at the disposal of tribunals entirely foreign. I would further remark that the sentence of a court of admiralty in the country of the captor is not the *ordinary way* by which the merchant vessels of one nation, taken on the high seas by the officers of another, are tried in time of peace. There is, in the ordinary way, no right whatever existing to take, to search, or even to board them; and I take this occasion to express the great satisfaction with which we have seen this principle solemnly recognized by the recent decision of a British court of admiralty. * * *

"In the objections heretofore disclosed to the concession desired, of the mutual and qualified right of search, the principal stress was laid upon the repugnance which such a concession would meet in the public feeling of this country, and of those to whom its interests are intrusted in the department of its government, the sanction of which is required for the ratification of treaties. The irritating tendency of the practice of search, and the inequalities of its probable operation, were slightly noticed and have been contested in argument or met by propositions of possible palliations or remedies for anticipated abuses in your letter. But the source and foundation of all these objections was, in our former correspondence, scarcely mentioned, and never discussed. They consist in the nature of the right of search at sea, which, as recognized or tolerated by the usage of nations, is a right exclusively of *war*, never exercised but by an outrage upon the rights of *peace*."

Mr. Adams, Sec. of State, to Mr. Canning, June 24, 1823. MSS. Notes, For. Leg.

As to discussions of Mr. J. Q. Adams on right of search with Mr. Stratford Canning, see 5 J. Q. Adams's Mem., 181, 182, 192, 210, 232.

The correspondence in 1819–23, in reference to the slave trade and the right of search will be found in House Rep. 348, 21st Cong., 1st sess.

As to right of search, see slave trade convention of 1824. 5 Am. St. Pap. (For. Rel.), 361.

The action of the Senate in 1824 on the proposed convention with Great Britain for the suppression of the slave trade was substantially as follows:

On May 21 it was resolved by a vote of 36 to 2 "that an article be added whereby it shall be free to either of the parties, at any time, to renounce the said convention, on giving six months' notice beforehand. On May 22, after several preliminary votes, it was, by a vote of yeas 29, nays 13, resolved: "That the Senate do advise and consent to the ratification of the convention made and concluded at London the 13th day of March, 1824, between the United States of America and the King of the United Kingdom of Great Britain and Ireland, with the exception of the words 'of America,' in line four of the first article; with the exception of the second article, and the following words in the seventh article: 'And it is further agreed that any individual, being a citizen or subject of either of the two contracting parties, who shall be found on board any vessel not carrying the flag of the other party, nor belonging to the subjects or citizens of either, but engaged in the illicit traffic of slaves, and seized or condemned on that account by the cruisers of the other party, under circumstances, which, by involving such individual in the guilt of slave trading, would subject him to the penalties of piracy, he shall be sent for trial before the competent court in the country to which he belongs, and the reasonable expenses of any witnesses belonging to the capturing vessel, in proceeding to the place of trial, during their detention there, and for their return to their own country, or to their station in its service, shall, in every such case, be allowed by the court, and defrayed by the country in which the trial takes place:' *Provided*, That an article be added, whereby it shall be free to either of the parties at any time to renounce the said convention, giving six months' notice beforehand."

5 Am. St. Pap. (For. Rel.), 362.

"The convention between the United States and Great Britain for the suppression of the African slave trade, is herewith transmitted to you, with the ratification on the part of the United States, under certain modifications and exceptions, annexed as conditions to the advice and consent of the Senate to its ratification.

"The participation of the Senate of the United States in the final conclusion of all treaties to which they are parties is already well known to the British Government, and the novelty of the principles established by the convention, as well as their importance, and the requisite assent of two-thirds of the Senators present to the final conclusion of every part of the ratified treaty, will explain the causes of its ratification under this form. It will be seen that the great and essential principles which form the basis of the compact are admitted to their full extent in the ratified part of the convention. The second article, and the portion of the seventh which it is proposed to expunge, are unes-

sential to the plan, and were not included in the project of convention transmitted to you from hence. They appear, indeed, to be, so far as concerned the United States, altogether inoperative, since they could not confer the power of capturing slave traders under the flag of a third party, a power not claimed either by the United States or Great Britain, unless by treaty; and the United States, having no such treaty with any other power, it is presumed that the bearing of those articles was exclusively upon the flags of those other nations with which Great Britain has already treaties for the suppression of the slave trade, and that, while they give an effective power to the officers of Great Britain, they conferred none upon those of the United States.

"The exception of the coast of America from the seas upon which the mutual power of capturing the vessels under the flag of either party may be exercised, had reference, in the views of the Senate, doubtless, to the coast of the United States. On no part of that coast, unless within the Gulf of Mexico, is there any probability that slave-trading vessels will ever be found. The necessity for the exercise of the authority to capture is, therefore, no greater than it would be upon the coast of Europe. In South America the only coast to which slave traders may be hereafter expected to resort, is that of Brazil, from which it is to be hoped they will shortly be expelled by the laws of the country.

"The limitation by which each party is left at liberty to renounce the convention by six months' notice to the other, may, perhaps, be useful in reconciling other nations to the adoption of its provisions. If the principles of the convention are to be permanently maintained this limitation must undoubtedly be abandoned; and when the public mind shall have been familiarized to the practical operation of the system, it is not doubted that this reservation will, on all sides, be readily given up.

"In giving these explanations to the British Government you will state that the President was fully prepared to have ratified the convention, without alteration, as it had been signed by you. He is aware that the conditional ratification leaves the British Government at liberty to concur therein, or to decline the ratification altogether, but he will not disguise the wish that, such as it is, it may receive the sanction of Great Britain, and be carried into effect. When the concurrence of both Governments has been at length obtained, by exertions so long and so anxiously continued, to principles so important, and for purposes of so high and honorable a character, it would prove a severe disappointment to the friends of freedom and of humanity if all prospect of effective concert between the two nations for the extirpation of this disgrace to civilized man should be lost by differences of sentiment, in all probability transient, upon unessential details."

Mr. Adams, Sec. of State, to Mr. Rush, May 29, 1824. MSS. Inst., Ministers. 5 Am. St. Pap. (For. Rel.), 362.

"I have the honor to inform you that Mr. Secretary Canning has given me to understand, in an interview which I have this day had with him, that his Government finds itself unable to accede to the convention for the suppression of the slave trade, with the alterations and modifications which have been annexed to its ratification on the part of the United States. He said that none of these alterations or modifications would have formed insuperable bars to the consent of Great Britain, except that which had expunged the word America from the first article, but that this was considered insuperable. * * *

"The reasons which Mr. Canning assigned for this determination on the part of Great Britain I forbear to state, as he has promised to address a communication in writing to me upon this subject, where they will be seen more accurately and at large; but to guard against any delay in my receiving that communication, I have thought it right not to lose any time in thus apprising you, for the President's information, of the result."

Mr. Rush to Mr. Adams, Sec. of State, Aug. 9, 1824. 5 Am. St. Pap. (For. Rel.), 364.

The opponents of the slave trade "were introducing, and had already obtained the consent of Spain, Portugal, and the Netherlands, to a new principle of the law of nations more formidable to human liberty than the slave trade itself—a right of the commanders of armed vessels of one nation to visit and search the merchant vessels of another in time of peace."

Mr. J. Q. Adams, April 29, 1819, as reported in 4 J. Q. Adams's Mem., 354.

As to the treaty proposed by the British Government in 1824 (modified by the Senate and then dropped), giving the right of search for suspected slaves, see the remarkable statement of Mr. J. Q. Adams, Apr. 14, 1842. Cong. Globe, 27th Cong., 2d sess, 424; Schuyler's Am. Diplom., 247.

The United States cannot accede to a treaty stipulation extending the right to search supposed slavers to the coasts of the United States.

Mr. McLane, Sec. of State, to Mr. Serurier, Mar. 24, 1834 MSS. Notes, For. Leg.

"The circumstances under which the right of boarding and visiting vessels at sea is usually enforced are defined with sufficient clearness; and even where the right is admitted, usage among civilized nations has prescribed with equal precision the manner in which it is to be exercised. The motive of this communication is, that the British Government should be clearly made sensible that the United States cannot, in justice to their own citizens, permit the recurrence of such causes of complaint. If, in the treaties concluded between Great Britain and other powers, the latter have thought fit, for the attainment of a particular object, to surrender to British cruisers certain rights and authority not recognized by maritime law, the officers charged with the execution of those treaties must bear in mind that their operation cannot give a right to interfere in any manner with the flag of nations not party to them. The United States not being such a party, vessels legally sailing under their flag can in no case be called upon to submit to the operation of

said treaties; and it behooves their Government to protect and sustain its citizens in every justifiable effort to resist all attempts to subject them to the rules therein established, or to any consequent deductions therefrom. * * *

"It is a matter of regret that this practice [of fraudulently using the flag of the United States to cover slavers] has not already been abandoned. The President, on learning the abuses which had grown out of it, and with a view to do away with every cause for its longer continuance, having now directed the establishment of a competent naval force to cruise along those parts of the African coast which American vessels are in the habit of visiting in the pursuit of their lawful commerce, and where it is alleged that the slave trade has been carried on under an illegal use of the flag of the United States, has a right to expect that positive instructions will be given to all Her Majesty's officers to forbear from boarding or visiting vessels under the American flag."

Mr. Forsyth, Sec. of State, to Mr. Stevenson, July 8, 1840. MSS. Inst., Gr. Brit.

An elaborate report of Mr. Forsyth, Sec. of State, Mar. 3, 1841, in relation to seizures or search of American vessels on the coast of Africa, will be found in House Ex. Doc. 115, 26th Cong., 2d sess.

"The President directs me to say that he approves your letter, and warmly commends the motives which animated you in presenting it. The whole subject is now before us here, or will be shortly, as Lord Ashburton arrived last evening; and without intending to intimate at present what modes of settling this point of difference with England will be proposed, you may receive two propositions as certain:

"1st. That in the absence of treaty stipulations the United States will maintain the immunity of merchant vessels on the sea to the fullest extent which the law of nations authorizes.

"2d. That if the Government of the United States, animated by a sincere desire to put an end to the African slave trade, shall be induced to enter into treaty stipulations for that purpose with any foreign power, those stipulations shall be such as shall be strictly limited to their true and single object; such as shall not be embarrassing to innocent commerce; and such especially as shall neither imply any inequality, nor can tend in any way to establish any inequality, in their practical operations."

Mr. Webster, Sec. of State, to Mr. Cass, Apr. 5, 1842. MSS. Inst., France.

"It is known that in December last a treaty was signed in London by the representatives of England, France, Russia, Prussia, and Austria, having for its professed object a strong and united effort of the five powers to put an end to the traffic [the slave trade]. This treaty was not officially communicated to the Government of the United States, but its provisions and stipulations are supposed to be accurately known

to the public. It is understood to be not yet ratified on the part of France.

"No application or request has been made to this Government to become party to this treaty; but the course it might take in regard to it has excited no small degree of attention and discussion in Europe, as the principle upon which it is founded, and the stipulations which it contains, have caused warm animadversions and great political excitement.

"In my message at the commencement of the present session of Congress I endeavored to state the principles which this Government supports respecting the right of search and the immunity of flags. Desirous of maintaining those principles fully, at the same time that existing obligations should be fulfilled, I have thought it most consistent with the honor and dignity of the country that it should execute its own laws and perform its own obligations by its own means and its own power. The examination or visitation of the merchant vessels of one nation by the cruisers of another for any purpose except those known and acknowledged by the law of nations, under whatever restraints or regulations it may take place, may lead to dangerous results. It is far better, by other means, to supersede any supposed necessity or any motive for such examination or visit. Interference with a merchant vessel by an armed cruiser is always a delicate proceeding, apt to touch the point of national honor, as well as to affect the interests of individuals. It has been thought, therefore, expedient, not only in accordance with the stipulations of the Treaty of Ghent, but at the same time as removing all pretext on the part of others for violating the immunities of the American flag upon the seas, as they exist and are defined by the law of nations, to enter into the articles now submitted to the Senate.

"The treaty which I now submit to you proposes no alteration, mitigation, or modification of the rules of the law of nations. It provides simply that each of the two Governments shall maintain on the coast of Africa a sufficient squadron to enforce, separately and respectively, the laws, rights, and obligations of the two countries for the suppression of the slave trade."

President Tyler's message, transmitting the Treaty of Washington to the Senate, Aug. 11, 1842. 6 Webster's Works, 353.

"Without intending or desiring to influence the policy of other Governments on this important subject this Government has reflected on what was due to its own character and position as the leading maritime power on the American continent, left free to make such choice of means for the fulfillment of its duties as it should deem best suited to its dignity. The result of its reflections has been that it does not concur in measures which, for whatever benevolent purpose they may be adopted, or with whatever care and moderation they may be exercised,

have yet a tendency to place the police of the seas in the hands of a single power. It chooses rather to follow its own laws, with its own sanction, and to carry them into execution by its own authority. Disposed to act in the spirit of the most cordial concurrence with other nations for the suppression of the African slave trade, that great reproach of our times, it deems it to be right nevertheless that this action, though concurrent, should be independent; and it believes that from this independence it will derive a greater degree of efficiency. * * *

"You are furnished, then, with the American policy in regard to this interesting subject. First, independent but cordially concurrent efforts of maritime states to suppress, as far as possible, the trade on the coast by means of competent and well-appointed squadrons, to watch the shores and scour the neighboring seas. Secondly, concurrent becoming remonstrance with all Governments who tolerate within their territories markets for the purchase of African negroes. There is much reason to believe that if other states, professing equal hostility to this nefarious traffic, would give their own powerful concurrence and co-operation to these remonstrances, the general effect would be satisfactory, and that the cupidity and crimes of individuals would at length cease to find both their temptation and their reward in the bosom of Christian states and in the permission of Christian Governments."

Mr. Webster, Sec. of State, to Mr. Cass, Aug. 29, 1842. MSS. Inst., France. 6 Webster's Works, 367.

"The objection seems to proceed still upon the implied ground that the abolition of the slave trade is more a duty of Great Britain, or a more leading object with her, than it is or should be with us; as if, in this great effort of civilized nations to do away the most cruel traffic that ever scourged or disgraced the world, we had not as high and honorable, as just and merciful, a part to act as any other nation upon the face of the earth. Let it be forever remembered that in this great work of humanity and justice the United States took the lead themselves. This Government declared the slave trade unlawful; and in this declaration it has been followed by the great powers of Europe. This Government declared the slave trade to be piracy, and in this, too, its example has been followed by other states. This Government—this young Government, springing up in this New World within half a century; founded on the broadest principles of civil liberty, and sustained by the moral sense and intelligence of the people—has gone in advance of all other nations in summoning the civilized world to a common effort to put down and destroy a nefarious traffic, reproachful to human nature. It has not deemed that it suffers any derogation from its character or its dignity, if, in seeking to fulfill this sacred duty, it act, as far as necessary, on fair and equal terms of concert with other powers, having in view the same praiseworthy object. Such were its sentiments when it entered into the solemn stipulations of the Treaty of Ghent; such were its sen-

timents when it requested England to concur with us in declaring the slave trade to be piracy; and such are the sentiments which it has manifested on all other proper occasions."

Same to same, Nov. 14, 1824; *ibid.* 6 Webster's Works, 380.

"The rights of merchant vessels of the United States on the high seas, as understood by this Government, have been clearly and fully asserted (in the Ashburton treaty). As asserted, they will be maintained; nor would a declaration, such as you propose, have increased its resolution or its ability in this respect. The Government of the United States relies on its own power and on the effective support of the people, to assert successfully all the rights of all its citizens on the sea as well as on the land, and it asks respect for these rights not as a boon or favor from any nation. The President's message, most certainly, is a clear declaration of what the country understands to be its rights, and his determination to maintain them, not a mere promise to negotiate for these rights or to endeavor to bring other powers into an acknowledgment of them, either express or implied."

Same to same, Dec. 20, 1842; *ibid.* 6 Webster's Works, 388.

As to the Ashburton treaty see *supra*, § 150*e*; 3 Phill. Int. Law, 527. It is to be observed that by the first article of the treaty of 1862 (hereafter criticised)—

"The two high contracting parties mutually consent that those ships of their respective navies which shall be provided with special instructions for that purpose, as hereinafter mentioned, may visit such merchant vessels of the two nations as may, upon reasonable grounds, be suspected of being engaged in the African slave trade, or of having been fitted out for that purpose; or of having, during the voyage on which they are met by the said cruisers, been engaged in the African slave trade, contrary to the provisions of this treaty; and that such cruisers may detain, and send or carry away, such vessels, in order that they may be brought to trial in the manner hereinafter agreed upon."

After certain specifications it is provided,

"Fourthly. The reciprocal right of search and detention shall be exercised only within the distance of two hundred miles from the coast of Africa, and to the southward of the thirty-second parallel of north latitude, *and within thirty leagues from the coast of the island of Cuba.*"

The objections to the clause in italics are hereafter noticed.

"Upon the reception of the President's message of December, 1842, in England, Lord Aberdeen, on the 18th of January, 1843, addressed a dispatch to Mr. Fox, still British minister here, and directed him to read it to Mr. Webster. It took notice of that part of the President's message which related to the right of search, and denied that any concession on this point had been made by Great Britain in the late negotiations. * * * Mr. Fox was informed by Mr. Webster that an answer to this dispatch would be made in due time through Mr. Everett."

2 Curtis' Life of Webster, 149 *ff.*, where the debates in Parliament on this topic are given.

"In compliance with the resolution of the House of Representatives of the 22d instant, requesting me to communicate with the House 'whatever correspondence or communication may have been received from the

British Government respecting the President's construction of the late British treaty concluded at Washington, as it concerns an alleged right to visit American vessels,' I herewith transmit a report made to me by the Secretary of State.

"I have also thought proper to communicate copies of Lord Aberdeen's letter of the 20th December, 1841, to Mr. Everett, Mr. Everett's letter of the 23d December in reply thereto, and extracts from several letters of Mr. Everett to the Secretary of State.

"I cannot forego the expression of my regret at the apparent purport of a part of Lord Aberdeen's dispatch to Mr. Fox. I had cherished the hope that all possibility of misunderstanding as to the true construction of the 8th article of the treaty lately concluded between Great Britain and the United States was precluded by the plain and well-weighed language in which it is expressed. The desire of both Governments is to put an end as speedily as possible to the slave trade; and that desire, I need scarcely add, is as strongly and as sincerely felt by the United States as it can be by Great Britain. Yet it must not be forgotten that the trade, though now universally reprobated, was, up to a late period, prosecuted by all who chose to engage in it; and there were unfortunately but very few Christian powers whose subjects were not permitted and even encouraged to share in the profits of what was regarded as a perfectly legitimate commerce. It originated at a period long before the United States had become independent, and was carried on within our borders, in opposition to the most earnest remonstrances and expostulations of some of the colonies in which it was most actively prosecuted. Those engaged in it were as little liable to injury or interruption as any others. Its character, thus fixed by common consent and general practice, could only be changed by the positive assent of each and every nation, expressed either in the form of municipal law or conventional arrangement. The United States led the way in efforts to suppress it. They claimed no right to dictate to others, but they resolved, without waiting for the co-operation of other powers, to prohibit it to their own citizens, and to visit its perpetration by them with condign punishment. I may safely affirm that it never occurred to this Government that any new maritime right accrued to it from the position it had thus assumed in regard to the slave trade. If, before our laws for its suppression, the flag of every nation might traverse the ocean unquestioned by our cruisers, this freedom was not, in our opinion, in the least abridged by our municipal legislation.

"Any other doctrine, it is plain, would subject to an arbitrary and ever-varying system of maritime police, adopted at will by the great naval power for the time being, the trade of the world in any places or in any articles which such power might see fit to prohibit to its own subjects or citizens. A principle of this kind could scarcely be acknowledged, without subjecting commerce to the risk of constant and harassing vexations.

"The attempt to justify such a pretension from the right to visit and detain ships upon reasonable suspicion of piracy would deservedly be exposed to universal condemnation, since it would be an attempt to convert an established rule of maritime law, incorporated as a principle into the international code by the consent of all nations, into a rule and principle adopted by a single nation, and enforced only by its assumed authority. To seize and detain a ship upon suspicion of piracy, with probable cause and in good faith, affords no just ground either for complaint on the part of the nation whose flag she bears, or claim of indemnity on the part of the owner. The universal law sanctions, and the common good requires, the existence of such a rule. The right, under such circumstances, not only to visit and detain, but to search a ship, is a perfect right, and involves neither responsibility nor indemnity. But, with this single exception, no nation has, in time of peace, any authority to detain the ships of another upon the high seas, on any pretext whatever, beyond the limits of her territorial jurisdiction. And such, I am happy to find, is substantially the doctrine of Great Britain herself, in her most recent official declarations, and even in those now communicated to the House. These declarations may well lead us to doubt whether the apparent difference between the two Governments is not rather one of definition than of principle. Not only is the right of *search*, properly so called, disclaimed by Great Britain, but even that of mere visit and inquiry is asserted with qualifications inconsistent with the idea of a perfect right.

"In the dispatch of Lord Aberdeen to Mr. Everett of the 20th of December, 1841, as also in that just received by the British minister in this country, made to Mr. Fox, his lordship declares that if, in spite of all the precaution which shall be used to prevent such occurrences, an American ship, by reason of any visit or detention by a British cruiser, 'should suffer loss and injury, it would be followed by prompt and ample remuneration;' and in order to make more manifest her intentions in this respect, Lord Aberdeen, in the dispatch of the 20th December, makes known to Mr. Everett the nature of the instructions given to the British cruisers. These are such as, if faithfully observed, would enable the British Government to approximate the standard of a fair indemnity. That Government has in several cases fulfilled her promises in this particular, by making adequate reparation for damage done to our commerce. It seems obvious to remark, that a right which is only to be exercised under such restrictions and precautions and risk, in case of any assignable damage, to be followed by the consequences of a trespass, can scarcely be considered anything more than a privilege asked for, and either conceded or withheld, on the usual principles of international comity.

"The principles laid down in Lord Aberdeen's dispatches, and the assurances of indemnity therein held out, although the utmost reliance was placed on the good faith of the British Government, were not re-

garded by the Executive as a sufficient security against the abuses which Lord Aberdeen admitted might arise in even the most cautious and moderate exercise of their new maritime police; and therefore, in my message at the opening of the last session, I set forth the views entertained by the Executive on this subject, and substantially affirmed both our inclination and ability to enforce our own laws, protect our flag from abuse, and acquit ourselves of all our duties and obligations on the high seas. In view of these assertions, the Treaty of Washington was negotiated, and, upon consultation with the British negotiator as to the quantum of force necessary to be employed in order to attain these objects, the result to which the most deliberate estimate led was embodied in the eighth article of the treaty.

"Such were my views at the time of negotiating that treaty, and such, in my opinion, is its plain and fair interpretation. I regarded the eighth article as removing all possible pretext, on the ground of mere necessity, to visit and detain our ships upon the African coast because of any alleged abuse of our flag by slave traders of other nations. We had taken upon ourselves the burden of preventing any such abuse, by stipulating to furnish an armed force regarded by both the high contracting parties as sufficient to accomplish that object.

"Denying, as we did and do, all color of right to exercise any such general police over the flags of independent nations, we did not demand of Great Britain any formal renunciation of her pretension; still less had we the idea of yielding anything ourselves in that respect. We chose to make a practical settlement of the question. This we owed to what we had already done upon this subject. The honor of the country called for it; the honor of its flag demanded that it should not be used by others to cover an iniquitous traffic. This Government, I am very sure, has both the inclination and ability to do this; and, if need be, it will not content itself with a fleet of eighty guns, but, sooner than any foreign Government shall exercise the province of executing its laws and fulfilling its obligations, the highest of which is to protect its flag alike from abuse or insult, it would, I doubt not, put in requisition for that purpose its whole naval power. The purpose of this Government is faithfully to fulfill the treaty on its part, and it will not permit itself to doubt that Great Britain will comply with it on hers. In this way peace will best be preserved and the most amicable relations maintained between the two countries."

President Tyler, message of Feb. 27, 1843. House Ex. Doc. 192, 27th Cong., 3d sess.

"The eighth and ninth articles of the Treaty of Washington constitute a mutual stipulation for concerted efforts to abolish the African slave trade. This stipulation, it may be admitted, has no other effects on the pretensions of either party than this: Great Britain had claimed as a *right* that which this Government could not admit to be a *right*, and in

the exercise of a just and proper spirit of amity a mode was resorted to which might render unnecessary both the assertion and the denial of such claim.

"There are probably those who think that what Lord Aberdeen calls a right of visit, and which he attempts to distinguish from the right of search, ought to have been expressly acknowledged by the Government of the United States; at the same time there are those on the other side who think that the formal surrender of such right of visit should have been demanded by the United States as a precedent condition to the negotiation for treaty stipulations on the subject of the African slave trade. But the treaty neither asserts the claim in terms nor denies the claim in terms; it neither formally insists upon it nor formally renounces it. Still the whole proceeding shows that the object of the stipulation was to avoid such differences and disputes as had already arisen, and the serious practical evils and inconveniences which, it cannot be denied, are always liable to result from the practice which Great Britain had asserted to be lawful. These evils and inconveniences had been acknowledged by both Governments. They had been such as to cause much irritation, and to threaten to disturb the amicable sentiments which prevailed between them. Both Governments were sincerely desirous of abolishing the slave trade; both Governments were equally desirous of avoiding occasion of complaint by their respective citizens and subjects; and both Governments regarded the 8th and 9th articles as effectual for their avowed purpose, and likely, at the same time to preserve all friendly relations, and to take away causes of future individual complaints. The Treaty of Washington was intended to fulfill the obligations of the Treaty of Ghent. It stands by itself, is clear and intelligible. It speaks its own language and manifests its own purpose. It needs no interpretation and requires no comment. As a fact, as an important occurrence in national intercourse, it may have important bearings on existing questions respecting the public law; and individuals, or perhaps Governments, may not agree as to what these bearings really are. Great Britain has discussions, if not controversies, with other great European states upon the subject of visit and search. These states will naturally make their own commentary on the Treaty of Washington, and draw their own inferences from the fact that such a treaty has been entered into. Its stipulations, in the mean time, are plain, explicit, satisfactory to both parties, and will be fulfilled on the part of the United States, and it is not doubted on the part of Great Britain also, with the utmost good faith.

"Holding this to be the true character of the treaty, I might, perhaps, excuse myself from entering into the consideration of the grounds of that claim of a right to visit merchant ships, for certain purposes, in time of peace, which Lord Aberdeen asserts for the British Goverment, and declares that it can never surrender. But I deem it right, never-

theless, and no more than justly respectful towards the British Government not to leave the point without remark. * * *

"The right of search, except when specially conceded by treaty, is a purely belligerent right, and can have no existence on the high seas during peace. The undersigned apprehends, however, that the right of search is not confined to the verification of the nationality of the vessel, but also extends to the object of her voyage and the nature of the cargo. The sole purpose of the British cruisers is to ascertain whether the vessels they meet with are really American or not. The right asserted has, in truth, no resemblance to the right of search, either in principle or practice. It is simply a right to satisfy the party who has a legitimate interest in knowing the truth that the vessel actually is what her colors announce. This right we concede as freely as we exercise. The British cruisers are not instructed to detain American vessels, under any circumstances whatever; on the contrary, they are ordered to abstain from all interference with them, be they slavers or otherwise. But where reasonable suspicion exists that the American flag has been abused, for the purpose of covering the vessel of another nation, it would appear scarcely credible, had it not been made manifest by the repeated protest of their representative, that the Government of the United States, which has stigmatized and abolished the trade itself, should object to the adoption of such means as are indispensably necessary for ascertaining the truth."

Mr. Webster, Sec. of State, to Mr. Everett, Mar. 28, 1843 [quoting a note of Lord Aberdeen to Mr. Everett of Dec. 20, 1842]. MSS. Inst., Gr. Brit. Printed with some formal alterations in 6 Webster's Works, 331 *ff.*

"Visit, as it has been understood, implies not only a right to inquire into the national character, but to detain the vessel, to stop the progress of the voyage, to examine papers, to decide on their regularity and authenticity, and to make inquisition on board for enemy's property, and into the business which the vessel is engaged in. In other words, it describes the entire right of belligerent visitation and search. Such a right is justly disclaimed by the British Government in time of peace. They nevertheless insist on a right which they denominate a right of visit, and by that word describe the claim which they assert. Therefore it is proper, and due to the importance and delicacy of the questions involved, to take care that, in discussing them, both Governments understand the terms which may be used in the same sense. If, indeed, it should be manifest that the difference between the parties is only verbal, it might be hoped that no harm would be done; but the Government of the United States thinks itself not chargeable with excessive jealousy, or with too great scrupulosity in the use of words in insisting on its opinion that there is no such distinction as the British Government maintains between visit and search, and that there is no right to visit, in time of peace, except in the execution of revenue laws or other mu-

nicipal regulations, in which cases the right is usually exercised near the coast, or within the marine league, or where the vessel is justly suspected of violating the law of nations by piratical aggression; but wherever exercised it is a right of search. Nor can the United States Government agree that the term 'right' is justly applied to such exercise of power as the British Government thinks it indispensable to maintain in certain cases. The right asserted is a right to ascertain whether a merchant vessel is justly entitled to the protection of the flag which she may happen to have hoisted, such vessel being in circumstances which render her liable to the suspicion, first, that she is not entitled to the protection of the flag; and, secondly, that if not entitled to it, she is, either by the law of England an English vessel, or, by the provisions of treaties with certain European powers, subject to the supervision and search of British cruisers. * * *

"An eminent member of the House of Commons (Mr. Charles Wood) thus states the British claim, and his statement is acquiesced in and adopted by the first minister of the Crown:

"'The claim of this country is for the right of our cruisers to ascertain whether a merchant vessel is justly entitled to the protection of the flag which she may happen to have hoisted, such vessel being in circumstances which rendered her liable to the suspicion, first, that she was not entitled to the protection of the flag; and, secondly, if not entitled to it, she was, either under the law of nations or the provisions of treaties, subject to the supervision and control of other cruisers.'

"Now, the question is: By what means is this ascertainment to be effected?

"As we understand the general and settled rules of public law in respect to ships-of-war sailing under the authority of their Government 'to arrest pirates and other public offenders,' there is no reason why they may not approach any vessels descried at sea for the purpose of ascertaining their real characters. Such a right of approach seems indispensable for the fair and discreet exercise of their authority; and the use of it cannot be justly deemed indicative of any design to insult or injure those they approach, or to impede them in their lawful commerce. On the other hand, it is as clear a right that no ship is, under such circumstances, bound to lie by or wait the approach of any other ship. She is at full liberty to pursue her voyage in her own way, and to use all necessary precautions to avoid any suspected sinister enterprise or hostile attack. Her right to the free use of the ocean is as perfect as that of any other. An entire equality is presumed to exist. She has a right to consult her own safety; but at the same time she must take care not to violate the rights of others. She may use any precautions dictated by the prudence or fears of her officers, either as to delay, or the progress or course of her voyage; but she is not at liberty to inflict injuries upon other innocent parties simply because of conjectural dangers.

"But if the vessel thus approached attempts to avoid the vessel approaching, or does not comply with her commander's order to send him her papers for his inspection, nor consent to be visited or detained, what is next to be done? Is force to be used? And if force be used, may that force be lawfully repelled? These questions lead at once to the elemental principle, the essence of the British claim. Suppose the merchant vessel be, in truth, an American vessel, engaged in lawful commerce, and that she does not choose to be detained. Suppose she resists the visit. What is the consequence? In all cases in which the belligerent right of visit exists, resistance to the exercise of that right is regarded as just cause of condemnation, both of vessel and cargo. Is that penalty, or what other penalty, to be incurred by resistance to visit in time of peace? Or, suppose that force be met by force, gun returned for gun, and the commander of the cruiser or some of his seamen be killed. What description of offense will have been committed? It would be said in behalf of the commander of the cruiser that he mistook the vessel for a vessel of England, Brazil, or Portugal. But does this mistake of his take away from the American vessel the right of self-defense? The writers of authority declare it to be a principle of natural law that the privilege of self-defense exists against an assailant who mistakes the object of his attack for another whom he had a right to assail. * * *

"If visit, or visitation, be not accompanied by search, it might well be, in most cases merely idle. A sight of papers may be demanded, and papers may be produced. But it is known that slave traders carry false papers and different sets of papers. A search for other papers, then, must be made where suspicion justifies it, or else the whole proceeding would be nugatory. In suspicious cases the language and general appearance of the crew are among the means of ascertaining the national character of the vessel. The cargo on board, also often indicates the country from which she comes. Her log-book showing the previous course and events of her voyage, her internal fitment and equipment, are all evidences for her or against her, on her allegation of character. These matters, it is obvious, can only be ascertained by rigorous search.

"It may be asked, if a vessel may not be called on to show her papers, why does she carry papers? No doubt she may be called on to show her papers; but the question is where, when, and by whom? Not in time of peace, on the high seas, where her rights are equal to the rights of any other vessel, and where none has a right to molest her. The use of her papers is, in time of war, to prove her neutrality when visited by belligerent cruisers, and in both peace and war to show her national character and the lawfulness of her voyage in those ports of other countries to which she may proceed for purposes of trade. It appears to the Government of the United States that the view of the whole subject which is the most naturally taken is also the most legal and

most in analogy with other cases. British cruisers have a right to detain British merchantmen for certain purposes; and they have a right, acquired by treaty, to detain merchant vessels of several other nations for the same purposes. But they have no right all to detain an American merchant vessel. This Lord Aberdeen admits in the fullest manner. Any detention of an American vessel by a British cruiser is therefore a wrong—a trespass—although it may be done under the belief that she was a British vessel, or that she belonged to a nation which conceded the right of such detention to the British cruisers, and the trespass, therefore, an involuntary trespass. * * * The Government of the United States has frequently made known its opinion, which it now repeats, that the practice of detaining American vessels, though subject to just compensation, if such detention afterward turns out to have been without just cause, however guarded by instructions or however cautiously exercised, necessarily leads to serious inconvenience and injury. * * *

"On the whole the Government of the United States, while it has not conceded a mutual right of visit or search, as has been done by the parties to the quintuple treaty of December, 1841, does not admit that, by the law and practice of nations, there is any such thing as a right of visit, distinguished by well-known rules and definitions, from the right of search.

"It does not admit that visit of American merchant vessels by British cruisers is founded on any right, notwithstanding the cruisers may suppose such vessel to be British, Brazilian, or Portuguese. It cannot but see that the detention and examination of American vessels by British cruisers has already led to consequences—and it fears that if continued would still lead to further consequences—highly injurious to the lawful commerce of the United States.

"At the same time the Government of the United States fully admits that its flag can give no immunity to pirates, nor to any other than regularly documented American vessels; and it was upon this view of the whole case, and with a firm conviction of the truth of these sentiments, that it cheerfully assumed the duties contained in the Treaty of Washington, in the hope that thereby causes of difficulty and difference might be altogether removed, and that the two powers might be enabled to act concurrently, cordially, and effectually, for the suppression of a traffic which both regard as a reproach upon the civilization of the age, and at war with every principle of humanity and every Christian sentiment."

*Ibid.*

On April 27, 1843, Mr. Everett wrote to Mr. Webster that he had read to Lord Aberdeen the instructions from which extracts are given above, and that Lord Aberdeen had said that "he did not know he should wish to alter a word; that he concurred with you in the propo-

sition that there is no such distinction as that between a right of search and a right of visit."

2 Curtis' Life of Webster, 165.

"Our late treaty provides that each country shall keep a naval force of a specified size on the coast of Africa, with the obvious view to remove all occasion for any trespass by the one upon the other. We have proceeded to execute our part of that stipulation, by sending to that coast four vessels carrying more than eighty guns, a force altogether sufficient to watch over American commerce, and to enforce the laws of the United States in relation to the slave trade. There cannot, therefore, be any pretense in future for any interference by the cruisers of England with our flag. Of course, it is not probable that there will be any further occasions for reclamations on that ground, except in such flagrant cases as will leave no room for dispute or doubts. With such a foundation for lasting harmony between the two countries, at least so far as this dangerous and exciting subject is concerned, it would seem to be an obvious dictate of prudence, as well as of propriety, to remove, as speedily as possible, all existing causes of complaint arising from the same source. Nothing would contribute more than this to a good understanding between the two Governments and their people."

Mr. Upshur, Sec. of State, to Mr. Everett, Aug. 8, 1843. MSS. Inst., Gr. Brit.

In the Brit. and For. St. Pap. for 1843–'44, vol. 32, 433, 565, are given the following documents in respect to the right of search:

Lord Aberdeen to Lord Ashburton, Feb. 8, 1842; Lord Ashburton to Lord Aberdeen, May 12, 1842, containing report of United States naval officers as to slave trade; Mr. Fox to Lord Aberdeen, Mar. 4, 1843; message of the President of Feb. 28, 1843, as to right of search; Mr. Webster (Sec. of State) to the President, Feb., 1843; Mr. Everett (London) to Mr. Webster, Dec. 28, 1841; Same to same, Dec. 31, 1841; Mr. Webster to Mr. Everett, Jan. 29, 1842.

President Fillmore's message of July 30, 1850, as to cases of recent stoppage and search of American vessels by British men-of-war is in Senate Ex. Doc. 66, 31st Cong., 1st sess.

"The Governments of Great Britain and France have issued orders to their naval commanders on the West India station to prevent by force, if necessary, the landing of adventurers from any nation on the Island of Cuba with hostile intent. The copy of a memorandum of a conversation on this subject between the chargé d'affaires of Her Britannic Majesty and the Acting Secretary of State, and of a subsequent note of the former to the Department of State, are herewith submitted, together with a copy of a note of the Acting Secretary of State to the minister of the French Republic, and of the reply of the latter on the same subject. These papers will acquaint you with the grounds of this interposition of the two leading commercial powers of Europe, and with the apprehensions, which this Government could not fail to entertain, that such interposition, if carried into effect, might lead to abuses in deroga-

tion of the maritime rights of the United States. The maritime rights of the United States are founded on a firm, secure, and well-defined basis; they stand upon the ground of national independence and public law, and will be maintained in all their full and just extent.

"The principle which this Government has heretofore solemnly announced it still adheres to, and will maintain under all circumstances and at all hazards. That principle is, that in every regularly documented merchant vessel, the crew who navigate it and those on board of it will find their protection in the flag which is over them. No American ship can be allowed to be visited or searched for the purpose of ascertaining the character of individuals on board, nor can there be allowed any watch by the vessels of any foreign nation over American vessels on the coasts of the United States or the seas adjacent thereto. It will be seen by the last communication from the British chargé d'affaires to the Department of State, that he is authorized to assure the Secretary of State that every care will be taken that, in executing the preventive measures against the expeditions, which the United States Government itself has denounced as not being entitled to the protection of any Government, no interference shall take place with the lawful commerce of any nation.

"In addition to the correspondence on this subject herewith submitted, official information has been received at the Department of State of assurances by the French Government that, in the orders given to the French naval forces, they were expressly instructed, in any operations they might engage in, to respect the flag of the United States wherever it might appear, and to commit no act of hostility upon any vessel or armament under its protection."

President Fillmore, Second Annual Message, 1851. (Mr. Webster, Sec. of State.)

"There is no question in regard to our international relations which has within a recent period been more fully discussed than that respecting the limits to the right of visitation and search. This is a belligerent right, and no nation which is not engaged in hostilities can have any pretense to exercise it upon the open sea. The established doctrine upon this subject is 'that the right of visitation and search of vessels, armed or unarmed, navigating the high seas in time of peace does not belong to the public ships of any nation. This right is strictly a belligerent right, allowed by the general consent of nations in time of war, and limited to those occasions.' The undersigned avails himself of the authority and language of a distinguished writer on international law: 'We again repeat that it is impossible to show a single passage of any institutional writer on public law, or the judgment of any court by which that law is administered, either in Europe or America, which will justify the exercise of such a right on the high seas in time of peace independent of special compact. The right of seizure for a breach of the revenue laws, or laws of trade and navigation of a particular country,

is quite different. The utmost length to which the exercise of this right on the high seas has ever been carried in respect to the vessels of another nation has been to justify seizing them within the territorial jurisdiction of the state against whose laws they offend, *and* pursuing them in case of flight beyond that limit, arresting them on the ocean, and bringing them in for adjudication before the tribunals of that state. This, however, suggests the Supreme Court of the United States, in the case, before quoted, of the Marianna Flora, has never been supposed to draw after it any right of visitation *or* search. The party, in such case, seizes at his peril. If he establishes the forfeiture he is justified.'

"This is not peculiarly an American doctrine; it has the sanction of the soundest expositors of international law. Upon the ocean in time of peace, that is, among nations not in war, all are entirely equal. * * *

"The most distinguished judge that ever presided over the British high court of admiralty has expressed himself clearly and emphatically on the subject of the right of visit and search, and declared 'that no authority can be found which gives any right of *visitation or interruption* over the vessels or navigation of other states on the high seas, except what the right of war gives to belligerents against neutrals.'"

Mr. Marcy, Sec. of State, to Mr. Cueto, Mar. 28, 1855. MSS. Notes, Spain.

"The Spanish Government claims the right to search or detain foreign vessels in its own territorial waters for the purpose of ascertaining their character, but it is not understood that it meets this case with a positive declaration that the El Dorado was within its territorial waters.

"The United States will never concede that, in the thoroughfares of commerce between Cape San Antonio and Yucatan, or between the Key of Florida and the Cuban coast, the territorial waters of Spain extend beyond cannon shot or a marine league. Considering the vast amount of property transported over these thoroughfares it is of the greatest importance to the interests of commerce that the extent of Spanish jurisdiction in these two straits should be accurately understood."

Mr. Marcy, Sec. of State, to Mr. Escalante, Oct. 29, 1855; *ibid.* *Supra*, § 32.

"Mr. Webster, in a dispatch in which he investigated this subject, correctly observed that what in Great Britain and the United States is known as the right of search is called by the continental jurists the right of visit, and then added, 'there is no such distinction as the British Government maintains between visit and search,' and he further remarked that the visitation of a vessel to answer any valuable purpose must often and necessarily lead not merely to the sight of papers, perhaps carried with a view to deceive, and produced on demand, but to a search for other papers, and an inspection of the log-book, showing the previous course and events of the voyage, to an examination into the language and general appearance of the crew, into the cargo on board, and the internal fitment and equipment of the vessel. 'These matters, it is obvious,' he continues, 'can only be ascertained by rigorous search,'

and the reasons originally urged by the British Government for the assertion and prosecution of this pretension furnish by their very nature a powerful argument against its validity. It was contended in its support that without its exercise the stipulations of certain antislave-trade treaties (to which the United States were not a party) could not be enforced, and that 'the present happy concurrence of the states of Christendom in this great object (the suppression of the slave trade), not merely justifies but renders indispensable the right now claimed and exercised by the British Government;' and it was also contended, that, without it, even the laws of England might be set at defiance by her own subjects; and these considerations were formally presented to this Government by the British Government in justification of this attempt to change the maritime law of the world. But they are rejected by the United States, who claim inviolability for their vessels, and hold on to that great code whose integrity it is the interest of the strong as well as the weak to maintain and defend, and they deny the right of any power or of any partial combination of powers to interpolate into it any new principle, however convenient this may be found."

Mr. Cass, Sec. of State, to Lord Napier, Apr. 10, 1858. MSS. Notes, Gr. Brit.

In instructions by Lord Malmesbury to Lord Napier June 11, 1858 (Brit. and For. St. Pap., 1857–'58, vol. 50, 537), is the following:

"General Cass observes, in his note to Mr. Napier of April 10, 1858, that 'a merchant-vessel upon the high seas is protected by her national character. He who forcibly enters her, does so upon his own responsibility. Undoubtedly, if a vessel assumes a national character to which she is not entitled, and is sailing under false colors, she cannot be protected by this assumption of a nationality to which she has no claim. As the identity of a person must be determined by the officer bearing a process for his arrest, and determined at the risk of such officer, so must the national identity of a vessel be determined, at the like hazard to him who, doubting the flag she displays, searches her to ascertain her true character. There no doubt may be circumstances which would go far to modify the complaints a nation would have a right to make for a violation of its sovereignty. If the boarding officer had just grounds of suspicion, and deported himself with propriety in the performance of his task, doing no injury, and peaceably retiring when satisfied of his error, no nation would make such an act the subject of serious reclamation.' His Majesty's Government (continues Lord Malmesbury), agree entirely in this view of the case, and the question, therefore, becomes one solely of discretion on the part of the boarding officer." But General Cass adds to the extract above given the following important qualification, overlooked by Lord Malmesbury: "*It is one thing to do an act avowedly illegal, and excuse it by the attending circumstances; and it is another and quite a different thing to claim a right of action, and the right, also, of determining when, and how, and to what extent, it shall be exercised. And this is no barren distinction, so far as the interest of this country is involved, but it is closely connected with an object dear to the American people—the freedom of their citizens upon the great highway of the world.*"

"Our old Palmerstonian haters are said to be already on his (Clarendon's) track; but they will be kept at bay by the threat of exposing the orders issued to British naval officers by the former Government, which are hinted to have involved not merely a search against slave traders, but one also against William Walker and his associate filibusters. At the royal ball, the night before last, I was assured, with emphasis, by one of the ministry, that he positively *knew* what had caused and motived the sudden outrages upon our vessels; he did not feel at liberty to communicate it, but it would come out. The men now in power had nothing to do with it. He rather thought too much had been conceded; but, he added, I am content, as, rather than bring our two countries into collision, I would concede a great deal more."

Mr. Dallas, minister to Great Britain, to Mr. Cass, Sec. of State, June 11, 1858. 2 Dallas, Letters from London, 72.

"No nation can exercise a right of visitation and search upon the common and unappropriated parts of the ocean, except from the belligerent claim."

Lord Stowell, as adopted by Mr. Cass, Sec. of State, in instructions to Mr. Dallas, June 30, 1858. MSS. Inst., Gr. Brit.

"It is my earnest desire that every misunderstanding with the Government of Great Britain should be amicably and speedily adjusted. It has been the misfortune of both countries, almost ever since the period of the Revolution, to have been annoyed by a succession of irritating and dangerous questions, threatening their friendly relations. This has partially prevented the full development of those feelings of mutual friendship between the people of the two countries, so natural in themselves and so conducive to their common interest. Any serious interruption of the commerce between the United States and Great Britain would be equally injurious to both. In fact, no two nations have ever existed on the face of the earth which could do each other so much good or so much harm.

"Entertaining these sentiments I am gratified to inform you that the long-pending controversy between the two Governments, in relation to the question of visitation and search, has been amicably adjusted. The claim, on the part of Great Britain, forcibly to visit American vessels on the high seas in time of peace, could not be sustained under the law of nations, and it had been overruled by her own most eminent jurists. This question was recently brought to an issue by the repeated acts of British cruisers in boarding and searching our merchant vessels in the Gulf of Mexico and the adjacent seas. These acts were the more injurious and annoying, as these waters are traversed by a large portion of the commerce and navigation of the United States, and their free and unrestricted use is essential to the security of the coastwise trade between the different States of the Union. Such vexatious interruptions could not fail to excite the feelings of the country, and to require the interposition of the Government. Remonstrances were addressed to the British Government against these violations of our rights

of sovereignty, and a naval force was at the same time ordered to the Cuban waters, with directions 'to protect all vessels of the United States on the high seas from search or detention by the vessels-of-war of any other nation.' These measures received the unqualified and even enthusiastic approbation of the American people. Most fortunately, however, no collision took place, and the British Government promptly avowed its recognition of the principles of international law upon this subject as laid down by the Government of the United States in the note of the Secretary of State to the British minister at Washington of April 10, 1858, which secure the vessels of the United States upon the high seas from visitation or search in time of peace, under any circumstances whatever. The claim has been abandoned in a manner reflecting honor on the British Government, and evincing a just regard for the law of nations, and cannot fail to strengthen the amicable relations between the two countries."

President Buchanan, Second Annual Message, 1858.

"I have to inform your lordship that Her Majesty's Government have received with lively satisfaction the note which General Cass addressed to your lordship on the 8th of November.

"The friendly tone in which it is written, and the high appreciation which it displays of the importance of terminating the irritating discussions in which both countries have been so long involved, cannot but tend to render that termination near at hand and permanent.

"I feel it to be a duty to do justice to the accuracy with which General Cass has recapitulated the circumstances under which the controversy has been sustained, and the efforts hitherto employed to settle it have failed."

Earl Malmesbury to Lord Napier, Dec. 8, 1858. Brit. and For. St. Pap. (1857–'58), vol. 48, 745.

A report by Mr. Cass, Sec. of State, Dec. 15, 1858, on visitation by officers of the British navy of American vessels in the waters of New Mexico is given in House Ex. Doc. 11, 35th Cong., 2d sess.

The President, while "earnestly opposed to the African slave trade, and thus determined to give full effect to the laws of the United States for its suppression, cannot permit himself in so doing to concur in any principle or assent to any practice which he believes would be inconsistent with that entire immunity of merchant vessels upon the high seas in time of peace for which this Government has always contended, and in whose preservation the commerce of the world has so deep an interest."

Mr. Cass, Sec. of State, to Mr. Sartiges, Jan. 25, 1859. MSS. Notes, France.

"The forcible visitation of vessels upon the ocean is prohibited by the law of nations, in time of peace, and this exemption from foreign jurisdiction is now recognized by Great Britain, and, it is believed, by all other commercial powers, even if the exercise of a right of visit were essential to the suppression of the slave trade. Whether such a right

should be conceded by one nation to its co-states of the world is a question for its own consideration, involving very serious consequences, but which is little likely to encounter any prejudiced feelings in favor of the slave trade in its solution nor to be influenced by them. But there is just reason to believe that the value of a right of visitation, as a means of putting an end to this traffic, has been greatly overrated. The object of such visitation is to ascertain the national character of the vessel. If found to belong to the same nation as the cruiser making the visit, and violating its laws, she may be seized. If belonging to another nation she must be released in whatever employment she may be engaged, unless indeed she has become a pirate, in which case she is liable to be captured by the naval force of any civilized power. If the United States maintained that by carrying their flag at her mast-head any vessel became thereby entitled to the immunity which belongs to American vessels, they might well be reproached with assuming a position which would go far toward shielding crimes upon the ocean from punishment. But they advance no such pretensions, while they concede that if, in the honest examination of a vessel sailing under American colors, but accompanied by strongly marked suspicious circumstances, a mistake is made, and she is found to be entitled to the flag she bears, but no injury is committed and the conduct of the boarding party is irreproachable, no Government would be likely to make a case thus exceptional in its character a subject of serious reclamation. * * *

"The police over their own vessels being a right inherent in all independent states, each of them is responsible to the public opinion of the world for its faithful preservation, as it is responsible for the execution of any other duty. The measures it will adopt, must depend upon its own judgment, and whether these are efficient or inefficient no other nation has a right of interference; and the same principles are applicable to territorial jurisdiction. Good laws it is the duty of every Government to provide, and also to make suitable provision for their just administration. But because offenders sometimes escape, nations are not therefore disposed to admit any participation in the execution of these laws, even though such a measure might insure their more faithful execution."

Mr. Cass, Sec. of State, to Mr. Dallas, Feb. 23, 1859. MSS. Inst., Gr. Brit.

"This country is desirous of the extinction of the slave trade, and is employing a larger force for that purpose in proportion to its naval means than any other power whatever. But it has other great interests upon the ocean—the immunity of its flag, the protection of its citizens, and the security of its commerce—which it does not intend to put to hazard by permitting the exercise of any foreign jurisdiction over its merchant vessels."

Same to same, Mar. 31, 1860; *ibid.*

"It must be a source of sincere satisfaction to all classes of our fellow citizens, and especially to those engaged in foreign commerce, that the claim on the part of Great Britain forcibly to visit and search American merchant vessels on the high seas in times of peace has been abandoned."

President Buchanan, Fourth Annual Message, 1860.

As to correspondence in respect to the treaty with Great Britain for search of slavers, see Mr. Seward, Sec. of State, to Mr. Adams, July 31, 1862. MSS. Inst., Gr. Brit.

"The right of search for contraband is a right to be exercised against a public enemy only on the high seas. It cannot there lawfully be exercised against a neutral who has not recognized both parties as belligerents. If, therefore, the commanders of our men-of-war should ascertain that a vessel of the United States is about to be searched on the high seas by a Spanish vessel, they may be authorized to resist such search with all the force at their disposal. If, also, they should fall in with a vessel of the United States which has been captured by a Spaniard on the high seas on the ground of being a carrier of contraband, or on any other pretext involving a claim to belligerent rights in that quarter, they may be authorized to recapture the prize if they should feel competent for that purpose. The maritime jurisdiction of Spain may be acknowledged to extend not only to a marine league beyond the coast of Cuba itself, but also to the same distance from the coast line of the several islets or keys with which Cuba itself is surrounded. Any acts of Spanish authority within that line cannot be called into question, provided they shall not be at variance with law or treaties.

Mr. Fish, Sec. of State, to Mr. Borie, May 18, 1869. MSS. Dom. Let.

The right of foreign cruisers to search vessels of the United States in times of peace on the high seas is denied by the United States, and when such search is insisted on reparation will be required.

Mr. Fish, Sec. of State, to Mr. Roberts, Jan. 13, 1872. MSS. Notes, Spain.

The steamer Virginius, bearing the flag of the United States, was captured by the Spanish war steamer Tornado on November 3, 1873, on waters claimed by the Spanish authorities to be territorial, and brought to Cuba with her crew and passengers, amounting on the whole to nearly one hundred and seventy prisoners, the charge being "piracy" and connection with certain Cuban insurgents. (See *supra*, § 230.)

To this transaction the following papers refer:

"The steamer Virginius was, on the 26th day of September, 1870, duly registered at the port of New York as a part of the commercial marine of the United States. On the 4th of October, 1870, having received the certificate of the register in the usual legal form, she sailed from the port of New York, and has not since been within the territorial jurisdiction of the United States. On the 31st day of October last, while sailing under the flag of the United States, on the high seas, she was forcibly seized by the Spanish gunboat Tornado, and was carried into the port of Santiago de Cuba, where fifty-three of her passengers

and crew were inhumanly, and, so far at least as relates to those who were citizens of the United States, without due process of law, put to death.

"It is a well-established principle, asserted by the United States from the beginning of their national independence, recognized by Great Britain and other maritime powers, and stated by the Senate in a resolution passed unanimously on the 16th of June, 1858, that 'American vessels on the high seas in time of peace, bearing the American flag, remain under the jurisdiction of the country to which they belong; and therefore any visitation, molestation, or detention of such vessel by force, or by the exhibition of force, on the part of a foreign power, is in derogation of the sovereignty of the United States.'

"In accordance with this principle the restoration of the Virginius, and the surrender of the survivors of her passengers and crew, and a due reparation to the flag, and the punishment of the authorities who had been guilty of the illegal acts of violence, were demanded. The Spanish Government has recognized the justice of the demand, and has arranged for the immediate delivery of the vessel, and for the surrender of the survivors of the passengers and crew, and for a salute to the flag, and for proceedings looking to the punishment of those who may be proved to have been guilty of illegal acts of violence toward citizens of the United States, and also toward indemnifying those who may be shown to be entitled to indemnity. A copy of a protocol of a conference between the Secretary of State and the Spanish minister, in which the terms of this arrangement were agreed to, is transmitted herewith.

"The correspondence on this subject with the legation of the United States in Madrid was conducted in cipher and by cable, and needs the verification of the actual text of the correspondence. It has seemed to me to be due to the importance of the case not to submit this correspondence until the accurate text can be received by mail. It is expected shortly, and will be submitted when received."

President Grant, Fifth Annual Message, 1873.

"In my annual message of December last I gave reason to expect that when the full and accurate text of the correspondence relating to the steamer Virginius, which had been telegraphed in cipher, should be received, the papers concerning the capture of the vessel, the execution of a part of its passengers and crew, and the restoration of the ship and the survivors would be transmitted to Congress.

"In compliance with the expectations then held out, I now transmit the papers and correspondence on that subject.

"On the 26th day of September, 1870, the Virginius was registered in the custom-house at New York as the property of a citizen of the United States, he having first made oath, as required by law, that he was 'the true and only owner of the said vessel, and that there was no subject

or citizen of any foreign prince or state, directly or indirectly, by way of trust, confidence, or otherwise, interested therein.'

"Having complied with the requisites of the statute in that behalf, she cleared in the usual way for the port of Curaçoa, and on or about the 4th day of October, 1870, sailed for that port. It is not disputed that she made the voyage according to her clearance, nor that, from that day to this, she has not returned within the territorial jurisdiction of the United States. It is also understood that she preserved her American papers, and that when within foreign ports she made the practice of putting forth a claim to American nationality, which was recognized by the authorities at such ports.

"When, therefore, she left the port of Kingston, in October last, under the flag of the United States, she would appear to have had, as against all powers except the United States, the right to fly that flag, and to claim its protection, as enjoyed by all regularly documented vessels registered as part of our commercial marine.

"No state of war existed, conferring upon a maritime power the right to molest and detain upon the high seas a documented vessel; and it cannot be pretended that the Virginius had placed herself without the pale of all law by acts of piracy against the human race.

"If her papers were irregular or fraudulent, the offense was one against the laws of the United States, justiciable only in their tribunals.

"When, therefore, it became known that the Virginius had been captured on the high seas by a Spanish man-of-war; that the American flag had been hauled down by the captors; that the vessel had been carried to a Spanish port; and that Spanish tribunals were taking jurisdiction over the persons of those found on her, and exercising that jurisdiction upon American citizens, not only in violation of the rules of international law, but in contravention of the provisions of the treaty of 1795, I directed a demand to be made upon Spain for the restoration of the vessel, and for the return of the survivors to the protection of the United States, for a salute to the flag, and for the punishment of the offending parties.

"The principles upon which these demands rested could not be seriously questioned, but it was suggested by the Spanish Government that there were grave doubts whether the Virginius was entitled to the character given her by her papers; and that therefore it might be proper for the United States, after the surrender of the vessel and the survivors to dispense with the salute to the flag, should such fact be established to their satisfaction.

"This seemed to be reasonable and just. I therefore assented to it, on the assurance that Spain would then declare that no insult to the flag of the United States had been intended.

"I also authorized an agreement to be made that, should it be shown to the satisfaction of this Government that the Virginius was improperly bearing the flag, proceedings should be instituted in our courts for

the punishment of the offense committed against the United States. On her part Spain undertook to proceed against those who had offended the sovereignty of the United States, or who had violated their treaty rights.

"The surrender of the vessel and the survivors to the jurisdiction of the tribunals of the United States was an admission of the principles upon which our demands had been founded. I therefore had no hesitation in agreeing to the arrangement finally made between the two Governments—an arrangement which was moderate and just, and calculated to cement the good relations which have so long existed between Spain and the United States.

"Under this agreement the Virginius, with the American flag flying, was delivered to the Navy of the United States at Bahia Honda, in the Island of Cuba, on the 16th ultimo. She was in an unseaworthy condition. In the passage to New York she encountered one of the most tempestuous of our winter storms. At the risk of their lives the officers and crew placed in charge of her attempted to keep her afloat. Their efforts were unavailing and she sank off Cape Fear. The prisoners who survived the massacres were surrendered at Santiago de Cuba on the 18th ultimo, and reached the port of New York in safety.

"The evidence submitted on the part of Spain to establish the fact that the Virginius at the time of her capture was improperly bearing the flag of the United States is transmitted herewith, together with the opinion of the Attorney-General thereon, and a copy of the note of the Spanish minister, expressing, on behalf of his Government, a disclaimer of an intent of indignity to the flag of the United States."

President Grant, Special Message, Jan. 5, 1874.

The following correspondence, being part of that submitted in the message above given, tends to explain the position taken by the Government:

"The capture on the high seas of a vessel bearing the American flag presents a very grave question, which will need investigation, and the summary proceedings resulting in the punishment of death, with such rapid haste, will attract attention as inhuman and in violation of the civilization of the age. And if it prove that an American citizen has been wrongfully executed, this Government will require most ample reparation."

Mr. Fish, Sec. of State, to Mr. Sickles, Nov. 7, 1873 (telegram). MSS. Inst., Spain.; For. Rel., 1874.

"You will receive by the mail of this date a copy of the telegrams which have been sent to you with reference to the capture of the Virginius, and also of those from you relating to the same subject, as they have been received and deciphered here.

"The first intelligence was received here late in the evening of the 5th instant, from Mr. Hall, acting consul-general in Havana. I was

absent from Washington the 6th, returning on the evening of the 6th. Your telegram was received announcing the instructions of the Madrid Government not to inflict any penalties until the matter should have been reported there.

"On the 7th the public journals announced the execution on the 4th of four persons who had been captured on the vessel, one of whom was represented to be an American, who is said to have entered the military service of the insurrectionists in Cuba, and who claimed to hold a military commission from the insurrectionary authorities, and to have been in actual military service on the island.

"The execution, as it is called, of those persons was forced on with indecent and barbarous haste, and in defiance of all humanity and regard to the usages of the civilized world.

"It was perpetrated in advance of the knowledge of the capture reaching Havana or Madrid, and it would seem to have been thus precipitated in cold blood and vindictiveness, to anticipate and prevent the interposition of any humane restraints upon the ferocity of the local authorities from the Government at Madrid or its representative in Havana.

"This is but another instance in the long catalogue of the defiance of the home Government by those intrusted with authority in Cuba, and adds another page to the dark history of bloody vengeance and cruel disregard of the rules of civilized war and of common humanity which the military and other officials in Cuba have but too frequently made part of the history of Spain's Government and of its colony.

"The promptness with which the Madrid Government responded to your suggestion, and forwarded instructions to the captain-general to await orders before inflicting any penalties on the passengers or crew of the Virginius, is accepted as evidence of their readiness to administer justice, and gives promise of the promptness with which they will condemn and punish the hot thirst for blood and vengeance which was exhibited at Santiago de Cuba.

"Condemnation, disavowal, and deprecation of the act will not be accepted by the world as sufficient to relieve the Government of Spain from participation in the just responsibility for the outrage. There must be a signal mark of displeasure and a punishment to which the civilized world can point, and which other subordinate or local officials will have cause to look to as a beacon on a dangerous rock, to be forever after avoided.

"You will represent this to the Government at Madrid, and you will further very earnestly, but avoiding any just cause of offended sensibility, represent that the failure of some speedy and signal visitation of punishment on those engaged in this dark deed cannot fail to be regarded as approval of the act, and in view of the orders given to abstain from any punishments which the home Government had passed upon

them, will be regarded as admission of the inability of the Government of the peninsula to control the affairs of the Island of Cuba. The omission to punish the acts of the 4th November, in Santiago de Cuba, will be a virtual abandonment of the control of the island, and cannot be regarded otherwise than as a recognition that some power more potent than that of Spain exisits within that colony.

"You may read what precedes to the minister, and you may say that this Government has confidence in the sincerity and good faith of the present Government of Madrid, and of its desire to have executed in Cuba the promises made in Madrid.

"We fear, however, that unaided, Spain has not the power to control the resistance to its authority under the attitude and profession of loyalty and of support which is more formidable than the insurrection of Yara to her continued ascendency. The rebellion and insurrection of the Casino Espagnole and its pretorian volunteers, present the most formidable opposition to the authority of the peninsula.

"With regard to the Virginius, we are still without information as to the particulars of her capture. There are conflicting representations as to the precise place of capture, whether within British waters or on the high seas, and we have no information as to whether she was first sighted within Spanish waters and the chase commenced there, or whether it was altogether in neutral waters.

"Mr. Hall has been requested to furnish full particulars, and a vessel of the Navy has been dispatched thither. Mr. Hall informs me that telegraphic communication between Havana and Santiago de Cuba has been interrupted.

"There is also some doubt as to the right of the Virginius to carry the American flag, or of her right to the papers which she unquestionably carried. This is being investigated, and, of course, no admission of doubt as to the character of the vessel can be allowed until it become apparent that the Government cannot sustain the nationality of the vessel, while the doubt imposes on the Government the necessity of caution in ascertaining the facts before making a positive demand.

"While writing this instruction, a telegram from Mr. Hall mentions that Havana papers of this morning published a statement, apparently from official sources, that the captain and thirty-six of the crew of the Virginius and sixteen others were shot on the 7th and 8th instant.

"Such wholesale butchery and murder is almost incredible; it would be wholly incredible but for the bloody and vengeful deeds of which Cuba has been the theater. No Government deserves to exist which can tolerate such crimes. Nature cries aloud against them. Spain will be loud and earnest in punishing them, or she will forfeit her past good name.

"Your request to the Government that our consul be permitted to see and to confer with American citizens who may be prisoners at Santiago

de Cuba was considerate, and is approved; but it had been anticipated through the Havana consulate."

Same to same, Nov. 12, 1873. MSS. Inst., Spain; *ibid.*

"I have the honor to forward a copy of a note passed to the minister of state yesterday, requesting that any American citizens in custody of the authorities at Santiago de Cuba be allowed all the privileges guaranteed to them by the seventh article of the treaty of 1795, and that the consul of the United States at that place be permitted to have free communication with the accused. This suggestion seemed to me proper, in view of what happened in March last in the case of the sailors of the bark Union, and your instructions in that case."

Mr. Sickles to Mr. Fish, Nov. 12, 1873. MSS. Dispatches, Spain; *ibid.*

"The case of the Deerhound, of which I cabled a brief statement this morning, was not settled without considerable hesitation and delay on the part of this Government. Mr. Carvajal insisted for some time that it was a proper subject for the decision of a prize court, and that until the judgment of that tribunal should be given, no diplomatic reclamation could be entertained. This ground was not satisfactory to Great Britain. It was replied that no declaration of war had been made by Spain; that the parties to the contest had not been recognized as belligerents; that no jurisdiction over such a capture could be acquired by a prize court in time of peace; that the act of the Spanish cruiser was a mere trespass on the high seas, from which no right of condemnation could possibly follow. Great Britain therefore urged that the matter was in the exclusive and sole cognizance of the executive authorities; and considering that the facts of the case and the principles of public law applicable to them were indisputable and clear, the immediate release of the vessel, passengers, and crew was demanded. The Spanish Government at length yielded to the arguments ably presented by Mr. MacDonell, the British chargé d'affaires, and made ample reparation."

*Ibid.*

"The Deerhound, an English vessel with arms and munitions of war for Don Carlos, captured in July last off this coast, on the high seas, by a Spanish gunboat, was released, with her crew and passengers, including one or more prominent Carlists, on the demand of Great Britain."

Same to same (telegram), Nov. 12, 1873; *ibid.*

"Conference appointed for this afternoon adjourned by minister, because he had received at a late hour last night information from the captain-general that forty-nine of the persons on board the Virginius had been shot on the 7th and 8th instant. Mr. Carvajal said he communicated this report to me with profound regret. President Castelar had shown the deepest feeling in view of this intelligence. It appears the orders of this Government, sent on the 6th, did not reach Havana until the 7th, and could not be transmitted to Santiago in time to prevent what was done. General Jovellar says he will stop any more slaughter. Further reports called for at two this morning, and I am promised explanations as soon as they can be given. The Madrid papers of last evening and this morning announced that fifty executions had taken place."

Same to same (telegram), Nov. 13, 1873; *ibid.*

"Your telegram announcing adjournment of conference received.

"Unless abundant reparation shall have been voluntarily tendered, you will demand the restoration of the Virginius, and the release and delivery to the United States of the persons captured on her who have not already been massacred, and that the flag of the United States be saluted in the port of Santiago and the signal punishment of the officials who were concerned in the capture of the vessel, and the execution of the passengers and crew.

"In case of refusal of satisfactory reparation within twelve days from this date, you will, at the expiration of that time, close your legation, and will, together with your secretary, leave Madrid, bringing with you the archives of the legation. You may leave the printed documents constituting the library in charge of the legation of some friendly power, which you may select, who will consent to take charge of them."

Mr. Fish, Sec. of State, to Mr. Sickles (telegram), Nov. 14, 1873. MSS. Inst., Spain; *ibid.*

"Hall telegraphs this date the confirmation of report of further execution on 12th instant, and that Havana papers of yesterday published account of execution of fifty-seven other prisoners, and that only some eighteen will escape death, but that nothing official was received. You will represent this report to minister. These repeated violations of assurances of good-will and of the prohibition of murder by the authorities in Santiago increase the necessity of full and speedy reparation. There is but one alternative if denied or long deferred. If Spain cannot redress the outrages perpetrated in her name in Cuba, the United States will. If Spain should regard this act of self-defense and justification, and of the vindication of long-continued wrongs, as necessitating her interference, the United States, while regretting it, cannot avoid the result. You will use this instruction cautiously and discreetly, avoiding unnecessarily exciting any proper sensibilities, and avoiding all appearance of menace; but the gravity of the case admits no doubt, and must be fairly and frankly met."

Same to same (telegram), Nov. 15, 1873; *ibid.*

"Consul at Havana telegraphs that the report of further executions communicated by him and mentioned in my telegram of 15th was officially contradicted, and that until 13th the total number of executions was fifty-three, thus confirming minister's statement in note to you.

"Last evening Spanish minister communicated to me, by direction of his Government, a telegram of yesterday's date, declaring the resolution of his Government to abide by the principles of justice and to observe international law, to comply with the letter of treaties, and to punish all those who shall have made themselves liable to punishment regardless of their station, and to make reparation if right should require it, urging at the same time that a knowledge of facts is necessary

to proceed with the judgment required by the gravity of the case, and that the news which had reached them, like that received here, must be confused.

"The telegram to the Spanish minister is subsequent in date to the minister's note of 17th to you, and may be regarded as a reconsideration or later decision of the Government. Appreciating this fact, and determined to continue to be right in the position he has assumed, the President holds that the demand for a proper length of time to learn the exact state of the facts is reasonable. In view of this request you will defer your immediate departure from Madrid, and await further instructions."

Same to same (telegram), Nov. 19, 1873; *ibid.*

"Instruction sent yesterday by cable authorizes you to defer closing legation in order to allow a reasonable time to Spanish Government to ascertain facts in response to their request through minister here, presented on 18th instant. No other postponement has been agreed to, and minister was informed that a satisfactory settlement would be expected by 26th."

Same to same (telegram), Nov. 20, 1873; *ibid.*

"I have the honor to acknowledge the receipt of your letter of the 11th instant, submitting to me a large number of documents and depositions, and asking for my opinion as to whether or not the Virginius, at the time of her capture by the Spanish man-of-war Tornado, was entitled to carry the flag of the United States, and whether or not she was carrying it improperly and without right at that time.

"This question arises under the protocol of the 29th ultimo, between the Spanish minister and the Secretary of State, in which, among other things, it is agreed that on the 25th instant Spain shall salute the flag of the United States. But it is further provided that 'if Spain should prove to the satisfaction of the Government of the United States that the Virginius was not entitled to carry the flag of the United States, and was carrying it, at the time of her capture, without right and improperly, the salute will be spontaneously dispensed with, as in such case not being necessarily requirable; but the United States will expect, in such a case, a disclaimer of the intent of indignity to its flag in the act which was committed.'

"Section 1 of the act of December 31, 1792, provides that ships or vessels registered pursuant to such act, 'and no other (except such as shall be duly qualified according to law for carrying on the coasting trade and fisheries, or one of them) shall be denominated and deemed ships or vessels of the United States, entitled to the benefits and privileges appertaining to such ships.' Section 4 of the same act provides for an oath, by which, among other things, to obtain the registry of a vessel, the owner is required to swear 'that there is no subject or citizen of any foreign prince or state, directly or indirectly, by way of trust,

confidence, or otherwise, interested in such ship or vessel, or in the profits or issues thereof.'

"Obviously, therefore, no vessel in which a foreigner is directly or indirectly interested is entitled to a United States registry, and if one is obtained by a false oath as to that point, and the fact is that the vessel is owned, or partly owned, by foreigners, she cannot be deemed a vessel of the United States, or entitled to the benefits or privileges appertaining to such vessels.

"The Virginius was registered in New York on the 26th of September, 1870, in the name of Patterson, who made oath as required by law, but the depositions submitted abundantly show that, in fact, Patterson was not the owner at that time, but that the vessel was the property of certain Cuban citizens in New York, who furnished the necessary funds for her purchase. J. E. Shepherd, who commanded said vessel when she left New York with a certificate of her register in the name of Patterson, testifies positively that he entered into an agreement to command said vessel at an interview between Quesada, Mora, Patterson, and others, at which it was distinctly understood that the Virginius belonged to Quesada, Mora, and other Cubans, and that said Mora exhibited to him receipts for the purchase-money and for the repairs and supplies upon said steamer, and explained to him how said funds were raised among the Cubans in New York. Adolpho De Varona, who was the secretary of the Cuban mission in New York at the time the Virginius was purchased, and afterwards sailed in her as Quesada's chief of staff, testifies that he was acquainted with all the details of the transaction, and knows that the Virginius was purchased with the funds of the Cubans, and with the understanding and arrangement that Patterson should appear as the nominal owner, because foreigners could not obtain a United States register for the vessel. Francis Bowen, Charles Smith, Edward Greenwood, John McCann, Matthew Murphy, Ambrose Rawlings, Thomas Gallagher, John Furlong, Thomas Anderson, and George W. Miller, who were employed upon the Virginius in various capacities after she was registered in the name of Patterson, testify clearly to the effect that they were informed and understood while they were upon the vessel that she belonged to Quesada and the Cubans represented by him, and that he navigated, controlled, and treated said vessel in all respects as though it was his property.

"Nothing appears to weaken the force of this testimony, though the witnesses were generally subjected to cross-examination; but, on the contrary, all the circumstances of the case tend to its corroboration. With the oath for registry the statutes requires a bond to be given, signed by the owner, captain, and one or more sureties; but there were no sureties upon the bond given by Patterson and Shepherd. Pains have been taken to ascertain if there was any insurance upon the vessel, but nothing of the kind has been found, and Quesada, Varona, and the other Cubans who took passage upon the Virginius, instead of going on

board at the wharf in the usual way, went aboard off a tug after the vessel had left the harbor of New York. I cannot do otherwise than to hold upon this evidence that Patterson's oath was false, and that the register obtained in his name was a fraud upon the navigation laws of the United States.

"Assuming the question to be what appears to conform to the intent of the protocol, whether or not the Virginius, at the time of her capture, had a right, as against the United States, to carry the American flag, I am of the opinion that she had no such right, because she had not been registered according to law; but I am also of the opinion that she was as much exempt from interference on the high seas by another power, on that ground, as though she had been lawfully registered. Spain, no doubt, has a right to capture a vessel, with an American register, and carrying the American flag, found in her own waters assisting, or endeavoring to assist, the insurrection in Cuba, but she has no right to capture such a vessel on the high seas upon an apprehension that, in violation of the neutrality or navigation laws of the United States, she was on her way to assist said rebellion. Spain may defend her territory and people from the hostile attacks of what is, or appears to be, an American vessel; but she has no jurisdiction whatever over the question as to whether or not such vessel is on the high seas in violation of any law of the United States. Spain cannot rightfully raise that question as to the Virginius, but the United States may, and, as I understand the protocol, they have agreed to do it, and, governed by that agreement and without admitting that Spain would otherwise have any interest in the question, I decide that the Virginius, at the time of her capture, was without right and improperly carrying the American flag."

Mr. Williams, Att'y Gen., to Mr. Fish, Dec. 17, 1873. 14 Op., 340; For. Rel., 1874. See as to flag without papers, *infra*, §§ 408 *ff*.

"Referring to the protocol signed on the 29th day of November, and to the agreement signed on the 8th day of December, instant, between the Spanish minister and myself, of which copies were furnished to you with my letter of 8th instant, I have the honor to call your attention to the provision in these two papers relative to a salute to the flag of the United States, to be made by Spain, in the harbor of Santiago de Cuba, on the 25th day of December, instant, and to the agreement in the protocol that 'if, before that date, Spain should prove to the satisfaction of the Government of the United States that the Virginius was not entitled to carry the flag of the United States, and was carrying it at the time of her capture without right and improperly, the salute will be spontaneously dispensed with, as in such case not being necessarily requirable.'

"The Spanish minister, in behalf of his Government, has submitted certain documents, including depositions taken before a United States commissioner, in the presence of the attorney of the United States for

the southern district of New York, by whom the parties making the depositions were cross-examined.

"These depositions, together with copies of the register, and other papers of the Virginius, were, by direction of the President, submitted to the Attorney-General, requesting his opinion upon the force of the evidence, whether it does substantiate to the reasonable satisfaction of this Government that the Virginius was not entitled to carry the flag of the United States, and was carrying it, at the time of her capture, without right and improperly.

"The Attorney-General holds, upon the evidence presented, that the register of the Virginius was a fraud upon the navigation laws of the United States, and is of the opinion that she had no right to carry the flag of the United States, and he 'decides that the Virginius, at the time of her capture, was without right, and improperly, carrying the American flag.'

"By direction of the President, I have the honor to inclose herewith a copy of this opinion and decision of the Attorney-General.

"The President directs me further to say that the conditions having thus been reached, on which, according to the protocol of the 29th of November last, the salute to the flag of the United States is to be spontaneously dispensed with, he desires that you will give the necessary orders and instruct the proper officers to notify the authorities of Santiago de Cuba of that fact, in time to carry out the intent and spirit of the agreement between the two Governments."

Mr. Fish, Sec. of State, to Mr. Robeson, Sec. of the Navy, Nov. 17, 1873. MSS. Dom. Let.; *ibid.*

"Spain having admitted (as could not be seriously questioned) that a regularly documented vessel of the United States is subject on the high seas in time of peace only to the police jurisdiction of the power from which it receives its papers, it seemed to the President that the United States should not refuse to concede to her the right to adduce proof to show that the Virginius was not rightfully carrying our flag. When the question of national honor was adjusted, it also seemed that there was a peculiar propriety in our consenting to an arbitration on a question of pecuniary damages."

Mr. Fish, Sec. of State, to Mr. Adee, Dec. 31, 1873. MSS. Inst., Spain.

"In March last an arrangement was made, through Mr. Cushing, our minister in Madrid, with the Spanish Government, for the payment by the latter to the United States of the sum of eighty thousand dollars in coin, for the purpose of the relief of the families or persons of the ship's company and certain passengers of the Virginius. This sum was to have been paid in three installments at two months each. It is due to the Spanish Government that I should state that the payments were fully and spontaneously anticipated by that Government, and that the whole amount was paid within but a few days more than two months

from the date of the agreement, a copy of which is herewith transmitted. In pursuance of the terms of the adjustment I have directed the distribution of the amount among the parties entitled thereto, including the ship's company and such of the passengers as were American citizens. Payments are made accordingly, on the application by the parties entitled thereto."

President Grant, Seventh Annual Message, 1875.

The following documents may be referred to in this connection:

Steamer Virginius. Correspondence as to, House Ex. Doc. 30, 43d Cong., 1st sess.

Trial of General Juan Burriel for the massacre of the passengers and crew of the. Correspondence. President's message, Jan. 21, 1876, House Ex. Doc. 90, 44th Cong., 1st sess.

Indemnity. Amount received and distributed. President's message, Nov. 15, 1877, House Ex. Doc. 15, 45th Cong., 1st sess.

Further correspondence. President's message, Mar. 29, 1878, House Ex. Doc. 72, 45th Cong., 2d sess.

The protocol of conference with Spain relative to the captured steamer Virginius, will be found in Brit. and For. St. Pap., 1872–'73, vol. 63. For the agreement as to indemnity, see Brit. and For. St. Pap., 1874–'75, vol. 66. As to ships without registry, see *infra*, §§ 408 *ff.*

"I have to instruct you to bring to the earnest attention of His Majesty's Government a series of occurrences on the high seas and in waters adjacent to the eastern part of the Island of Cuba of such exceptional gravity that this Government cannot but attach the utmost importance thereto, inasmuch as the facts which have been brought to the attention of this Department, if substantiated, involve not only unwarrantable interference with the legitimate pursuit of peaceful commerce by American citizens, but also a grave affront to the honor and dignity of their flag.

"Four separate instances of the visitation and search of American commercial vessels by armed cruisers of Spain have been reported in rapid succession, under circumstances which impress the mind of the President with the substantial truthfulness of the statements, made under circumstances which preclude collusion or willful deception on the part of those making them.

"The facts of these occurrences, in the order in which they took place, as sworn to by the officers of the several vessels, are as follows:

"1st. The schooner Ethel A. Merritt, one of the fleet belonging to the firm of Warner & Merritt, fruiterers, of Philadelphia, sailed from Port Antonio, Jamaica, on the 29th May last, laden with fruit for Philadelphia. On the next day, May 30, she was overhauled by a vessel-of-war under the Spanish flag, which fired a blank shot, upon which the Ethel A. Merritt displayed the United States flag and kept on her course. The cruiser then bore down upon her and fired a solid shot which glanced and passed through her rigging. The master of the schooner, to save the owners' property and the lives of his crew, then hove to and

his vessel was boarded by an armed officer, in Spanish uniform, who searched her, and finding nothing on board save legitimate cargo, permitted her to proceed on her course. The affidavits of the master and first mate of the schooner fixed her distance from the nearest point of the Island of Cuba at the time she was boarded, as between six and seven nautical miles. The name of the boarding cruiser was not ascertained at the time, and through the mistaken impression of one of the schooner's crew, who read the name on her stern indistinctly, she was supposed to be called the Nuncio or Nunico.

"2d. The schooner Eunice P. Newcomb, of Wellfleet, Mass., bound from Port Antonio, Jamaica, to Boston, with a cargo of bananas and cocoanuts, on or about the 18th of June last, was in like manner overhauled by a gunboat under the Spanish flag, which fired a blank shot across her bow. The Eunice P. Newcomb showed the United States flag and kept on her course, being then on the high seas, seven or eight nautical miles distant from the coast of Cuba. The Spanish cruiser next fired a solid shot across the schooner's stern, when the latter hove to and was boarded by three men from the gunboat, who searched the vessel and left her to proceed on her course. In this case, also, the name of the boarding cruiser was not reported to the Department.

"3d. The schooner George Washington, of Booth Bay, Me., cleared from Baltimore, Md., on the 22d of June last, in ballast, for Manchioneal, in Jamaica, for a cargo of fruit. On the 5th of July, when about fifteen miles distant from Cape Maysi, on the eastern extremity of the Island of Cuba, she sighted a steamer some ten miles distant. The steamer altered her course and bore down upon the schooner, which hoisted the United States flag. The steamer overtook the schooner, not displaying the Spanish flag until abreast of her, steamed ahead with guns manned, and lowered a boat which put off to the George Washington. The master of the latter hove to, and the boat, containing two officers and two men, heavily armed, ran alongside. The Spanish officers and coxswain went on board, examined the schooner's papers, searched her hold and ship's stores, inspected all her crew, and left her without explanation. The search took place about fifteen miles southeasterly of Cape Maysi. The name of the vessel was in this instance, also, not ascertained, but the concluding letters on her stern, all that could be read as she lay, are said to have been "gary," which leads the Department to conjecture that she may have been the Blasco de Garay, the gunboat concerned the following day, in the same neighborhood, in the fourth and last of the cases of visitation and search thus far reported to this Government.

"4th. The schooner Hattie Haskell, of New York, sailed from that city on the 18th of June last, with a general cargo for the San Blas coast in the Colombian State of Panama. On the 6th of July she sighted the east coast of Cuba, off Cape Maysi. At two o'clock that day she sighted a side-wheel steamer, which gave chase, and, when near, set the Span-

ish flag, whereat the Hattie Haskell showed the American colors. At six o'clock the gunboat, which proved to be the Blasco de Garay, ordered the schooner to heave to, and when a cable's length distant, sent a boat off to her with an armed crew, her guns being meanwhile manned and crew mustered for action. The boat carried two officers, who examined the schooner's papers and searched her hold, after which she was permitted to proceed. This visit and search occurred about 32 miles southwesterly from Cape Maysi, as verified by the affidavits of the master, mate, and all the crew of the Hattie Haskell before the United States court at Aspinwall.

"As may naturally be supposed, these occurrences gave this Government much concern, and immediate steps were taken to ascertain the truth of the facts stated. The prompt denial of the possibility of such an event taking place, which was spontaneously made public through the press of the Cuban authorities, coupled with the circumstances of no vessel bearing a name even remotely like that of Nuncio or Nunico being in the Spanish service, gave rise at first to the conjecture that the search of the Ethel A. Merritt might have been the work of some piratical craft, and the Tennessee, a war vessel of the United States, was promptly dispatched to Cuban waters to make an investigation.

"Your own dispatch of the 16th of June (No. 33) shows how quick the Spanish ministry was to disavow the act, then only known to it through the press; and how earnest was the assurance given that if the firing had taken place as reported, it was done contrary to the express orders and wish of the Spanish Government. It was, however, soon learned by the rear-admiral commanding the Tennessee that the firing upon, boarding, and search of the Ethel A. Merritt and Eunice P. Newcomb was admitted by the Spanish authorities at Santiago de Cuba, the explanation given by them being that the *guarda costas* are not permitted to cruise at a greater distance than six miles from the Cuban shore; that the schooners when boarded by officers of the gunboat Canto were at a distance not greater than from two to three miles from the south coast of Cuba, and that the occurrences were immediately reported through the captain of the port of Santiago de Cuba to the Spanish admiral at Havana.

"The reported visitation and search of the George Washington and Hattie Haskill has not as yet been in like manner admitted, but from the verification of the incidents with respect to the two previous searches, there can be little doubt that the occurrences in their cases will be likewise found to be true, and that the war vessels of Spain off the coast of Cuba have in at least four instances in rapid succession exercised the right of visitation and search upon vessels of the United States flying the American flag, and passing in the pursuit of lawful trade through the commercial highway of nations which lies to the eastward of the Island of Cuba. This Government does not lose sight of the *ex parte* declarations made by the Spanish local authorities at San-

tiago de Cuba, that the two acts thus far verified took place within the three-mile limit. This point is in dispute, and evidence as trustworthy as proof can well be in such cases is adduced to show that the vessels were at the time from six to eight miles distant from the shore. In the cases of the two remaining searches the evidence fixes the distance from shore far outside of the limits mentioned, and in that of the Hattie Haskell, especially, at over twenty miles from the Cuban coast.

"The question does not appear to this Government to be one to be decided alone by the geographical position of the vessels, but by the higher considerations involved in this unwonted exercise of a right of search in time of peace, and to a greater extent than the existing treaty of 1795, between the two nations, in its eighteenth article, permits it to be exercised even in time of recognized public war, that article permitting visitation only, with inspection of the vessel's sea-letters, and not search. These interferences with our legitimate commerce do not even take the form of a revenue formality performed by the revenue vessels of Spain, but carry in their methods most unequivocal features of belligerent searches made by the war vessels of Spain. From the unhappy history of the events of the past ten years in and about the waters of the Antilles, it is only too cogently to be inferred that these proceedings of Spanish war vessels assume a right thus to arrest our peaceful commerce under motives not of revenue inspection, but of warlike defense. In this aspect of the case it may well be doubted whether, under color of revenue investigation to intercept smuggling or other frauds, jurisdictional power within the limit of the recognized maritime league could be invoked in time of peace to justify the interference of Spanish cruisers with the lawful commerce of nations passing along a public maritime highway, in a regular course of navigation which brings them near the Cuban coast, though not bound to its ports. It is not to be supposed that the world's commerce is to be impeded, and the ships of foreign and friendly nations forced to seek an unwonted channel of navigation; that they are to be driven out of their proper course into adverse winds and currents to avoid the offensive exercise of a right which is allowed only to the exigencies of a state of war, and to avert the imminent risk of armed attack and of discourtesy to the flag they bear. And it needs no argument to show that the exercise of any such asserted right upon commercial vessels, on the high seas, in time of peace, is inconsistent with the maintenance of even the most ordinary semblance of friendly relations between the nation which thus conducts itself and that whose merchant vessels are exposed to systematic detention and search by armed force.

"I have made use of the terms 'systematic detention and search' advisedly, for although I am loath to believe that the Government of His Majesty has determined upon the adoption of a course towards the vessels of the United States, in or near the jurisdictional waters of Spain, which can only imply a standing menace to the integrity and honor of

my country and its flag, yet the occurrence in quick succession of four such grave acts of offensive search of our peaceful traders, after so long an interval of repose since this question was last raised in the case of the American whalers on the southern coast of Cuba, cannot but make me apprehensive that the Government of Spain, or the superior authority of Cuba, in pursuance of the discretionary power it is understood to possess, may have taken up a new line of action, and one wholly inconsistent with those relations between the two countries which both their reciprocal interests and duties require should be maintained unbroken.

"It is my profound hope that such apprehensions on my part may be found to be baseless. But in view of the length of time which has elapsed since the first of these occurrences was known to the public here and in Spain, of the anxiety which the minister of state expressed to you in the matter of the telegraphic inquiries made by him of the Cuban authorities, and of the immediate report of the early cases to the admiral at Havana, which is said to have been made, I cannot but express my surprise and regret that the Spanish Government should not of itself have hastened to make some explanation of the incidents calculated to allay the anxiety of a friendly power, whose just susceptibilities as respects the safety of its commerce and the honor of its flag are so well known to the Spanish Government.

"I do not undertake, now, either a full exposition of the doctrine of this Government on the subject of the maritime jurisdiction of states over circumjacent waters, or a particular inquiry as to the diverse views, in some sense, which have been brought forward, heretofore, in the discussion between Spain and the United States on the subject of jurisdiction over Cuban waters.

"I desire, however, that the position heretofore more than once distinctly taken by this Government, in its diplomatic correspondence with Spain, shall be understood by you and firmly adhered to in any intercourse you may have in the pending situation with the Spanish minister of foreign affairs. This Government never has recognized and never will recognize any pretense or exercise of sovereignty on the part of Spain beyond the belt of a league from the Cuban coast over the commerce of this country in time of peace. This rule of the law of nations we consider too firmly established to be drawn into debate, and any dominion over the sea outside of this limit will be resisted with the same firmness as if such dominion were asserted in mid-ocean.

"The revenue regulations of a country framed and adopted under the motive and to the end of protecting trade with its ports against smuggling and other frauds which operate upon vessels bound to such ports have, without due consideration, been allowed to play a part in the discussions between Spain and the United States on the extent of maritime dominion accorded by the law of nations which does not belong to them. In this light are to be regarded the royal decrees which it has been claimed by the Spanish Government had for more than a

hundred years established two leagues as the measure of maritime jurisdiction asserted and exercised by the Spanish Crown both in peninsular and colonial waters. Of this character, obviously, are the regulations of our revenue system in force since 1799, which not only allow but enjoin visitation of vessels bound to our ports within four leagues from land, which, in her diplomatic correspondence with this Government, Spain has much insisted on as equivalent to its own dominion as asserted off its coasts, except that our authority was exerted at twice the distance from land.

"But the distinction between dominion over the sea, carrying a right of visit and search of all vessels found within such dominion, and fiscal or revenue regulations of commerce, vessels, and cargoes engaged in trade as allowed with our ports to a reasonable range of approach to such ports, needs only to be pointed out to be fully appreciated. Every nation has full jurisdiction of commerce with itself, until by treaty stipulations it has parted with some portion of this full control. In this jurisdiction is easily included a requirement that vessels seeking our ports, in trade, shall be subject to such visitation and inspection as the exigencies of our revenue may demand, in the judgment of this Government, for the protection of the revenues and the adequate administration of the customs service. This is not dominion over the sea where these vessels are visited, but dominion over this commerce with us, its vehicles and cargoes, even while at sea. It carries no assertion of dominion, territorial and *in invitum*, but over voluntary trade in progress and by its own election, submissive to our regulations of it, even in its approaches to our coasts and while still outside of our territorial dominion. (This statutory provision is the subject of discussion in instructions of Mr. Fish and Mr. Evarts, given *supra*, § 32.)

"You will observe, therefore, that the American vessels which have been interfered with thus unwarrantably were not engaged in trade with Cuba, and were in no degree subject to any surveillance or visitation of revenue regulation. The acts complained of, if, indeed, as our proofs seem to make clear, without the league accorded as territorial by the law of nations, have no support whatever from the principle of commercial regulation which I have explained. Spain had no jurisdiction over the waters in which our vessels were found; no jurisdiction over the trade in which they were engaged; and no warrant under the law of nations, to which alone these vessels in this commerce were subject, can be found for their arrest by the Spanish gunboats.

"As the offense against the rights of our commerce and the freedom our flag, which we complain of in those four instances, is substantive, it is not necessary for me now to insist upon the form and manner of these visitations and searches as elements or aggravations of this offense. It cannot, however, escape notice that each transaction has unequivocal

features of the exercise of direct sovereignty, and by mere force, as if by territorial and armed dominion over the sea which was the scene of the transactions. These were gunboats, a part of the naval power of Spain, under the threat of their armaments and by the presence of adequate armed force boarding these vessels, compelling submission; their action was neither more nor less than such as it would have been under a belligerent right on the high seas in time of war.

"In manner and form, then, as well as in substance, the power to which our commerce was obliged to succumb was not of commercial regulation or revenue inspection, or by any of the instruments employed in preventive or protective service with which commerce is familiar.

"Unless some face shall be put upon these disturbances of our peaceful and honest commerce in one of the most important thoroughfares which I cannot anticipate, this Government will look to Spain for a prompt and ready apology for their occurrence, a distinct assurance against their repetition, and such an indemnity to the owners of those several vessels as will satisfy them for the past and guarantee our commerce against renewed interruption by engaging the interest of Spain in restraint of rash or ignorant infractions, by subordinate agents of its power, of our rights upon the seas."

Mr. Evarts, Sec. of State, to Mr. Fairchild, Aug. 11, 1880. MSS. Inst., Spain, For. Rel., 1880.

The right of search cannot be exercised in time of peace; nor is it any excuse that the search was attempted in the port of a third sovereign who makes no complaint of the outrage.

Mr. Evarts, Sec. of State, to Mr. Asta-Burnagna, Mar. 3, 1881. MSS. Notes, Chili.

"By the law of nations, as it is understood in this Department, the citizens or subjects of a particular country who are owners of a ship, are entitled to carry on such ship, when at sea, the flag of such country; and such flag is to be regarded by all foreign sovereigns as the badge of nationality. It is true that municipal laws exist in the United States, as in other countries, by which, for municipal purposes this rule of the law of nations is subjected to certain limitations. But it is also true that these limitations have no extraterritorial force, and that it is not within the provision of foreign sovereigns to enforce them. Whenever a wrong is done, or supposed to be done, by a foreign sovereign to a vessel owned by citizens of the United States, then the Government of the United States on being duly advised will inquire into the wrong.

"Until, however, such a question actually arises, it is not in accordance with the practice of this Department to declare how the law thus stated would be applied in such contingencies as are suggested in your communication acknowledged as above. The question, in fact, of the right of the local authorities at any particular British port to impose

the tests to which you refer, could only come before this Department on the application of ship-owners claiming to be thereby aggrieved; and until they present their case, and are heard on their own behalf, you will no doubt agree with me that it would be unsuitable for this Department to express in advance any opinion by which their case might be prejudiced."

Mr. Bayard, Sec. of State, to Sir L. West, Apr. 9, 1886. MSS. Notes, Gr. Brit.

"Mr. Machado's claim, as will be seen from this review, has two distinct relations. The first is for the affront to the flag of the United States which his two vessels bore. No foreign sovereign had then the right in time of peace to visit and search a vessel bearing that flag, unless in the single instance of piracy shown beyond reasonable doubt. At the very time Mr. Machado's vessels were thus arrested, Great Britain had been urging on us to give her this privilege in respect to American ships supposed to be slavers; but this proposition was peremptorily repelled. This very fact made the arrest in these particular cases an outrage which this Government was bound to resent. It is true that in 1862, under peculiar circumstances, a treaty with Great Britain granting this right on the basis of reciprocity was duly ratified and proclaimed; but this treaty has, in consequence of the cessation of the slave trade, practically ceased to operate; and visitation and search, in time of peace, of American vessels by British cruisers, except on the ground of piracy, was in 1854 and 1857, and still is, regarded by us as an offense requiring apology and indemnity. It is due to the British Government to say that, when called upon for an explanation, it expressed its regrets at the occurrences in question, tendered an apology, punished the offending officer, and agreed to pay such compensation to Mr. Machado as would, under the circumstances, be suitable. That Government then offered to arbitrate, as has been seen, in case of inability to agree upon the amount of damages."

Mr. Bayard, Sec. of State, to Messrs. Sawyer and Spooner, Apr. 19, 1886. MSS. Dom. Let.

"What is this right of search? Is it a substantive and independent right wantonly, and in the pride of power, to vex and harass neutral commerce, because there is a capacity to do so; or to indulge the idle and mischievous curiosity of looking into neutral trade; or the assumption of a right to control it? If it be such a substantive and independent right, it would be better that cargoes should be inspected in port before the sailing of the vessel, or that belligerent licenses should be procured. But this is not its character." The right of search "has been truly denominated a right growing out of and ancillary to the greater right of capture. Where this greater right may be legally exercised without search, the right of search can never rise or come into question."

Marshall, C. J. The Nereide, 9 Cranch, 406.

Ships-of-war sailing under the authority of their Government, instructed to arrest pirates and other public offenders, may approach vessels at sea to ascertain their character.

A ship under such circumstances is not bound to lie by and await approach, but she has no right to fire at an approaching cruiser upon a mere conjecture that she is a pirate, especially if her own conduct has invited the approach; and, if this be done, the cruiser may lawfully repel force by force and capture her.

The Marianna Flora, 11 Wheat., 1.

The commander of a cruiser having fairly exercised his discretion, in judging whether an attack on him was piratical, cannot be held responsible in damages for having come to a conclusion which subsequent judicial investigation shows to have been incorrect.

*Ibid.*

A public vessel of the United States has the right, on the high seas, to detain a merchant vessel of the United States until the Government can act upon the matter, where there is just cause to believe that such merchant vessel is engaged in a trade forbidden by act of Congress.

3 Op., 405, Grundy, 1839.

The brig Thomas, of Havana, sailing under the American flag, was seized by a public vessel of the United States in the port of Havana, on suspicion of being engaged in the slave trade. A correspondence ensued between the captain-general of Cuba and the United States consul at Havana, who advised the seizure, which terminated in a friendly disposition of the question whether the seizure was a violation of the jurisdictional rights of Spain; and upon this point no opinion was given by the Attorney-General. But it was held that as to the captain of the Thomas and his vessel the seizure was not wrongful.

*Ibid.*

The opinion of Attorney-General Williams, Dec. 17, 1873, on the Virginius case (14 Op., 340) is given in a prior page of this section.

Lord Aberdeen having maintained in 1841 that American vessels on the high seas were not visited as American vessels, but as vessels of nations with whom Great Britain had treaties, but who fraudulently carried American colors, Mr. Wheaton (Inquiry, 143) replied that "neither is the neutral vessel visited in time of war, *as neutral*, but she is ever visited and captured and detained and carried in for adjudication, *as being suspected* to be an enemy, either literally such, or as having forfeited her neutral character by violating her neutral duties."

See as approving Mr. Wheaton's views, Mr. Legaré, Sec. of State, June 9, 1843. MSS. Inst., Prussia.

On the assumption of the British Government that by the law of nations a search to determine as to the fraudulency of a flag is admissible, Mr. Lawrence thus speaks: "If the proposition of the British Government was tenable, we were in much worse position than if we had act-

ually conceded the right of search. In the treaties made with other powers there were limits as to the time when and where the visitation for the examination of the papers may be made; and the right of detention is confined to certain cruisers specially authorized. In our case, if admitted at all, it would be equally competent for any ship-of-war, and if English ships have the right, all others possess it, to visit and detain any merchantman at any time and in any part of the ocean." (Visit and Search, 41. See Schuyler's Am. Diplom., 251, citing to same effect President Tyler's message of Dec. 8, 1841.) The same position is taken by Mr. Webster in his instructions to Mr. Everett of March 28, 1843.

As to the treaty of 1842, see further *supra*, § 150*e*; 2 Halleck's Int. Law (Baker's ed.), 277.

Although Mr. Webster, as has been seen, followed up the Ashburton treaty of 1842 with a vigorous declaration of the determination of the Government of the United States to admit no right of visitation in times of peace, the British ministry seemed to hold that the opposition of the United States to such visitation was relaxed. It may have been on this assumption that early in 1858 a number of small vessels-of-war were sent into Cuban waters with instructions to search for slavers. This mission was exercised with so little delicacy and reserve, in respect to vessels of the United States sailing in those waters, that President Buchanan not only addressed a grave protest to the British Government, but sent a naval force to the Cuban waters to "protect all vessels of the United States on the high seas from search or detention by the vessels-of-war of any other nation." The Senate unanimously approved of these instructions (Cong. Globe, 1858–'59, p. 3081, cited in 2 Curtis's Buchanan, 214), and the offensive orders were withdrawn by the British Government.

Mr. Dallas having, on July 4, 1858, at a dinner of Americans in London, said: "Visit and search in regard to American vessels on the high seas in time of peace is finally ended," Lord Lyndhurst, on July 26, in the House of Lords, said in reference to this remark: "We have surrendered no right at all, for no such right as that contended for ever existed. We have abandoned the assumption of right, and in so doing we have acted justly, prudently, and wisely. I think it is of great importance that this question should be distinctly and finally understood and settled. By no writer on international law has this right ever been asserted. There is no decision of any court of justice having jurisdiction to decide such questions in which that right has ever been admitted."

On April 7, 1862, Mr. Seward, in view of the exigencies of the civil war then pending, agreed to a proposal of the British Government extending the right of visitation in such cases as a means of putting down the slave trade, and a treaty to this effect (unfortunately without duly restricting the right of visitation in such cases) was agreed to and ratified by the Senate of the United States. (See review of Mr. Seward's action in this relation in a pamphlet by the late Mr. William B. Reed). The treaty provided for mixed courts for the determination of seizures of this class. The slave trade having virtually ceased, so far as concerns this country, on the abolition of slavery, the mixed courts never went into operation. By a supplementary treaty in 1870, the duties assigned to these courts were given to the admiralty courts of the two countries respectively. (See Schuyler's Am. Diplom., 263, 264). The

action of our Government giving the right of search in this particular line of cases excludes it from other cases on the principle *expressio unius est exclusio alterius.*

It is a serious objection to the treaty that it extends this right of search to our own coast, the Keys of Florida being within thirty leagues from Point Yeacos or Mantanzas. It appears from a letter of Mr. Perry, minister at Madrid (U. S. Dip. Corr., 1862, 509), that the Spanish minister expressed surprise that the United States "after combating the principle so long," "should have yielded now a right so exceedingly liable to be abused in practice"; and this surprise may still be expressed elsewhere than in Spain.

"Two essays, 'An inquiry into the validity of the British claim to a right of visitation and search of American vessels suspected to be engaged in the African slave trade,' by Mr. Wheaton, London, 1842; and 'Examen de la Question anjourd'hui pendante entre le Gouvernement des États Unis et celui de la Grande Bretagne, concernant le droit de Visite' (ascribed to Hon. Lewis Cass, then minister to France), Paris, 1842, with the letter of General Cass to M. Guizot, dated 13th February, 1842, and which was in the nature of a protest against the quintuple treaty of 20th December, 1841, are understood to have had no little influence in preventing the ratification of that treaty by the Government of France.

"The publications referred to received, as it were, an official sanction from Mr. Legaré, on his assuming the seals of the State Department. In his earliest instructions he said: 'I avail myself of the first opportunity afforded by our new official relations, to express to you my hearty satisfaction at the part you took, with General Cass, in the discussion of the "right of search," and the manner you acquitted yourself of it. I read your pamphlet with entire assent. It is due to the civilization of the age, and the power of opinion, even over the most arbitrary Governments, that every encroachment on the rights of nations should become the subject of immediate censure and denunciation. One great object of permanent missions is to establish a censorship of this kind, and to render by means of it the appeals of the injured to the sympathies of mankind, through diplomatic organs, at once more easy, more direct, and more effective.' (Mr. Legaré to Mr. Wheaton, June 9, 1843. State Department MSS.)"

Lawrence's Wheaton (ed. 1863), 262, 263.

It is said that this prerogative is essential to clear the seas of pirates. But the prerogative is an impertinent intrusion on the privacy of individuals as well as on the territory of the state whose domains are thus invaded; and the evil of sustaining such a prerogative is far greater than the evil of permitting a pirate for a few hours to carry a simulated flag. Pirates, in the present condition of the seas, have been very rarely arrested when setting up this simulation. They are now, in the few cases in which they appear, readily tracked by other means; and the fact that in some instances they are caught when carrying a false flag no more sustains the right of general search of merchant shipping than would the fact that conspirators sometimes carry false papers justify the police in seizing every business man whom they meet and searching his correspondence. In the very rare cases in which an apparent pirate is seized and searched on the high seas under a mistake,

the vessel being a merchant ship, the defense must be, not prerogative, but necessity, only to be justified on the grounds on which is justified an assault made on apparent but unreal cause. (See to this effect Gessner, 12th ed., 303; Kaltenborn, Seerecht, ii, 350; Wheat., Right of Visitation, London, 1842. See to the contrary Phill., iii, 147, 148; Heffter, 164; Calvo, ii, 656. Ortolan holds that the function is to be exercised at the risk of the visiting cruiser as an extra-legal prerogative. Ortolan, iii, 258.)

It may be added that basing the right to search a vessel on the assumption of piracy is a *petitio principii*, equivalent to saying that the vessel is to be searched because she is a pirate, when it is for the purpose of determining whether she is a pirate that she is searched. The searching, as is the case on issuing a search warrant in our ordinary criminal practice, should be at the risk of the party searching, and only on probable cause first shown, not for the purpose of inquiring whether there is probable cause. The right of British cruisers to search a foreign vessel for British sailors was claimed by the British Government prior to the war of 1812 between Great Britain and the United States. The right was not abandoned by Great Britain at Ghent, but it has never since been exercised. It is now virtually surrendered. (1 Wheat. Int. Law, 737.) "I cannot think," says Sir R. Phillimore (3 Phill., 1879, 445), "that the claim of Great Britain was founded on international law. In my opinion it was not." The right to visit and search on certain conditions has frequently, it should be added, been given by treaty, in which case it is determined by the limitations imposed by the contracting states. (See specifications in Gessner, 12th ed., 305.) At the same time we must remember that independent of the right of search, a ship, whether public or private, has a right to approach another on the high seas, if it can, and to hail or speak it, and require it to show its colors, the approaching ship first showing its own. (Ortolan, Rég. Int. et Dip. de la Mer, 233, &c.; Field's Int. Code, § 62.)

"The views of Mr. Webster on this question are fully sustained by the best writers on public law in America and Europe. Chancellor Kent says most emphatically that the right of visitation and search 'is strictly and exclusively a war right, and does not rightfully exist in time of peace, unless conceded by treaty.' He, however, concedes the *right of approach* (as described by the Supreme Court of the United States in the Marianna Flora) for the sole purpose of ascertaining the real national character of the vessel sailing under suspicious circumstances. With respect to the right of *visit in time of peace*, claimed by the English Government, Mr. Wheaton defied the British admiralty lawyers 'to show a single passage of any institutional writer on public law, or the judgment of any court by which that law is administered, either in Europe or America, which will justify the exercise of such a right on the high seas in time of peace.' * * * 'The distinction now set up, between a right of *visitation* and a right of *search*, is nowhere alluded to by any public jurist as being founded on the law of nations. The technical term of *visitation and search*, used by the English civilians, is exactly synonymous with the *droit de visite* of the continental civilians. The right of seizure for a breach of the revenue laws, or laws of trade and navigation, of a particular nation, is quite different. The utmost length to which the exercise of this right on the high seas has ever been carried, in respect to the vessels of another nation, has been to justify seizing them within the territorial jurisdiction of the state against

whose laws they offend, *and* pursuing them in case of flight, seizing them upon the ocean, and bringing them in for adjudication before the tribunals of that State. This, however, says the Supreme Court of the United States in the case of the Marianna Flora, 'has never been supposed to draw after it any right of visitation and search. The party, in such case, seizes at his peril. If he establishes the forfeiture he is justified.' Mr. Justice Story, delivering the opinion of the Supreme Court in the case of the Marianna Flora, says that the right of visitation and search does not belong, in time of peace, to the public ships of any nation. 'This right is strictly a belligerent right, allowed by the general consent of nations in time of war, and limited to those occasions.' 'Upon the ocean, then, in time of peace, all possess an entire equality. It is the common highway of all, appropriated to the use of all, and no one can vindicate to himself a superior exclusive prerogative there. Every ship sails there with the unquestionable right of pursuing her own lawful business without interruption.'"

2 Halleck's Int. Law (Baker's ed.), 270, 271.

In 2 Halleck's Int. Law (Baker's ed.), 273, 274, it is shown that Sir R. Phillimore's assertion that "the right of visit in time of peace, *for the purpose of ascertaining the nationality of a vessel*, is a part, indeed, but a very small part, of the belligerent right of visit and search," is founded on a misconception of the words of Bynkershoek and Kent, to which it appeals. See also Edinburgh Rev. for Oct., 1807, vol. xi, 14.

"When Mr. Wilberforce, in 1818, suggested such a concession of the right of search for slavers to Mr. J. Q. Adams, the answer was: 'My countrymen will never assent to such an arrangement.' A convention to this effect, signed by Mr. Rush and Sir Stratford Canning, was amended by the United States Senate so as to be inapplicable to the American coasts, and was then rejected by England. General Jackson, in 1834, through the then Secretary of State, informed Sir Charles Vaughan, the English minister, that 'the United States were resolved never to be a party to any convention on this subject.' Mr. Webster, in a dispatch to General Cass, declared, in terms the most solemn, that our Government would not 'concur in measures which, for whatever benevolent purposes they may be adopted, or with whatever care or moderation they may be exercised, have a tendency to place the police of the seas in the hands of a single power.' (See Lawrence's Right of Visitation and Search, 94–117; Diplomatic Hist. of the War, 1884, 13, 52, 419.) And Mr. Webster, when Secretary of State in 1851, said: 'I cannot bring myself to believe that those Governments (England and France), or either of them, would dare to search an American merchantman on the high seas to ascertain whether individuals may be on board bound to Cuba, and with hostile purposes.' (Priv. Corr., 477.)"

Whart. Com. Am. Law, § 194.

For a discussion of the negotiations between Great Britain and the United States in relation to the slave trade and the right of visit, see 1 Phill. Int. Law (3d, ed.), 414; 3 *ibid.*, 525, 542.

As to the mode of summoning a neutral to undergo visitation, see the case of the Marianna Flora, 11 Wheat., 1; discussed in 3 Phill. Int. Law (3d ed.) 538.

IV. *ACTION OF PRIZE COURT MAY BE ESSENTIAL.*

§ 328.

"By the well-settled principles of national law it is made the duty of the captor to place an adequate force on board of the captured vessel, and if from mistaken reliance upon the sufficiency of that force, or from misplaced confidence, he fails in that object, the omission is considered to be at his own peril. * * *

"It appears to be equally well settled that capture alone does not transfer any right of property in the vessel or cargo to the captors, the title remaining unchanged until a regular sentence of condemnation has been pronounced by some court of competent jurisdiction. * * *

"The points involved, when considered with reference to the powers and functions of the different branches of this Government, are, besides, within the cognizance of the judicial department; and tribunals are instituted in which they may be fairly investigated. To these tribunals exclusively belongs the right of deciding between different claimants who may choose to litigate their rights before them. The Executive may, it is true, order property to be restored to the rightful *undisputed* owner, in cases where the *United States alone* have, under their revenue laws, put in a claim for forfeiture; but it is not held to be within his constitutional power to take from the possession of an individual, property of which he was once admitted to be the rightful owner, to which he still lays claim, and his title to which has not been divested by the judgment of a court."

Mr. Vail, Acting Sec. of State, to Mr. Pontois, Oct. 19, 1838. MSS. Notes, France.

"After a Mexican privateer has captured an American vessel, the property cannot be transferred until after it shall have been condemned by a court of admiralty; and the question of prize or no prize belongs exclusively to the courts of the captor. These principles of public law are incontestable. At the time the Mexican Government issued these commissions, they knew perfectly well that the prizes of their privateers could not be brought within Mexican ports for condemnation. Aware of this impossibility, they have attempted to overcome it in their prize regulations, by conferring on their consuls in foreign ports, the power, in effect of condemning prizes taken by their privateers. But no principle of public law is settled on surer foundations than that 'neutral ports are not intended to be auxiliary to the operations of the parties at war; and the law of nations has very wisely ordained that a prize court of a belligerent captor cannot exercise jurisdiction in a neutral country. All such assumed authorities are unlawful, and their acts are void.' I quote from the language of Chancellor (then Chief-Justice) Kent, in delivering the opinion of the court in the case of Wheelwright *v.* Depeyster, 1 Johnston's Rep., 481; and the authorities cited by

him fully justify the decision. One of these is the case of Glass *et al. v.* The Sloop Betsey (3 Dallas, 6); in which the Supreme Court of the United States sanctioned this principle so early as the year 1794."

Mr. Buchanan, Sec. of State, to Mr. Saunders, June 13, 1847. MSS. Inst., Spain.

As to prize courts in foreign lands, see *supra*, §§ 399, 400.

"Only the fifth question remains, namely: Did Captain Wilkes exercise the right of capturing the contraband in conformity with the law of nations?

"It is just here that the difficulties of the case begin. What is the manner which the law of nations prescribes for disposing of the contraband when you have found and seized it on board of the neutral vessel? The answer would be easily found if the question were what you shall do with the contraband vessel. You must take or send her into a convenient port, and subject her to a judicial prosecution there in admiralty, which will try and decide the questions of belligerency, neutrality, contraband, and capture. So, again, you would promptly find the same answer if the question were, What is the manner of proceeding prescribed by the law of nations in regard to the contraband, if it be property or things of material or pecuniary value?

"But the question here concerns the mode of procedure in regard not to the vessel that was carrying the contraband, nor yet to contraband things which worked the forfeiture of the vessel, but to contraband persons.

"The books of law are dumb. Yet the question is as important as it is difficult. First, the belligerent captor has a right to prevent the contraband officer, soldier, sailor, minister, messenger, or courier from proceeding in his unlawful voyage, and reaching the destined scene of his injurious service. But, on the other hand, the person captured may be innocent—that is, he may not be contraband. He, therefore, has a right to a fair trial of the accusation against him. The neutral state that has taken him under its flag is bound to protect him if he is not contraband, and is therefore entitled to be satisfied upon that important question. The faith of that state is pledged to his safety, if innocent, as its justice is pledged to his surrender if he is really contraband. Here are conflicting claims, involving personal liberty, life, honor, and duty. Here are conflicting national claims, involving welfare, safety, honor, and empire. They require a tribunal and a trial. The captors and the captured are equals; the neutral and the belligerent state are equals.

"While the law authorities were found silent, it was suggested at an early day by this Government that you should take the captured persons into a convenient port, and institute judicial proceedings there to try the controversy. But only courts of admiralty have jurisdiction in maritime cases, and these courts have formulas to try only claims to contraband chattels, but none to try claims concerning contraband per-

sons. The courts can entertain no proceedings and render no judgment in favor of or against the alleged contraband men.

"It was replied all this was true; but you can reach in those courts a decision which will have the moral weight of a judicial one by a circuitous proceeding. Convey the suspected men, together with the suspected vessel, into port, and try there the question whether the vessel is contraband. You can prove it to be so by proving the suspected men to be contraband, and the court must then determine the vessel to be contraband. If the men are not contraband the vessel will escape condemnation. Still, there is no judgment for or against the captured persons. But it was assumed that there would result from the determination of the court concerning the vessel a legal certainty concerning the character of the men.

"This course of proceeding seemed open to many objections. It elevates the incidental inferior private interest into the proper place of the main paramount public one, and possibly it may make the fortunes, the safety, or the existence of a nation depend on the accidents of a merely personal and pecuniary litigation. Moreover, when the judgment of the prize court upon the lawfulness of the capture of the vessel is rendered, it really concludes nothing, and binds neither the belligerent state nor the neutral upon the great question of the disposition to be made of the captured contraband persons. That question is still to be really determined, if at all, by diplomatic arrangement or by war.

"One may well express his surprise when told that the law of nations has furnished no more reasonable, practical, and perfect mode than this of determining questions of such grave import between sovereign powers. The regret we may feel on the occasion is nevertheless modified by the reflection that the difficulty is not altogether anomalous. Similar and equal deficiencies are found in every system of municipal law, especially in the system which exists in the greater portions of Great Britain and the United States. The title to personal property can hardly ever be resolved by a court without resorting to the fiction that the claimant has lost and the possessor has found it, and the title to real estate is disputed by real litigants under the names of imaginary persons. It must be confessed, however, that while all aggrieved nations demand, and all impartial ones concede, the need of some form of judicial process in determining the characters of contraband persons, no other form than the illogical and circuitous one thus described exists, nor has any other yet been suggested. Practically, therefore, the choice is between that judicial remedy or no judicial remedy whatever.

"If there be no judicial remedy, the result is that the question must be determined by the captor himself, on the deck of the prize vessel. Very grave objections arise against such a course. The captor is armed, the neutral is unarmed. The captor is interested, prejudiced, and perhaps violent; the neutral, if truly neutral, is disinterested, subdued,

and helpless. The tribunal is irresponsible, while its judgment is carried into instant execution. The captured party is compelled to submit, though bound by no legal, moral, or treaty obligation to acquiesce. Reparation is distant and problematic, and depends at last on the justice, magnanimity, or weakness of the state in whose behalf and by whose authority the capture was made. Out of these disputes reprisals and wars necessarily arise, and these are so frequent and destructive that it may well be doubted whether this form of remedy is not a greater social evil than all that could follow if the belligerent right of search were universally renounced and abolished forever. But carry the case one step further. What if the state that has made the capture unreasonably refuse to hear the complaint of the neutral or to redress it? In that case, the very act of capture would be an act of war—of war begun without notice, and possibly entirely without provocation.

"I think all unprejudiced minds will agree that, imperfect as the existing judicial remedy may be supposed to be, it would be, as a general practice, better to follow it than to adopt the summary one of leaving the decision with the captor, and relying upon diplomatic debates to review his decision. Practically, it is a question of choice between law, with its imperfections and delays, and war, with its evils and desolations. Nor is it ever to be forgotten that neutrality, honestly and justly preserved, is always the harbinger of peace, and therefore is the common interest of nations, which is only saying that it is the interest of humanity itself.

"At the same time it is not to be denied that it may sometimes happen that the judicial remedy will become impossible, as by the shipwreck of the prize vessel, or other circumstances which excuse the captor from sending or taking her into port for confiscation. In such a case the right of the captor to the custody of the captured persons, and to dispose of them, if they are really contraband, so as to defeat their unlawful purposes, cannot reasonably be denied. What rule shall be applied in such a case? Clearly the captor ought to be required to show that the failure of the judicial remedy results from circumstances beyond his control, and without his fault. Otherwise, he would be allowed to derive advantage from a wrongful act of his own. * * *

"I have not been unaware that, in examining this question, I have fallen into an argument for what seems to be the British side of it against my own country. But I am relieved from all embarrassment on that subject. I had hardly fallen into that line of argument when I discovered that I was really defending and maintaining, not an exclusively British interest, but an old, honored, and cherished American cause, not upon British authorities, but upon principles that constitute a large portion of the distinctive policy by which the United States have developed the resources of a continent, and thus becoming a considerable maritime power, have won the respect and confidence of many nations. These principles were laid down for us, in 1804, by James Mad-

ison, when Secretary of State in the administration of Thomas Jefferson, in instructions given to James Monroe, our minister to England. Although the case before him concerned a description of persons different from those who are incidentally the subjects of the present discussion, the ground he assumed then was the same I now occupy, and the arguments by which he sustained himself upon it have been an inspiration to me in preparing this reply.

"'Whenever,' he says, 'property found in a neutral vessel is supposed to be liable on any ground to capture and condemnation, the rule in all cases is that the question shall not be decided by the captor, but be carried before a legal tribunal, where a regular trial may be had, and where the captor himself is liable to damages for an abuse of his power. Can it be reasonable, then, or just, that a belligerent commander who is thus restricted, and thus responsible in case of mere property of trivial amount, should be permitted, without recurring to any tribunal whatever, to examine the crew of a neutral vessel to decide the important question of their respective allegiances, and to carry that decision into execution by forcing every individual he may choose into a service abhorrent to his feelings, cutting him off from his most tender connections, exposing his mind and his person to the most humiliating discipline and his life itself to the greatest danger. Reason, justice, and humanity unite in protesting against so extravagant a proceeding.'

"If I decide this case in favor of my own Government, I must disavow its most cherished principles, and reverse and forever abandon its essential policy. The country cannot afford the sacrifice. If I maintain those principles, and adhere to that policy, I must surrender the case itself. It will be seen, therefore, that this Government could not deny the justice of the claim presented to us in this respect upon its merits. We are asked to do to the British nation just what we have always insisted all nations ought to do to us."

Mr. Seward, Sec. of State, to Lord Lyons, Dec. 26, 1861. MSS. Notes, Gr. Brit.
For Lord Russell's position in the case, see *infra*, § 374.
The question whether belligerent diplomatic agents may be regarded as contraband of war is discussed in a future section. See *infra*, § 374.

"The American people could not have been united in a war which, being waged to maintain Captain Wilkes's act of force, would have practically been a voluntary war against Great Britain; at the same time it would have been a war in 1861 against Great Britain for a cause directly the opposite of the cause for which we waged war against the same people in 1812."

Mr. Seward, Sec. of State, to Mr. Adams, Jan. 31, 1862. MSS. Inst., Gr. Brit.

"The Trent affair, all the world sees, was an accident for which not the least responsibility rests upon this Government. For a time our national pride and passion appealed to us to abandon an ancient liberal policy; but, even though unadvised, we did not listen to it, and we are

to-day, after that occurrence, as ready and as willing to join other maritime powers in meliorations of the law, to the extent that France desires, as we were before it happened, and before the civil war commenced."

Mr. Seward, Sec. of State, to Mr. Dayton, Feb. 19, 1862. MSS. Inst., France.

"Necessity will excuse the captor from the duty of sending in the prize."

Dana's Wheaton, § 388, note.

"Where a prize is not fit for a voyage to a place of adjudication, and yet may be of value, it is customary to sell her. The statutes of the United States assume that a captor, or any national authority, may sell, in a case of necessity, rather than destroy the vessel; and that the Government may itself take a prize into its service, in a case of belligerent necessity, or if it is unseaworthy for a voyage to a port of adjudication. (Act 1864, chap. 174, § 28.)"

*Ibid.*

"Irrespective of the advantages or disadvantages to claimants or captors, on the bare question of the capacity of the court to take cognizance of a cause where the prize is not bodily in its custody, but yet is in existence, there seems to be now no doubt; whether a court will exercise its functions in any given case of an absent prize is a different case, and one of discretion, upon circumstances."

*Ibid.*

"All that the Federal States Government can urge is, that we did much the same thing ourselves before the war of 1812, when we stopped American ships and took out of them seamen whom we claimed as British. In point of fact, it was not the same thing, for we merely asserted on the part of the Crown a right to the services of our own sailors. We imputed to the ships in which those sailors might be found no breach of neutrality, and consequently we had no right to take them before a prize court, and therefore, if the right was to be exercised at all, it was necessary that it should be exercised by our naval officers. * * But we do not undertake to justify all our acts of half a century ago. The law of impressment has been abolished, and it is very certain that during the last fifty years nothing of the kind has been attempted, or even imagined in England. The law of nations is deduced from the actual practice of nations; and as we, during our last war (though sorely in need of sailors), did not revive our claim to take our sailors out of American ships, the claim must be held to have been conclusively abandoned." (111 Quarterly Rev., Jan., 1862, art. 8, 269.)

"The truth is that this practice never rested upon any principle of the law of nations at all, but upon a principle of municipal law at variance with the law of nations. That principle was the doctrine of the inalienable allegiance of subjects to their sovereigns. The inference was that the sovereign had a municipal right to claim the persons and services of his subjects wherever they could be found; and that, in particular, seamen were not protected by a neutral flag, and had no right to serve a neutral power without the King's license. * * He might take them, under the old municipal theory of allegiance, wherever they could be found. But by the modern conceptions of the law of nations, terri-

torial independence is the more powerful principle of the two. Within the territorial limits, or under the flag of another state, every foreign sovereignty becomes subject. By the law of prize a captor has no property in a captured vessel or her cargo until the rightfulness of the seizure has been decided by a court administering the law of nations; but as the seizure of British seamen in foreign ships on their allegiance to King George was a municipal right, and not a right under the law of nations, the courts of admiralty had no jurisdiction in the matter." (115 Edinburgh Rev., art. 10, Jan., 1862, 271.)

"But though Earl Russell, in his note of the 3d of December, 1861, in making the demand for the liberation of the commissioners, places it on no specific ground, Mr. Seward might be deemed fully justified by Mr. Thouvenel's reference, in his dispatch to the French minister at Washington, of the same date, to the previously declared sentiments of the American Government, and by the approbation with which the intervention based on that statement was received at London, to infer from the British demand not only an assimilation to the continental law of contraband, subsequently adopted by them in terms, but as a consequence thereof an abandonment of any pretension to take persons, whether English subjects or others, from neutral vessels, on any pretext whatever, not within the conceded exception of military persons in the actual service of the enemy."

Lawrence's Wheaton (ed. 1863), 217, 218.
As to Trent case, see further, *infra*, § 374.

By the law of nations a neutral subject, whose property has been illegally captured, may pursue and recover that property in whatever waters it is found, unless a competent jurisdiction has adjudged it prize.

Miller *v.* The Resolution, 2 Dall., 1.

Whenever an officer seizes a vessel as prize he is bound to commit her to the care of a competent officer and crew, not because the original crew, when left on board, in case of seizure of the vessel of a citizen or neutral, are released from their duty without the assent of the master, but because of a want of the right to subject the crew of the captured vessel to the authority of the captor's officer. If a vessel were seized as prize and no one put on board but the prize-master, without any undertaking of the original ship's company to navigate her under his orders, the captor might be liable for any loss that followed from insubordination of the crew.

The Eleanor, 2 Wheat., 345.

A vessel which has been rendered liable to capture as enemy's property by sailing under the license or pass of the enemy, or for trading with the enemy, may still be seized and condemned as prize of war after her return to the United States, by virtue of the general authority of the Government to seize all enemies' property coming into our ports during war. And as a general rule, any person may seize any property forfeited to the use of the Government, either by the municipal law or by the law of prize, for the purpose of enforcing the forfeiture; and it

depends upon the Government itself whether it will act upon the seizure. If it proceeds to enforce the forfeiture by legal process, this is a sufficient confirmation of the seizure.

The Caledonian, 4 Wheat., 100.

The United States not having acknowledged the existence of a Mexican Republic or State at war with Spain, the Supreme Court does not recognize the existence of any lawful court of prize at Galveston.

The Nueva Anna and Liebre, 6 Wheat., 193.

A tortious possession under an illegal capture cannot make a valid title by a sale.

The Fanny, 9 Wheat., 658.

A captor may, under imperative circumstances, sell the captured property and subject the proceeds to the adjudication of a court of prize. The orders of the commander-in-chief not to weaken his force by detaching an officer and crew for the prize, or his own deliberate and honest judgment, exercised with reference to all the circumstances, that the public service does not permit him to make such detachment, will excuse the captor from sending in his prize for adjudication. But if no sufficient cause is shown to justify the sale, or if the captor has unreasonably neglected to bring the question of prize or no prize to an adjudication, the court may refuse to proceed to an adjudication and may award restitution, with or without damages, upon the ground of forfeiture of rights by the captor, although his seizure was originally lawful.

If the captor should neglect to proceed at all, the court may, upon a libel filed by the owner for a marine trespass, grant a monition to proceed to adjudication in a court of prize, or refuse it and at once award damages. It is the duty of the captor, under the law of nations (affirmed by act of Congress), to send captured property in for adjudication by a court of his own country having competent jurisdiction.

Jecker *v.* Montgomery, 13 How., 498.

The United States have the right to order an uncondemned ship, captured by the subjects of a foreign power, out of their territory.

1 Op., 78, Lee, 1797. See 8 Lodge's Hamilton, 304.

The word "captured," as used in the fourth article of the treaty with France of 1800 (expired by limitation) as a technical and descriptive term, does not include the meaning, and ought not to be construed to have the effect, of the term "*re*captured" in the sense of the treaty.

1 Op., 111, Lincoln, 1802. As to this treaty, see *supra*, § 148*a*.

It is the duty of the captors to place an adequate force upon the captured vessel, and the omission to do so is at their own risk.

3 Op., 377, Grundy, 1838.

The Lone entered the port of Matamoras while it was blockaded by a French squadron, and sailed thence, bound to New Orleans, as her

port of final destination. On her homeward voyage she was captured by a vessel belonging to the blockading squadron. Some days after the capture, her captain rescued her and brought her to New Orleans. A demand was made on the President by the French Government for her return to the captors. It was advised that he had no power to grant the demand, the case involving questions to be settled by the courts and not by the Executive, and that the claimants must go into the courts. It was also advised that if a vessel, after escaping from her captors, terminates her voyage in safety, her liability to condemnation for the escape entirely ceases.

*Ibid.*

Section 2 of the prize act of 1863 (12 Stat. L., 759) authorizing the taking by the Government of any captured property and the deposit of its value in the Treasury, subject to the jurisdiction of the prize court in which proceedings may be instituted for the condemnation of the property, is a valid exercise of the power of Congress to make rules concerning captures. This provision is not in conflict with the public law of war, and does not impair the just rights of neutrals.

10 Op., 519, Bates, 1863.

The act of 1864, on this topic, repealing the act of 1863, assumes the right of the Government to direct the appropriation of prizes.

As to hauling down flag, see App., Vol. III, § 328.

### V. *WHEN HAVING JURISDICTION SUCH COURT MAY CONCLUDE.*

§ 329.

Neither by the law of nations nor by the French-American treaty then in force, had a French consul in Charleston in 1793 jurisdiction to condemn as legal prize a British vessel captured and brought into that port by a French frigate; and such act is not only a nullity, but justifies an appeal to the French minister to "interpose efficaciously to prevent a repetition of the error."

Mr. Jefferson, Sec. of State, to Mr. Ternant, May 15, 1793. 1 Am. St. Pap., 70; 3 Jeff. Works, 105. See *supra*, §§ 1, 148, 328; *infra*, § 406.

"Another doctrine advanced by Mr. Genet is that our courts can take no cognizance of questions whether vessels, *held by theirs*, as prizes, are lawful prizes or not; that this jurisdiction belongs exclusively to their consulates here, which have been lately erected by the National Assembly into complete courts of admiralty.

"Let us consider, first, what is the extent of the jurisdiction which the consulates of France may rightfully exercise here. Every nation has of natural right, entirely and exclusively, all the jurisdiction which may be rightfully exercised in the territory it occupies. If it cedes any portion of that jurisdiction to judges appointed by another nation, the limits of their power must depend on the instrument of cession. The United

States and France have, by their consular convention, given mutually to their consuls jurisdiction in certain cases specially enumerated. But that convention gives to neither the power of establishing complete courts of admiralty within the territory of the other, nor even of deciding the particular question of prize or not prize. The consulates of France, then, cannot take judicial cognizance of those questions here. Of this opinion Mr. Genet was when he wrote his letter of May 27, wherein he promises to correct the error of the consul at Charleston, of whom, in my letter of the 15th, I had complained as arrogating to himself that jurisdiction, though in his subsequent letters he has thought proper to embark in the errors of his consuls.

"But the United States at the same time do not pretend any right to try the validity of captures, made *on the high seas*, by France, or any other nation, over its enemies. These questions belong, of common usage, to the sovereign of the captor, and whenever it is necessary to determine them, resort must be had to his courts. This is the case provided for in the 17th article of the treaty which says that such prizes shall not be arrested nor cognizance taken of the validity thereof; a stipulation much insisted on by Mr. Genet and the consuls, and which we never thought of infringing or questioning. As the validity of captures, then, made *on the high seas* by France over its enemies, cannot be tried within the United States by their consuls, so neither can it by our own courts. Nor is this the question between us, though we have been misled into it.

"The real question is, whether the United States have not a right to protect vessels within their waters, and on their coasts. The Grange was taken within the Delaware, between the shores of Jersey and of the Delaware State, and several miles above its mouth. The seizing her was a flagrant violation of the jurisdiction of the United States."

Mr. Jefferson, Sec. of State, to Mr. Morris, Aug. 16, 1793. MSS. Inst., Ministers. 4 Jeff. Works, 39.

"The merchant vessels of a nation at peace with another can only, if captured on the high seas, be justly adjudged to be prize by that other when such vessels shall have violated either the law of nations or some existing treaty. When either of these causes can be with truth alleged, the adjudication is not complained of. It is only in cases where no law, whether established by the common consent of the civilized world or by particular compact between the two Governments, has been infracted—no rule which governs the conduct of belligerent and neutral powers towards each other has been broken by the vessel condemned—that the United States complain of, and expect compensation for the injury.

"It is perfectly understood that many of these decisions, alike unjust and injurious, have been made by the French consular tribunals established in Spain. This circumstance in no degree weakens the claim of the United States on the Spanish Government. That complete and ex-

clusive jurisdiction within its own territory is of the very essence of sovereignty is a principle which all nations assert. Courts, therefore, of whatever description, can only be established in any nation by the consent of the sovereign power of that nation. All the powers they possess must be granted by, proceed from, and be a portion of, the supreme authority of that country in which such powers are exercised. Of consequence, foreign nations consider the decisions of such tribunals in like manner as if made by the ordinary tribunals of the country. A Government may certainly, at its discretion, permit any portion of its sovereignty to be exercised by foreigners within its territory; but for the acts of those to whom such portions of sovereignty may be delegated, the Government remains, to those with whom it has relations, as completely responsible as if such powers had been exercised by its own subjects named by itself. The interior arrangements which a Government makes according to its will cannot be noticed by foreign nations or affect its obligations to them. Of consequence the United States can consider the condemnation of their vessels by the French tribunals in Spain no otherwise than if such condemnations had been made in the ordinary tribunals of the nation.

"Where vessels so condemned have been captured by privateers equipped in the ports of His Catholic Majesty, or manned in whole or in part by his subjects, the hostility of the act is rendered still more complete.

"In the one case or in the other, the aggressions complained of are totally incompatible with those rules which the law of nations (Vat., b. 3, s. 15, 5, 17, 102, 104) prescribes for a conduct of a neutral power. They are also considered as violating the 6th article of our treaty with Spain. By that article each nation binds itself to protect by all means in their power, the vessels and other effects belonging to the citizens or subjects of the other which shall be within the extent of their jurisdiction by sea or land, and to use all their efforts to recover and cause to be restored to the right owners their vessels and effects which may have been taken from them within the extent of their said jurisdiction."

Mr. Marshall, Sec. of State, to Mr. Humphreys, Sept. 8, 1800. MSS. Inst., Ministers. See criticisms *infra*, § 329*a*.

Unless otherwise provided by treaty, the proper court to determine the validity of a capture is a prize court appointed by the captor's state; and the establishment of international prize courts, though very desirable, can only be effected by treaty, and would probably be attended by many complications.

The proceedings are to be in conformity with the practice of the court of trial, but in subordination to the settled rules in this respect of international law. That captures at sea belong primarily to the sovereign, and the proceeds are to be distributed, after due condemnation by a prize court, according to the laws imposed by such sovereign, see The Banda Booty, L. R., 1 Ad. & Ec., 109; The Siren, 7 Wall., 152, and other cases cited in 1 Kent's Com. (Holmes' note), 102.

The taking to the prize court should be prompt, though a *bona fide* delay in this respect, caused by the peculiar conditions of the case, does not expose the captor to liability as a trespasser. Jecker *v.* Montgomery, 18 How., 111; Fay *v.* Montgomery, 1 Curtis, 266, and cases cited *supra.*

"The prize court of an ally cannot condemn. Prize or no prize is a question belonging, exclusively to the courts of the country of the captor." (1 Kent Com. 104; Glass *v.* Sloop Betsey, 3 Dall., 6.) But a prize court may take jurisdiction of property captured on a vessel although such vessel was not brought under its cognizance. (The Advocate, Blatch. Pr. Ca., 142, and other cases in same volume. The legislation of the United States in reference to prizes is to be found in the following statutes: (1) Act in respect to right of salvage in case of reprisals, Mar. 3, 1800. (2) Supplementary act of Jan. 27, 1813. (3) Act simplifying process of seizure, March 25, 1862. (4) Sections 2, 6, and 12 of the act of July 17, 1862, in reference to the U. S. Navy. (5) Act regulating prize procedure, March 3, 1863. (6) Act regulating prize procedure and distribution, 1864.)

The following is part of the award of the Geneva arbitrators on September 14, 1872:

"And whereas the judicial acquittal of the Oreto at Nassau cannot relieve Great Britain from the responsibility incurred by her under the principles of international law, * * * the tribunal, by a majority of four voices to one, is of opinion that Great Britain has in this case failed, by omission, to fulfill the duties presented in the first, in the second, and in the third of the rules established by article 6 of the Treaty of Washington."

See more fully *infra*, §§ 329, 402*a*.

As will be seen hereafter (*infra*, § 359), the ruling the Supreme Court in the case of The Circassian was disregarded as authority by the subsequent British and American Mixed Commission.

"There are two apparent exceptions to this exclusive jurisdiction of the prize courts of the captor's country over questions of prize; first, where the capture is made within the territory of a neutral state; and, second, where it is made by a vessel fitted out within the territory of the neutral state. In either of these cases the judicial tribunals of such neutral state have jurisdiction to determine the validity of captures so made, and to vindicate its own neutrality by restoring the property of its own subjects, or of other states in amity with it. 'A neutral nation,' says the Supreme Court of the United States, 'which knows its duty, will not interfere between belligerents, so as to obstruct them in the exercise of their undoubted right to judge, through the medium of their own courts, of the validity of every capture made under their respective commissions, and to decide on every question of prize law which may arise in the progress of such discussion. But it is no departure from this obligation if, in a case in which a captured vessel be brought or voluntarily comes *infra præsidia*, the neutral nation extends its examination so far as to ascertain whether a trespass has been committed on its own neutrality by the vessel which has made the capture. So long as a nation does not interfere in the war, but professes an exact impartiality towards both parties, it is its duty, as well as right, and its safety, good faith, and honor demand of it, to be vigilant in preventing its neutrality from being abused, for the purpose of hostility against

either of them. * * * In the performance of this duty, all the belligerents must be supposed to have an equal interest; and a disregard or neglect of it would inevitably expose the neutral nation to the charge of insincerity, and to the just dissatisfaction and complaints of the belligerent, the property of whose subjects should not, under such circumstances, be restored.' These are not, properly considered, exceptions to the general rule of prize jurisdiction, but are cases where the courts of a neutral state are called upon to interfere for the purpose of maintaining and vindicating its neutrality."

2 Halleck's Int. Law (Baker's ed.), 413. As to neutral duties in this respect, see *infra*, § 399.

The infirmities which attach to the constitution of prize courts are elsewhere noticed (*supra*, § 238; *infra*, § 329*a*), and attention will be hereafter called to the circumstances which have tended to impair the authority of the prize courts of the United States. See remarks at close of § 362. In Kaltenborn's Seerecht ii, 389, the proceedings in the United States courts in this relation are examined in detail.

A court of admiralty (prize as well as instance) of one nation may carry into effect the decree of an admiralty court of another nation. And where the decree was for restitution, which could not be specifically enforced, it was held that damages might be decreed.

Penhallow *v.* Doane, 3 Dall., 54.

A district court of the United States, though a court of admiralty, cannot take jurisdiction of a libel for damages, in case of a capture as prize, by a foreign belligerent power on the high seas, the captured vessel not being within the United States, but *infra præsidia* of the captors.

U. S. *v.* Peters, *ibid.*, 121.

If a captured vessel is abandoned at sea by the captors, and being thus derelict is taken possession of by a neutral and brought into a neutral port and libeled for salvage, the district court has jurisdiction to entertain such libel, and, *ex necessitate*, may also adjudicate upon the conflicting claims of the captors and former owners to the surplus. In such a case the claim of the captors was allowed, as no neutral nation can impugn or destroy the right vested in the belligerent by the capture.

McDonough *v.* Dannery, *ibid.*, 188.

If a vessel has a Spanish register, and sails under Spanish colors, and has on board accounts describing her as Spanish property, there is probable cause for seizing her as belonging to Spanish subjects.

Del Col *v.* Arnold, *ibid.*, 333.

The right to seize a vessel and send her in for further examination is not the right to spoliate and injure the property captured; and for any damage or spoliation the captors are answerable to the owners if the property be not condemned as prize.

*Ibid.*

The facts in this case (Del Col *v.* Arnold) were as follows: A French privateer had captured as prize, on the high seas, an American brig, called the Grand Sachem, and owned by the defendant in error. At the time of taking possession of the brig, a sum of money was removed from her into the privateer; a prize master and several mariners were put on board of her, and were directed to steer for Charleston. On their way to Charleston a British frigate captured the privateer and gave chase to the prize; whereupon the prize-master run her into shoal water, and there she was abandoned by all on board, except a sailor originally belonging to her crew, and a passenger. In a short time she drove on shore, was scuttled, and plundered. The money taken from her by the French privateer, and taken in the latter by the British frigate, had been condemned in Jamaica. A libel was filed in the district court of South Carolina by the defendant in error against Del Col and others, the owners of the French privateer. When the marshal came with process against the brig, she was in the joint possession of the custom-house officers and the privateer's men, the latter of whom prevented the execution of the process. Thereupon a ship and cargo, a prize to the privateer, lying in the harbor of Charleston, were attached by the libelant, and sold by agreement between the parties, and the proceeds paid into court, to abide the issue of the suit. The district court pronounced a decree in favor of libelant for the full value of the Grand Sachem and her cargo, with interest at 10 per cent. from the day of capture; declared "that the proceeds of the ship Industry and her cargo, attached in this cause, be held answerable to that amount;" and directed that the defendant in error should enter into a stipulation to account to the plaintiffs in error for the money condemned as prize to the British frigate, or any part of it, that he might recover as neutral property. This decree was affirmed by the circuit court and in turn by the Supreme Court. So far as this case may be interpreted to lend support to the idea that the courts of a neutral can take cognizance of the legality of belligerent seizure, it has been severely critized by the Supreme Court (L'Invincible, 1 Wheat., 238), and pronounced to be "glaringly inconsistent" with the acknowledged doctrine of that court.

A belligerent cruiser who, with probable cause, seizes a neutral and takes her into port for adjudication, and proceeds regularly, is not a wrongdoer.

Jennings *v.* Carson, 4 Cranch, 2.

The question whether the *res* was so situated as to be subject to the jurisdiction of a foreign prize court is examinable.

Rose *v.* Himely, 4 Cranch, 241; but see Hudson *v.* Guestier, 6 *ibid.*, 285.

In every case of a foreign sentence condemning a vessel as prize of war, the authority of the tribunal to act as a prize court is examinable.

Hudson *v.* Guestier, 6 Cranch, 281.

A foreign sentence of a competent court, though contrary to the law of nations, is valid here, because not examinable. Hence, the condemnation of an American vessel, by a court of admiralty of France, sitting at Guadeloupe, professedly for a violation of the Milan decree in trading to a dependence of England, was held valid, though this decree had been declared by Congress to be a violation of international law. If, however, Congress had gone further and declared sentences of condemnation, pronounced under the decree, absolutely void, they would have been so treated by the courts.

Williams *v.* Armroyd, 7 Cranch, 423.

But the better view is that a sovereign is as much bound, internationally, for erroneous judicial as for erroneous executive or legislative action; and that though a prize court may bind *in rem*, it does not bar a diplomatic appeal for redress. *Infra*, § 329*a*.

The law of prize is part of the law of nations. In it a hostile character is attached to trade independently of the character of the trader who pursues or directs it.

The Rapid, 8 Cranch, 155.

A donation on the high seas, by a captor to a neutral, does not exempt the property from recapture, and the donee who brings it into a port of his own country, must be treated as a salvor.

The Adventure, 8 Cranch, 221.

In a prize cause, the claimant of cargo is not precluded by a sentence condemning the vessel as enemies' property, for want of a claim, from showing in the same cause that the vessel, in fact, was American property, and her owner, without any fault of the claimant of the cargo, has neglected to interpose a claim.

The Mary, 9 Cranch, 126.

On questions of belligerent and neutral rights the Supreme Court will recognize the decisions of the courts of every country, so far as they are founded on a law common to every country, not as authorities, but with respect. The decisions of the courts of every foreign civilized land show in a given case how the law of nations is understood in such lands, and will be considered in adopting the rule which is to prevail in the United States.

Thirty Hogsheads of Sugar *v.* Boyle, 9 Cranch, 191. See *supra*, § 8, *infra*, § 329*a*.

The United States having at one time formed a component part of the British Empire, their prize law was ours; and when we separated it continued to be our prize law, so far as it was adapted to our circumstances, and was not varied by the power which was capable of changing it.

Thirty Hogsheads of Sugar *v.* Boyle, 9 Cranch, 191; The Siren, 13 Wall., 389.

A prize case in the British courts, professing to be decided on ancient principles, will not be entirely disregarded, unless it be very unreason-

able, or be founded on a construction rejected by other nations. But "it will not be advanced in consequence of the former relation between the two countries, that any obvious misconstruction of public law made by the British courts will be considered as forming a rule for the American courts, or that any recent rule of the British courts is entitled to more respect than the recent rules of other countries."

Thirty Hogsheads of Sugar *v.* Boyle, 9 Cranch, 191.

The court of prize is emphatically a court of the law of nations; and it takes neither its character nor its rules from the mere municipal regulations of any country. By this law the definition of prize goods is that they are goods taken on the high seas, *jure belli*, out of the hands of the enemy.

Schooner Adeline, 9 Cranch, 244.

Recaptures are cases of prize and are to be proceeded in as such.

*Ibid.*

In recaptures of property of friends the rule of reciprocity is followed, and as France awards to recaptors the entire property of friends, recaptured after twenty-four hours' possession by the enemy, that rule must be applied to French property.

*Ibid.*

The power of the courts in the United States to adjudge prize cases is dependent upon legislation by Congress.

The Mary and Susan, 1 Wheat., 46.

The exclusive cognizance of prize questions belongs in general to the capturing power, and the courts of other countries will not undertake to redress alleged marine torts committed by public armed vessels in assertion of belligerent rights. This applies to privateers, duly commissioned. But our courts of admiralty will take jurisdiction, to inquire if the alleged wrong-doer is duly commissioned, or has, by the use of our territory to increase his force, trespassed on our neutral rights.

L'Invincible, 1 Wheat., 238.

The courts of the United States would have authority, in the absence of any act of Congress, to decree restitution of property captured in violation of their neutrality.

The right of adjudicating on all captures and questions of prize belongs exclusively to the courts of the nation to which the captor belongs and from which his commission issues; but if a captured vessel be brought or voluntarily comes *infra præsidia* of a neutral power, the latter may inquire whether its neutrality has been violated by the capture, and, if any violation be shown, should decree restitution.

The Estrella, 4 Wheat., 298.

Whenever a capture is made by any belligerent in violation of our neutrality, if the prize come voluntarily within our jurisdiction, it should be restored to the original owners; this is done on the footing of the general law of nations.

La Amistad de Rues, 5 Wheat., 385.

A claimant cannot raise the question of the validity of the captor's commission. That is a question between the captor and his Government. If the commission be valid, the condemnation is to the captor; if not, to the Government.

The Amiable Isabella, 6 Wheat., 1, 66.

Permission to a foreign public ship to land goods in our ports does not involve a pledge that, if illegally captured, they shall be exempted from the ordinary operation of our laws. Though property may be condemned in the courts of the captor, while lying in a neutral port, it must be in the possession of the captor there, at the time of the condemnation; for, if the captor's possession has previously been divested, the condemnation is invalid.

The Santissima Trinidad, 7 Wheat., 283, affirming S. C., 1 Brock, where it was held that the question of prize or no prize belongs exclusively to the courts of the captor; and in no case does a neutral assume the right of deciding it; but that at the same time, as offenses may be committed by a belligerent against a neutral, in his military operations, which it would be inconsistent with the neutral character to permit, and which give to the other belligerent, the party injured by those operations, claims upon the neutral which he is not at liberty to disregard; in such a situation, the neutral has a double duty to perform; he must vindicate his own rights, and afford redress to the party injured by their violation. It was also held that if the wrong-doer comes completely within the power of the neutral, the practice of this Government is to restore the thing wrongfully taken.

Whoever sets up a title under a condemnation is bound to show that the court had jurisdiction of the cause, and that the sentence has been rightly pronounced upon the application of parties competent to ask it. For this purpose it is necessary to show who are the captors, and how the court has acquired authority to decide the cause.

In the ordinary cases no difficulty arises on this subject, for the courts of the captors have general jurisdiction of prize, and their adjudication is conclusive upon the proprietary interest. But where the capture is made by captors acting under the commission of a foreign country, such capture gives them a right which no other nation, neutral to them, has authority to impugn, unless for the purpose of vindicating its own violated neutrality. The courts of another nation, whether an ally or a co-belligerent only, can acquire no general right to entertain cognizance of the cause, unless by the consent or upon the voluntary submission of the captors.

La Nereyda, 8 Wheat., 108.

The abuse of a commission by making a collusive capture does not render the commission void, but the captors acquire no title to the prize.

The Experiment, *ibid.*, 261.

As to right to impugn capture, where the capturing vessel is equipped in our waters in violation of neutrality, see The Fanny, 9 Wheat., 668.

Though a superior physical force is not necessary to make a seizure, there must be an open, visible possession claimed, and a submission to the control of the seizing officer. If a seizure be voluntarily abandoned it becomes a nullity, and it must be followed up by appropriate proceedings to be effectual in conferring rights of property.

The Josefa Segunda, 10 Wheat., 312.

The validity of the seizure and the question of prize or no prize can only be determined in the courts upon which jurisdiction has been conferred by the sovereign under whose authority the capture was made. Neither the President nor any military officer can establish a court in a conquered country, and authorize it to decide prize cases and administer the laws of nations.

Jecker *v.* Montgomery, 13 How., 498; 18 *ibid.*, 110.

When a vessel is captured, the rule is to bring her into some convenient port of the Government of the captor for adjudication. The mere fact of capture does not work a transfer of title, and until there is a sentence of condemnation or restitution, the captured vessel is held by the Government in trust for those who, by the decree of the court, may have the ultimate right to it.

Demands against property captured as prize of war must be adjusted in a prize-court. The property arrested as prize is not attachable at the suit of private parties; and if such parties have claims which in their opinion override the rights of the captors, they must present them to the prize court for settlement. The jurisdiction of a prize court over a captured vessel is determined by the capture and not by the filing of a libel.

The Nassau, 4 Wall., 634.

If a ship or cargo is enemy property, or if either be otherwise liable to condemnation, the circumstance that the vessel, at the time of the capture, was in neutral waters, would not, by itself, avail the claimants in a prize court. It might constitute a ground of claim by the neutral power, whose territories had suffered trespass, for apology or indemnity; but neither an enemy, nor a neutral acting the part of an enemy, can demand restitution of captured property on the sole ground of capture in neutral waters.

The Sir William Peel, 5 Wall., 517; The Adela, 6 *ibid.*, 266. See as to neutral rights and duties in such cases, *infra*, §§ 394, 398; *supra*, § 227.

A Spanish-owned vessel on her way from New York to Havana, being in distress, put, by leave of the admiral commanding the squadron, into Port Royal, S. C., then in rebellion, and blockaded by a Government fleet, and was there seized as a prize of war and used by the Government. She was afterward condemned as prize, but ordered to be restored. She never was restored, damages for her seizure, detention, and value being awarded. It was held that she was not prize of war, or subject of capture; and that her owners were entitled to fair indemnity, although it might be well doubted whether the case was not more properly a subject for diplomatic adjustment than for determination by the courts.

The Nuestra Señora de Regla, 17 Wall., 30.

Prize courts are subject to the instructions of their own sovereign. In the absence of such instructions their jurisdiction and rules of decision are to be ascertained by reference to the known powers of such tribunals and the principles by which they are governed under the public law and the practice of nations.

The Amy Warwick, 2 Sprague, 123.

The proceedings of a prize court of the Confederate States are of no validity in the United States, and a condemnation and sale by such a court do not convey any title to the purchaser, or confer upon him any right to give a title to others.

The Lilla, 2 Sprague, 177.

A captured vessel must be brought within the jurisdiction of the country to which the captor belongs, before a regular condemnation can be awarded.

1 Op., 78, Lee, 1797. See *supra*, § 328.

Proceedings against the ship and cargo are to be had before the district court of the United States according to the laws of Congress and the usage and practice of courts of admiralty in prize causes.

1 Op., 85, Lee, 1798.

Where a vessel, alleged to be Danish property, was seized as French property, on the south side of the island of St. Domingo, and while proceeding for an examination, under the protection of the American flag, was seized by a British armed ship and taken into Jamaica and there condemned, and a claim was made by the Danish subject upon the Government of the United States for compensation, it was advised that the first captors were not liable for the first capture and detention for examination, there being probable cause for the seizure, nor for the second capture; and that the Government of the United States was not bound for the unlawful captures of its subjects.

1 Op., 106, Lincoln, 1802.

Where a French vessel was captured and condemned as lawful prize prior to the treaty with France of 1800 (expired by limitation), and one moiety had been paid to the captors and the other to the United States, after the siguing of the treaty, and on hearing before the Supreme Court, on writ of error, the decree of the circuit court had been reversed, and the vessel, etc., had been ordered to be restored, and pursuant thereto the moiety of the United States had been paid over, and a claim made for the other moiety which had been paid to the captors, it was advised that the United States are not liable for such moiety.

1 Op., 114, Lincoln, 1802.

On a reconsideration of the case referred to in the preceding opinion, and on examination of the opinion delivered by the Supreme Court, giving a judicial interpretation of the treaty referred to, the preceding opinion is substantially reaffirmed.

1 Op., 119, Lincoln, 1802.

Proceedings in the vice-admiralty court at St. Domingo are nullities, for the reason that the court is not legally constituted.

5 Op., 689, appendix, Lee, 1798.

No title to a captured vessel and cargo passes to the captors till a sentence of condemnation has been passed by a court having jurisdiction.

3 Op., 317, Grundy, 1838.

When the courts have acquired jurisdiction of cases of maritime capture, the political department of the Government should postpone the consideration of questions concerning reclamations and indemnities until the judiciary has finally performed its functions in these cases.

11 Op., 117, Bates, 1864.

Prize courts are tribunals of the law of nations, and the jurisprudence they administer is a part of that law. They deal with cases of capture as distinguished from seizures; their decrees are decrees of condemnation, not of forfeiture; they judge the character and relations of the vessel and cargo, and not the acts of persons.

11 Op., 445, Speed, 1866.

As to captures, see *infra*, § 345.

### VI. *BUT NOT WHEN NOT IN CONFORMITY WITH INTERNATIONAL LAW.*

### § 329*a*.

As is elsewhere seen, the executive and the judiciary, being co-ordinate powers, and the former being intrusted distinctively with the foreign relations of the state, it is not governed in such relations by the decisions of the latter, though such decisions are entitled to great deference. *Supra*, § 238.

It has been also seen that a foreign judgment on a question of international law, to be a bar to a claim, must be in accordance with sound principles of international law. *Supra*, § 242, and cases cited in § 329. See as to judgments invalid by international law *supra*, § 242.

The question of the ubiquitous validity of the action of prize courts was discussed in the case of the Betsey by the board of commissioners acting under the 7th article of the treaty of 1794. The Betsey had been condemned by the vice-admiralty of Bermuda, and the condemnation had been affirmed by the lord commissioners of appeal. It having been argued that this affirmance settled the question internationally, Mr. Pinkney, who was one of the commissioners under the treaty, conceded that, adopting the words of the answer to the British memorial, "the legality of a seizure as prize is to be determined in the courts of the nation to which the captor belongs, judging according to the law of nations, and to treaties (if any) subsisting between the states of the captor and claimant." He proceeded, however, to adopt from Rutherford (2 Nat. Law, 593) the position that "the right of the state to which the captors belong, to judge exclusively, is not a *complete jurisdiction*. The *captors*, who are its members, are bound to submit to its sentence, though this sentence should happen to be erroneous, because it has a complete jurisdiction over their persons; *but the other parties to the controversy*, as they are members of another state, are only bound to submit to its sentence as far as this sentence is agreeable to the law of nations or to particular treaties, because it has no jurisdiction over them in respect either of their persons or of the things that are the subject of the controversy. If justice, therefore, is not done them, they may apply to their own state for a remedy, which may, consistently with the law of nations, give them a remedy, either by solemn war or by reprisals." After adopting this position, as further explained by Rutherford, Mr. Pinkney proceeds to say: "From the foregoing quotations it may be collected that the jurisdiction of the court of the capturing nation is complete *upon the point of property;* that its sentence forecloses all controversy between claimant and captors, and those claiming under them; and that it terminates forever all ordinary judicial inquiry upon the matter of it. These are the unquestionable effects of a final admiralty sentence, and in these respects it is unimpeachable and conclusive." * * * But "neither the United States nor the claimants, its citizens, are bound to take for just the sentence of the lords, if in fact it is not so; and that the affirmance of an illegal condemnation, so far from legitimating the wrong done by the original seizure, and precluding the neutral from seeking reparation for it against the British nation, is peculiarly that very act which consummates the wrong, and indisputably perfects the neutral's right of demanding that reparation through the medium of the Government. * * * If the largest possible scope be given to the jurisdiction in question, still it is a jurisdiction which must be *rightfully* used by the state that claims it. The law of nations cannot be supposed to give to one state the right of invading, under judicial forms, the property of another." Dr. Nicholl, better known by his subsequent title of Sir J. Nicholl, an eminent civilian, who was also a commissioner, agreed in holding the action of the lords commissioners as not concluding the claimants from recourse to an international appeal. (Wheaton's Life of Pinkney, 199, 206, 208.) Prize courts, in fact, are to be viewed in two aspects: The first is that of international tribunals, in which capacity they bind the thing acted on everywhere, and bind the parties so far

as concerns such thing. The second is that of domestic tribunals (in which light they are to be considered in all respects, except as to the proceedings *in rem*), which are simply agents of the sovereign which commissions them. Hence, a sovereign is as much liable internationally for the wrongful action of prize courts as he is for the wrongful action of any other courts. It was consequently held in the case of the Betsey, before the London commission of 1798–1804, that while the decisions of prize courts bind the parties, so far as concerns the particular litigation acting *in rem*, they may be contested by the Government of the party which feels aggrieved.

MSS. Returns of Comm. Dept. of State.

A judicial decree contravening the law of nations has no extraterritorial force.

Mr. Evarts, Sec. of State, to Mr. Brunetti, Oct. 23, 1878. MSS. Notes, Spain.
Mr. Bayard, Sec. of State, to Mr. McLane, June 23, 1886. MSS. Inst., France.
*Supra*, §§ 8, 238, 242.
As to non-ubiquity of bankrupt decree, see *supra*, § 9.

The preamble to the judgment of the Geneva Tribunal of 1872 declares that the judicial acquittal of the Oreto, at Nassau, cannot relieve Great Britain from the responsibility incurred by her under the principles of international law.

See *infra*, § 402*a*; *supra*, § 329.

"It is true that the vice-admiralty court of the Bahamas, by its judgment, which is given at page 521 of the fifth volume of the Appendix to the American case, acquitted the Florida of every charge; but, while respecting the authority of the *res judicata*, I ask whether it is possible to deduce from this an argument on which to found a moral conviction that the English Government is released from its responsibility under the rules laid down in Article VI of the Treaty of Washington? I abstain from repeating the considerations into which my honorable colleagues who have preceded me have entered on this subject.

"It is not the question of special legal responsibility with which we have here to deal, but rather that of the responsibility which results from the principles of international law, and the moral conviction at which we have arrived in consequence of the acts imputed to the Florida.

"This conviction is strengthened by a consideration of the terms of the conclusion of the judgment of the vice-admiralty court, where it is said, 'that all the circumstances of the case taken together seem sufficient to justify strong suspicion that an attempt was being made to infringe that neutrality so wisely determined upon by Her Majesty's Government.'

"The decision of the vice-admiralty court may then be considered as conclusive, even if not perfectly correct, as between those who claimed the vessel and the British Government, which claimed its confiscation under the clauses of the foreign-enlistment act; but I do not think it is sufficient to bar the claim of the United States against Great Britain. The United States were not parties to the suit; everything relating to it is for them *res inter alios acta*."

Count Sclopis, opinion in Geneva Tribunal of 1872. 193

"The objection that the judicial decision at Nassau relieves Great Britain of all responsibility cannot be maintained. As regards the internal (or municipal) law, the judgment is valid; but as far as international law is concerned, it does not alter the position of Great Britain."

Mr. Staempli, *ibid.*

In the opinion of Judge John Davis on French spoliations, Ct. of Cls., May 17, 1886, is the following:

"The defendants say, further, the condemnation cannot be illegal because made by a prize court having jurisdiction, and the decisions of such courts are final and binding. This proposition is of course admitted so far as the *res* is concerned; the decision of the court, as to that, is undoubtedly final, and vests good title in the purchaser at the sale; not so as to the diplomatic claim, for that claim has its very foundation in the judicial decision, and its validity depends upon the justice of the court's proceedings and conclusion. It is an elementary doctrine of diplomacy that the citizen must exhaust his remedy in the local courts before he can fall back upon his Government for diplomatic redress; he must then present such a case as will authorize that Government to urge that there has been a failure of justice. The diplomatic claim, therefore, is based not so much upon the original wrong upon which the court decided, as upon the action and conclusion of the court itself, and, diplomatically speaking, there is no claim until the courts have decided. That decision, then, is not only not final, but on the contrary is the beginning, the very corner-stone, of the international controversy. This leads us naturally to another point made by the defense, in that the claimant did not 'exhaust his remedy' because he did not prosecute an appeal. We of course admit that usually there is no foundation for diplomatic action until a case cognizable by the local courts is prosecuted to that of last resort; but this doctrine involves the admission that there are courts freely open to the claimant, and that he is unhampered in the protection of his rights therein, including his right of appeal. It is within the knowledge of every casual reader of the history of the time that no such condition of affairs in fact then existed.

"The very valuable report of Mr. Broadhead shows that prior to March 27, 1800, there was no appeal except to the department of the Loire-Inférieure, and in the then existing state of bad feeling and modified hostilities, and under the surrounding circumstances, this was to the captains of the seized vessels, in most if not in all cases, a physical impossibility. Nor prior to the agreement of 1800 was there any practical reason for appealing to a court when the result, as our seamen believed, whether rightly or not, but still honestly, was a foregone conclusion, and while negotiations were progressing for a settlement; nor is there anything in these negotiations showing that a technical exhaustion of legal remedy would be required. We are of opinion that the

claimant was not, under these purely exceptional circumstances, obliged to prosecute his case through the highest court, even if he could have done so, which we doubt."

"The Danish objection to the claims (for spoliations of American commerce in 1809 and 1810) was thus stated in a note of August 17, 1825, to Hughes: 'The sentences by which vessels bearing the flag of the United States have been released or condemned by the prize tribunals, or high court of admiralty, are without appeal, and cannot, without derogating from that which has been established from the remotest times in the Danish monarchy, be altered or annulled.' In a paper of marked ability, Wheaton controverted this. He said: 'The institution of these tribunals, so far from exempting or being intended to exempt the sovereign of the belligerent nation from responsibility, is designed to fix and ascertain that responsibility. Those cruisers are responsible only to the sovereign whose commission they bear. So long as seizures are regularly made upon apparent grounds of just suspicion, and followed by prompt adjudication in the usual mode, and until the acts of the captors are confirmed by the sovereign in the sentences of the tribunal appointed by him to adjudicate in matters of prize, the neutral has no ground of complaint, and what he suffers is the inevitable consequence of the belligerent right of capture. But the moment the decision of the tribunal of last resort has been pronounced against the claimant (supposing it not to be warranted by the facts of the case, and the law of nations as applied to those facts), and justice has thus been finally denied, the capture and the condemnation become the acts of the state, for which the sovereign is responsible to the Government of the claimant. * * * No greater sanctity can be imputed to the proceedings of prize tribunals, even by the most extravagant theory of the conclusiveness of their sentences, than is justly attributed to the acts of the sovereign himself. But those acts, however binding on his own subjects, if they are not conformable to the public law of the world, cannot be considered as binding on the subjects of other states. A wrong done to them forms an equally just subject of complaint on the part of their Government, whether it proceed from the direct agency of the sovereign himself, or is inflicted by the instrumentality of his tribunals.'

"The claimants sent an agent to Copenhagen, with power to agree upon a compromise sum in gross. The King of Denmark offered to pay half a million marks-banco of Hamburg. Wheaton said that the United States would consent to accept three millions of marks-banco. The parties agreed at length upon six hundred and fifty thousand Spanish milled dollars. In informing Mr. Van Buren of the signature of the treaty, Wheaton said: 'I have not before me sufficient material from which to form a judgment as to the real amount of the losses unjustly sustained by our citizens from Danish captures. You will find that Mr. Ewing, in his correspondence, estimates the actual loss at about $1,750,000, reckoning about thirty-five condemnations "quite unjust," to use his own expression. But supposing the real injury to have been considerably greater, the sum now recovered, considering the diminished resources of this exhausted country, will, I trust, be considered as a tolerable salvage from this calamitous concern.'"

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

As to treaty relations with Denmark, see *supra*, § 147.

"'Where the responsibility of the captor ceases,' says Mr. Wheaton, 'that of the state begins. It is responsible to other states for the acts of the captors under its commission the moment these acts are confirmed by the definitive sentence of the tribunals which it has appointed to determine the validity of captures in war.' The sentence of the judge is conclusive against the subjects of the state, but it cannot have the same controlling efficiency towards the subjects of a foreign state. It prevents any further judicial inquiry into the subject-matter, but it does not prevent the foreign state from demanding indemnity for the property of its subjects, which may have been unlawfully condemned by the prize court of another nation.'"

2 Halleck's Int. Law (Baker's ed.), 429, citing Wheaton's Elements, part iv, chap. 2, § 15.

Mr. Alexander Hamilton took, as to the treaty of 1794, the same position in a letter of October 3, 1795, to Mr. Wolcott. (8 Hamilton's Works, Lodge's ed., 359.) Mr. Hamilton gives the following reasons:

1. "The subject of complaint to be redressed is irregular or illegal captures or condemnations."

2. "The article contemplates that various circumstances may obstruct compensation in the ordinary course of justice." After giving other reasons he asks: "Is not the constitution of such a tribunal (a commission) by the two parties a manifest abandonment of the pretension of one to administer justice definitely through its tribunals?" He states that he understood Mr. Burr and Mr. B. Livingston, whom he had met at a consultation, agreed with him in this view, though it was in conflict with an opinion given by Mr. Rawle and Mr. Lewis.

"The attention of the mixed commission has been repeatedly called to the precedent of the authority exercised by a similar commission under the British treaty of 1794, and of the discussion between the British and American commissioners on the point, the American commissioners sustaining the fullness and supremacy of the jurisdiction which the British commissioners questioned. The disposition made of the doubt by the lord chancellor (Loughborough) in his answer to the fifth commissioner, Colonel Trumbull, who had submitted the point for his advice, is well known. 'The construction of the American gentlemen is correct. It was the intention of the high contracting parties to the treaty to clothe this commission with power paramount to all the maritime courts of both nations—a power to review and (if in their opinion it should appear just) to revise the decisions of any or all the maritime courts of both.'"

Trumbull's Reminiscences of his Own Times, 193, quoted in argument of Mr. Evarts before the British and American Mixed Commission in the Springbok case, 29. See *infra*, § 362.

In 1753, Prussia successfully held Great Britain responsible for the erroneous action of British prize courts; and the same result attended the exceptions of the United States to British condemnations before the mixed commission under the treaty of 1794, as already stated, and the exceptions taken by the United States to Danish condemnations, for which Denmark was held responsible.

2 Halleck's Int. Law (Baker's ed.), 431.

"The sovereign is therefore held responsible to the state whose citizen the claimaint is, that no injustice is done by the capture."

Dana's Wheaton, § 388, note.

In a dissenting opinion by Judge Thomas Cooper, in Dempsie, assignee of Brown, *v.* Insurance Company, in the Pennsylvania court of errors and appeals, 1808 (referred to *supra*, § 238), the following reasons are given for declining to assign international conclusive authority to the decisions of foreign prize courts:

"They are emanations of the executive authority, the judges sitting, not during good behavior, but during pleasure.

"They are bound by executive instructions which are always dictated by the interest of the belligerent. (To this a note is appended calling attention to the fact that Napoleon's Milan decrees were directed to the Tribunal des Prizes; and that the British orders of council of 1807 were directed *inter alios* to the British courts of admiralty and vice-admiralty.)

"They are the courts of the belligerent; the plaintiffs, libelants, are the subjects of the belligerent, cruising under the authority and protection of the belligerent.

"The property, if condemned, enriches the belligerent nation. * * *

"The proceedings are written, by interrogatories and answers; by the civil law, and not by the common law of our own country or of England.

"There is no intervention of a jury trial, nor any *viva voce* examination of testimony.

"The salary of a British judge depends on a great degree upon the number of condemnations. I believe it is £15 sterling a vessel." On the last point it may be mentioned that the practice which exists in some countries of vesting in the judge the appointment of clerks and other officials who receive large emoluments from condemnations, coupled with the fact that the offices in question are often occupied by members of the judge's family, or by personal friends whose interests he has at heart, must, from the nature of things, influence the judge in the shape which he gives the case, unconscious as he may be of such influence. "A power over a man's sustenance," so substantially said Chief-Justice Gibson, of Pennsylvania, in declaring unconstitutional an act of the legislature of that State reducing the salaries of the judges, "is a power over himself," and a power of this kind over the judiciary, it was held, it was not constitutional for the legislature to assume. Yet what power of this character could be more subtle than that exercised over an admiralty judge by a prize case coming before him with an offer of large emoluments to himself, or to some one of his family or friends, if a condemnation be decreed? That such a temptation would not be consciously yielded to by British or American judges may be unhesitatingly affirmed. But the atmosphere of influence which such a condition of things generates is no less pervasive and powerful than would be that of temptations directly and avowedly applied; and it is impossible not to admit that in this atmosphere judges of prize courts have been from time to time immersed, and that it is from some, at least, of these judges that the precedents which make up our prize law have been in part drawn. Judge Cooper's opinion, from which the above points are taken, was published in Philadelphia, in 1810, with a preface by Mr. A. J. Dallas, United States district attorney in Philadelphia, and afterwards Secretary of the Treasury. In this preface, which adopts and defends the

views of Judge Cooper, is cited Lord Ellenborough's contemptuous censure (in Fisher *v.* Ogle, 1 Camp., 418, and Donaldson *v.* Thompson, *ibid*, 429) of foreign courts of admiralty, and Mr. Dallas proceeds to declare that "whatever the animosity of the belligerents can generate against each other, whatever their power can impose on the rest of the world, is now the law of war, the only measure of justice, while the neutral flag, instead of producing respect and safety, is the certain signal for insult and aggression."

Mr. Wheaton, after noticing Lord Stowell's claim to absolute superiority from national prejudice, argues that it was impossible for that eminent judge to divest himself of prejudices favorable to the development of a great maritime nation such as England. (Wheat. Hist., 711.) On the other hand, Chancellor Kent (1 Com., 8) declares that "there is scarcely a decision in the English prize courts at Westminster, on any general question of public right, that has not received the express approbation and sanction of our national courts."

But, as is illustrated by the remarks of Mr. Cushing and Sir. T. Twiss (quoted *supra*, § 238*a*), the present tendency of opinion is to regard the prize-court rulings of Great Britain during the Napoleonic wars, and the rulings in this country based on them, as not binding executive action in matters of international law. And, as has also been noticed, the high belligerent prerogatives claimed by Sir W. Scott (Lord Stowell), and adopted on his authority by our own Supreme Court, have lately been so modified by the English courts as to make them consonant with the views held on the same topic by the executive department of the Government of the United States as well as by the great body of European publicists.

*Supra*, §§ 238, 238*a*, 242; *infra*, § 362; note to the Springbok case.

The prevalent opinion now is, that in international controversies a sovereign can no more protect himself by a decision in his favor by courts established by him, even though they be prize courts, than he can by the action of any other department of his Government.

*Supra*, §§ 238*a*, 242. See this noticed in the Springbok case, *infra*, § 362.

"The instant that a court sitting to administer international law recognizes either governmental orders or proclamations setting forth governmental policy as constituting rules of that code, at once that court ceases in fact to administer in its purity the law which it pretends to administer. * * * The functions of the tribunal have undergone a change which is justly and inevitably fatal to its weight and influence with foreign powers. It is not only a degradation to itself, but it is a mischievous injury to the Government which has destroyed the efficiency of an able ally."

5 Am. Law Rev., 255.

In an article in the Edinburgh Review for February, 1812, under the title of "Disputes with America" (vol. 19, p. 290), the contrast between Sir William Scott's opinions in 1798 and 1799 and those stated by him in 1811, is thus stated. In the Maria, (1 Rob., 350, June 11, 1799), he spoke as follows: "In my opinion, if it could be shown that, regarding mere speculative general principles, such a condemnation ought to be deemed sufficient, that would not be enough; more must be proved, 'it must be shown that it is conformable to the usage and practice of nations.' A great part of the law of nations stands on no other foundation. It is introduced, indeed, by gene-

ral principles; but it travels with those general principles only to a certain extent; and if it stops there, you are not at liberty to go further, and to say that mere general speculation would bear you out in a further progress." "It is my duty not to admit, that because one nation has thought proper to depart from the common usage of the world, and to meet the notice of mankind in a new and unprecedented manner, that I am on that account under the necessity of acknowledging the efficacy of such a novel institution, merely because general theory might give it a degree of countenance, independent of all practice from the earliest history of the world." (1 Rob., 139 *ff.*) "Such," says the Edinburgh Review, "were the sound, enlightened, and consistent doctrines promulgated by the learned judge in the years 1798 and 1799, doctrines wholly unconnected with any 'present purpose of particular national interest,' uninfluenced by any preference or 'distinction to independent states;' delivered from a seat '*of judicial authority locally here,*' indeed, but according to a law which '*has no locality,*' and by one whose duty it is to determine the question exactly as he would determine the question, if sitting at Stockholm,' 'asserting no pretentions, on the part of Great Britain, which he would not allow to Sweden.'" * * * "Twelve years," so continues the Review, "have passed away since the period of those beautiful doctrines—an interval not marked by any general change of character among neutrals, or any new atrocities on the part of belligerents—distinguished by no pretensions which had not frequently before been set up by the different parties in the war, except that on both sides the right of unlimited blockade had been asserted, France, complaining that England, in 1806, and previously, exercised this power, had declared England and her colonies in a state of blockade; and England, in her turn, proclaimed all France, and her allies, blockaded. There were orders and decrees on both sides; and both parties acted upon them. The neutrals protested; and, recollecting the sound and impartial principles of our prize courts in 1798 and 1790, they appealed to that 'judicial authority which has its seat locally here,' but is bound to enforce 'a law that has no locality,' and 'to determine in London exactly as it would in Stockholm.' The question arose, whether those orders and decrees of one belligerent justified the capture of a neutral trader, and on this point we find Sir W. Scott delivering himself with his accustomed eloquence, with a power of language, indeed, which never forsakes him, and which might have convinced any person, except the suffering parties to whom it was addressed. (Case of the Fox, 30th May, 1811.)

"'It is strictly true that by the constitution of this country, the King in council possesses legislative rights over this court, and has power to issue orders and instructions which it is bound to obey and enforce; and these constitute the written law of this court. These two propositions, that the court is bound to administer the law of nations, and that it is bound to enforce the King's orders in council, are not at all inconsistent with each other; because, these orders and instructions are presumed to conform themselves, under the given circumstances, to the principles of its unwritten law. They are either directory applications of those principles to the cases indicated in them, cases which, with all the facts and circumstances belonging to them, and which constitute their legal character, could be but imperfectly known to the court itself, or they are positive regulations, consistent with those principles, applying to matters which require more exact and definite rules than those general principles are capable of furnishing.

"'The constitution of this court, relatively to the legislative power of the King in council, is analogous to that of the courts of common law relatively to that of the Parliament of this Kingdom. Those courts have their unwritten law, the approved principles of natural reason and justice; they have likewise the written or statute law in acts of Parliament, which are directory applications of the same principles to particular subjects, or positive regulations consistent with them upon matters which would remain too much at large if they were left to the imperfect information which the courts could extract from mere general speculations. What would be the duty of the individuals who preside in those courts, if required to enforce an act of Parliament

which contradicted those principles, is a question which I presume they would not entertain *a priori;* because they will not entertain *a priori* the supposition that any such will arise. In like manner, this court will not let itself loose into speculations as to what would be its duty under such an emergency; because it cannot, without extreme indecency, presume that any such emergency will happen; and it is the less disposed to entertain them, because its own observation and experience attest the general conformity of such orders and instructions to its principles of unwritten law.' (Pp. 2, 3.)

"Here there are two propositions mentioned, asserting two several duties which the court has to perform. One of these is very clearly described; the duty of listening to orders in council, and proclamations issued by one of the parties before the court; the other, the duty of administering the law of nations, seems so little consistent with the former, that we naturally go back to the preceding passage of the judgment where a more particular mention is made of it. 'This court,' says the learned judge, 'is bound to administer the law of nations to the subjects of other countries, in the different relations in which they may be placed towards this country and its Government. This is what other countries have a right to demand for their subjects, and to complain if they receive it not. This is its unwritten law evidenced in the course of its decisions, and collected from the common usage of civilized states.'

"The faultless language of this statement all will readily confess and admire. The more judicial virtues of clearness and consistency may be more doubtful in the eyes of those who have been studying the law of nations under the same judge, when ruling the cases of the Flad Oyen and Swedish Convoy. It is with great reluctance that we enter upon any observations which may appear to question anything stated by such accurate reporters, by Dr. Edwards and Sir C. Robinson, to have been delivered in the high court of admiralty. But we have no choice left; we must be content to make our election between the doctrines of 1799 and 1811, and to abandon one or the other. The reluctance which we feel is therefore materially diminished; for, if we venture to dispute the law recently laid down by the learned judge, it is upon his own authority in times but little removed from the present in point of date, and nowise differing from them in any other respect.

"How, then, can the court be said to administer the unwritten law of nations between contending states, if it allows that one Government, within whose territory it 'locally has its seat,' to make alterations on that law at any moment of time? And by what stretch of ingenuity can we reconcile the position, that the court treats the English Government and foreign claimants alike, determining the cause exactly as it would if sitting in the claimant's country, with the new position that the English Government possesses legislative powers over the court, and that its orders are in the law of nations what statutes are in the body of municipal law? These are questions which, we believe, the combined skill and address of the whole doctors of either law may safely be defied to answer.

"Again, what analogy is there between the proclamations of one belligerent, as relating to points in the law of nations, and the enactments of statute, as regarding the common law of the land? Were there indeed any general council of civilized states—any congress, such as that fancied in Henry IV's famous project for a perpetual peace—any amphytyonic council for modern Europe; its decisions and edicts might bear to the established public law the same relation that statutes have to the municipal code, because they would be the enactments of a common head, binding on and acknowledged by the whole body. But the edicts of one state, in questions between that state and foreign powers, or between that state and the subjects of foreign powers, or between those who stand in the place of that state and foreign Governments or individuals, much more nearly resemble the acts of a party to the cause than the enactments of the law by which both parties are bound to abide.

"Mark the consequences of such loose doctrines, such feeble analogies. They resolve themselves into an immediate denial that any such thing as the law of nations

exists, or that contending parties have any common court to which all may resort for justice. There may be a court for French captors in France and for English captors in England. To these tribunals such parties may respectively appeal in safety; for they derive their rights from edicts issued by the Governments of the two countries severally; and those edicts are good law in the prize courts of each. But for the American claimant, there is no law by which he may be redressed, no court to which he may resort. The edicts of his Government are listened to in neither the French nor the English tribunals; and he is a prey to the orders of each belligerent in succession. Perhaps it may be thought quite a sufficient hardship, without this aggravation, that even under the old and pure system laid down in 1799 and 1798, the neutral was forced to receive his sentence in a foreign court, always in the courts of the captor's country. But this undoubted rule of law, tempered by the just principles with which it was accompanied, appeared safe and harmless. For, though the court sat locally in the belligerent country, it disclaimed all allegiance to its Government, and professed to decide exactly as it would have done sitting in the neutral territory. How is it now, when the court, sitting as before, has made so large a stride in allegiance as to profess an implicit obedience to the orders of the belligerent Government within whose dominion it acts?

"That a Government should issue edicts repugnant to the law of nations, may be a supposition unwillingly admitted; but it is one not contrary to the fact, for all Governments have done so, and England among the rest, according to the learned judge's own statement. Neither will it avail to say that, to inquire into the probable conduct of the prize courts in such circumstances, is to favor a supposition which cannot be entertained '*without extreme indecency*,' or to compare this with an inquiry into the probable conduct of municipal courts in the event of a statute being passed repugnant to the principles of municipal law. The cases are quite dissimilar. The line of conduct for municipal courts in such an emergency is clear. No one ever doubted that they must obey the law. The old law is abrogated, and they can only look to the new. But the courts of prize are to administer a law which cannot, according to Sir William Scott (and if we err it is under the shelter of a grave authority), be altered by the practice of one nation, unless it be acquiesced in by the rest for a course of years; for he has laid down that the law, with which they are conversant, is to be gathered from general principles, as exemplified in the constant and common usage of all nations.

"Perhaps it may bring the present case somewhat nearer the feelings of the reader if he figures to himself a war between America and France, in which England is neutral. At first, the English traders engross all the commerce which each belligerent sacrifices to his quarrel with his adversary. Speedily the two belligerents become jealous of England, and endeavor to draw her into their contest. They issue decrees against each other nominally, but, in effect, bearing hard on the English trade; and English vessels are carried by scores into the ports of America and France. Here they appeal to the law of nations; but are told, at Paris, that this law admits of modifications, and that the French courts must be bound by the decrees of the Tuileries; at New York, that American courts take the law of nations from Washington; and, in both tribunals, that it is impossible, '*without extreme indecency*,' to suppose the case of any public act of state being done which shall be an infringement on the law of nations. The argument may be long, and its windings intricate and subtle; but the result is short, plain, and savoring of matter of fact, rather than matter of law; all the English vessels carried into either country would be condemned as good and lawful prize to the captors."

In 115 Edinburgh Review, (January, 1862,) 261, we have the following: "Lord Stowell conceived this country to be engaged in a revolutionary contest, because we had the misfortune to be at war with a revolutionary government. The landmarks of former times and the stipu-

lations of more recent treaties were swept away by the torrent; but we are bold to assert that it is not for the interest or the honor of this country to attempt at this day to apply the extreme, and often unjustifiable, rules which may boast Lord Stowell's authority."

### VII. *PROCEEDINGS OF SUCH COURTS.*

### § 330.

District courts of the United States possess all the powers of a court of admiralty, both instance and prize, and may award restitution of property claimed as prize of war by a foreign captor.

Glass *v.* The Sloop Betsey, 3 Dall., 6.

A sentence of condemnation as prize does not establish any particular fact without which the sentence may have been rightfully pronounced.

Maley *v.* Shattuck, 3 Cranch, 458.

The commander of a public armed vessel who unlawfully seizes a vessel on the high seas, which is afterwards captured by a belligerent and condemned as lawful prize, though actually neutral property, is liable to make restitution in value, with damages; and the neutral owner is not bound to appear and defend in the prize court in which his vessel is proceeded against.

*Ibid.*

A seizure for the breach of a municipal regulation made within the territorial jurisdiction of the sovereign, being valid, and conferring jurisdiction on the sovereign, his courts may proceed to sentence, though the *res* be lying in a port of another friendly power.

Hudson *v.* Guestier, 4 Cranch, 293. See Hudson *v.* Guestier, 6 *ibid.*, 285. *Supra*, § 329.

An American vessel sailed from Naples in the year 1812 with a British license to carry her cargo to England. She touched at Gibraltar, and, after leaving her deck-load, sailed thence for the United States. Learning afterwards that war had broken out between the United States and Great Britain, she altered her course for England, was captured by the British, carried into Cork, libeled, and acquitted upon her license. She then sold her cargo, and, after a detention of seven months in Ireland, purchased a return cargo in Liverpool, and sailed for the United States. She was captured by an American privateer, and both vessel and cargo were condemned as prize to the captors. It was held that the capture was not abandoned, though only a prize-master was put on board, the crew being Americans, and there being no reason to apprehend a rescue.

The Alexander, 8 Cranch, 169.

Sailing with an intention to further the views of the enemy is sufficient to condemn the property, although that intention be frustrated by capture.

The Aurora, *ibid.*, 202.

Capture as prize of war, *jure belli*, overrides all previous liens.

The Frances, 8 Cranch, 418; the Hampton, 5 Wall., 372; the Battle, 6 *ibid.*, 498.

No lien upon enemy's property, by way of pledge for the payment of purchase-money, or otherwise, is sufficient to defeat the rights of the captors in a prize court, unless in very peculiar cases where the lien is imposed by a general law of the mercantile world, independent of any contract between the parties.

The Frances, 8 Cranch, 418.

If a vessel be captured by a superior force and a prize-master and a small force be put on board, it is not the duty of the master and crew of the vessel so captured to attempt to rescue her, as they may thereby expose the vessel to condemnation, though otherwise innocent.

Brig Short Staple *v.* U. S., 9 Cranch, 55.

The circumstance that a ship is found in the possession of the enemy affords *prima facie* evidence that it is his property. But if it was originally of a friendly or neutral character, and has not been changed by a sentence of condemnation, or by such possession as nations recognize as firm and effectual, it will be restored absolutely or conditionally, as each case requires.

Schooner Adeline, *ibid.*, 244.

The test affidavit should state that the property, at the time of shipment and capture, did belong, and, if restored, will belong, to the claimant. If the principal is without the country, or at a great distance from the court, the claim and affidavit may be made by an agent.

*Ibid.*

As has been already noticed, where a capture is made by a privateer which had been illegally equipped in a neutral country, the prize courts of such neutral country have power, and it is their duty, to restore the captured property if brought within their jurisdiction to its owner.

Brig Alerta *v.* Moran, 9 Cranch, 359. *Supra*, § 329.

To constitute a capture some act should be done indicative of an intention to seize and to retain as prize; and it is sufficient if such intention is fairly to be inferred from the conduct of the captor.

The Grotius, *ibid.*, 368.

Where captured goods, claimed by a neutral owner, are by consent sold under an order of the court, and the proceeds are finally ordered to be paid to such owner, the amount of the duties should be deducted by the court.

Brig Concord, 9 Cranch, 387; the Nereide, 1 Wheat., 171.

The captors of a neutral ship, laden in part with enemy's property, are responsible only for the freight on the property condemned, and not for the whole freight.

The Antonia Johanna, 1 Wheat., 159.

In prize questions the Supreme Court has appellate jurisdiction only.

The Harrison, *ibid.*, 298.

It is a general rule in prize causes that the decision should be prompt, and should be made, unless some good reason for departing from the rule exist, on the papers and testimony afforded by the captured vessel, or which can be invoked from the papers of other vessels in possession of the court. But in cases of joint and collusive capture, the usual simplicity of the prize proceedings is necessarily departed from; and where, in these cases, there is the least doubt, other evidence may be resorted to.

The George, *ibid.*, 408.

It is the duty of neutrals to put on board of their ships sufficient papers to show the real character of the property; and, if false or colorable documents are used, the necessity or reasonableness of the excuse ought to be very clear and unequivocal to induce a court of prize to rest satisfied with it.

The Dos Hermanos, 2 Wheat., 76.

Claimants of property which is liable to condemnation cannot litigate the question of the captor's commission. They have no standing before the court to assert the rights of the United States. If the capture was without a commission, the condemnation must be to the United States generally; if with a commission as a national vessel, it must still be to the United States, but the proceeds are to be distributed by the court among the captors according to law.

*Ibid.*

If a party attempt to impose on the court by knowingly or fraudulently claiming as his own property belonging in part to others, he shall not be entitled to restitution of that portion which he may ultimately establish as his own.

*Ibid.*

It is the duty of the captors, as soon as practicable, to bring the ship's papers into the registry of the district court, and to have the examinations of the principal officers and seamen of the captured ship taken upon the standing interrogatories.

*Ibid.*; the Pizarro, 2 Wheat., 227.

It is exclusively upon these papers and the examinations that the cause is to be heard before the district court. If, from the whole evidence, the property clearly appear to be hostile or neutral, condemna-

tion or acquittal immediately follows. If the property appear doubtful, or the case be clouded with suspicions or inconsistencies, further proof may, in the discretion of the court, be taken. If the parties have been guilty of gross fraud or misconduct, or illegality, further proof is not allowed, and the parties are visited with all the fatal consequences of an original hostile character.

*Ibid.*

In prize causes the evidence to acquit or condemn must come, in the first instance, from the papers and crew of the captured ship.

The Dos Hermanos, 2 Wheat., 76.

Where an enemy's vessel was captured by a private armed vessel of the United States, and subsequently dispossessed by force or terror of another vessel of the United States, the prize was, under the circumstances of the case, adjudged to the first captor, with costs and damages.

The Mary, *ibid.*, 123.

In a case of grave doubt as to whether the capture was collusive, the court adjudged the vessel to the captors.

The Bothnia and the Jahnstoff, *ibid.*, 169.

Concealment or even spoliation of papers is not of itself a sufficient ground for condemnation in a prize court; but it is a material circumstance calculated to excite the vigilance and justify the suspicions of the court, though it is open to explanation.

The Pizarro, *ibid.*, 227.

Under the Spanish treaty of 1795, stipulating that free ships shall make free goods, the want of such a sea-letter, passport, or such certificates as are described in the 17th article of the treaty, is not a substantive ground of condemnation. It only authorizes capture and sending in for adjudication, and the proprietary interest in the ship may be proven by other equivalent testimony. The Spanish character of the ship being ascertained, the proprietary interest of the cargo cannot be inquired into, unless so far as to ascertain that it does not belong to citizens of the United States, whose property, engaged in trade with the enemy, is not protected by the treaty.

*Ibid.*

In a suit by the owners of captured property, lost through the fault and negligence of the captors, the value of the captured vessel, and the prime cost of the cargo, with all charges, and the premium of insurance, were allowed in ascertaining the damages.

The Anna Maria, 2 Wheat., 327.

Where a capture has actually taken place with the assent of the commander of a squadron, express or implied, the question of liability as-

sumes a different aspect, and the prize-master may be considered as bailee to the use of the whole squadron who are to share in the prize money; but not so as to mere trespasses unattended with a conversion to the use of the squadron.

The Eleanor, *ibid.*, 345.

A bill of lading, consigning the goods to a neutral, but unaccompanied by an invoice or letter of advice, is not a sufficient evidence to entitle the claimant to restitution, but affords a ground for the introduction of further proof. The fact of invoices and letters of advice not being found on board may induce a suspicion that papers have been spoliated. But even if it were proved that an enemy master carrying a cargo chiefly hostile, had thrown papers overboard, a neutral claimant to whom no fraud is imputable ought not thereby to be precluded from further proof.

The Friendschaft, 3 Wheat., 14.

A vessel recaptured from the enemy after condemnation must be condemned as enemies' property, and is not to be restored to the former owner on payment of salvage. The act of June 26, 1812, sec. 5 (2 Stat. L., 760), has not changed the law in that respect. A sentence of condemnation completely extinguishes the title of the original proprietor, and transfers a complete title to the captor.

The Star, *ibid.*, 78.

It is a relaxation of the rules of the prize court to allow time for further proof in a case where there has been a concealment of material papers.

The Fortuna, *ibid.*, 236.

On an illegal capture the original wrong-doers may be made responsible beyond the loss actually sustained in case of gross and wanton outrage; but the owners of the offending privateer, who are only constructively liable, are not liable for punitive damages.

The Amiable Nancy, *ibid.*, 546.

The fact of a vessel having been sent into an enemy's port for adjudication, and afterwards permitted to resume her voyage, was held to raise a violent presumption that she had a license; and, the claimant having produced no evidence to repel the presumption, condemnation was pronounced.

The Langdon Cheves, 4 Wheat., 103.

In the absence of any act of Congress on the subject, the courts of the United States would have authority, under the general law of nations, to decree restitution of property captured in violation of their neutrality, under a commission issued within the United States, or under an

armament, or augmentation of the armament or crew of the capturing vessel, within the same.

The Estrella, *ibid.*, 298.

The *onus probandi* of a neutral interest rests on the claimant; but the evidence to acquit or condemn shall, in the first instance, come from the ship's papers and persons on board. If the neutrality of the property is not established finally beyond a reasonable doubt, condemnation ensues. The assertion of a false claim, in whole or in part, by an agent of, or in connivance with, the real owners, leads to condemnation.

The Amiable Isabella, 6 Wheat., 1, 78.

The commission of a public ship, signed by the proper authorities of the nation to which she belongs, is complete proof of her national character; and the courts of a foreign country will not inquire into the means by which the title to the property has been acquired.

The Santissima Trinidad, 7 Wheat., 283.

Where a capture is made by captors acting under the commission of a foreign country, such capture gives them a right which no other nation neutral to them has a right to impugn, unless for the purpose of vindicating its own violated neutrality.

La Nereyda, 8 Wheat., 108.

Whoever sets up a title under condemnation is bound to show that the court had jurisdiction of the cause; and that the sentence has been pronounced upon the application of parties competent to ask for it.

*Ibid.*

If property has been wrongfully brought into the United States, and the duty paid by a wrongful captor, and a decree of restitution is made after a sale, the captor is liable on such a decree only for the balance, without interest, after deducting the amount paid as duties.

The Santa Maria, 10 Wheat., 431.

In every case of a proceeding for condemnation upon captures made by the public ships-of-war of the United States, whether the same be cases of prize strictly *jure belli*, or upon public acts in the nature of captures *jure belli*, the proceedings are in the name and authority of the United States.

The Palmyra, 12 Wheat., 1.

Prize proceedings should be in the name of the United States; but if conducted in the name of the captors until the Supreme Court is reached, they will not be reversed on that ground.

Jecker *v.* Montgomery, 18 How., 110.

Prize courts properly deny damages or costs where there has been probable cause for seizure. Probable cause exists where there are cir-

cumstances sufficient to warrant suspicion, though not sufficient to warrant condemnation.

The Thompson, 3 Wall., 155.

Causes of prize are usually heard, in the first instance, upon the papers found on board the vessel, and the examination taken *in preparatorio;* and it is in the discretion of the court to order further proof. The *prima facie* effect of a bill of lading being to vest the ownership of the goods in the consignee named in it, where the consignee so named is an enemy the goods are *prima facie* liable to condemnation. Capture at sea of enemy's property clothes the captors with all the rights of the owner at the commencement of the voyage; and no lien created after the capture, or after the commencement of the voyage, can deprive the captors of their rights.

The Sally Magee, *ibid.*, 451.

Frankness and truth are especially required of the officers of captured vessels when examined in preparation for the first hearing in prize.

The Springbok, 5 Wall., 1. See *infra,* § 362.

When a vessel is liable to condemnation, the first presumption is that the cargo is in the same situation.

The Sally Magee, 3 Wall., 451.

Regularly, in cases of prize, no evidence is admissible on the first hearing, except that which comes from the ship's papers or the testimony of persons found on board. If, upon this evidence, the case is not sufficiently clear to warrant condemnation or restitution, opportunity is given by the court, either of its own accord or on motion and proper grounds shown, to introduce additional evidence under an order for further proof. If, preparatory to the first hearing, testimony was taken of persons not in any way connected with the ship, such evidence is properly excluded, and the hearing takes place on the proper proofs.

The Sir William Peel, 5 Wall., 517.

A ship or cargo is not exempt from condemnation in a prize court, because it was captured in neutral waters. Such a capture might constitute a ground of claim by the neutral power, whose territory had suffered violation, for apology or indemnity. But neither an enemy, nor a neutral acting the part of an enemy, can demand restitution of captured property on the sole ground of capture in neutral waters.

*Ibid.* See *infra,* § 398.

Where several witnesses stated facts tending to prove that a vessel was in the employment of an enemy Government, and that part, at least, of her return cargo was enemy property; but the statement of others made it probable that the vessel was what she professed to be, a merchant steamer, belonging to neutrals; that her outward cargo was

consigned in good faith by neutral owners for lawful sale; that the return cargo was purchased by neutrals, and on neutral account—the court directed restitution, without costs or expenses to either party as against the other.

*Ibid.* The Sir William Peel, *ut sup.*

In a case of joint capture by the Army and Navy, it was held that the capture inured exclusively to the benefit of the United States, there being no statutory provision in such a case as to prize-money.

The Siren, 13 Wall., 389.

The right of vessels of the Navy of the United States to prize-money exists only by virtue of statute.

*Ibid.*

"The question (in cases of condemnation of a vessel for breach of neutrality) is as to the innocency or guilt of *the vessel*, as if the transaction in which she was implicated was one of personal volition on her part." "The most distinguished and unblemished reputation on the part of a ship-owner will not protect his vessel from confiscation when it is engaged, through untrustworthy agents, and without his knowledge and against his prohibition, in illicit employments, in infraction of revenue and fiscal laws, and pre-eminently in violating the laws of war."

Judge Betts, in the case of the Napoleon, Olcutt, 208.

The legality of captures is to be decided upon competent evidence, and no rules are more proper for determining the competency of evidence than those which prevail in courts of admiralty.

1 Op., 40, Bradford, 1794.

The master of a captured vessel, by the usage of admiralty, is a competent witness.

*Ibid.*

It is reasonable, as applicable to all nations, to permit a portion of a prize cargo to be sold under the superintendence of our public officers, for the necessary reparation of the prize ship. As to France, it is within the 19th article of the treaty of 1778.

The prize ship should be permitted to sail whenever the captors wish, and a deception practiced on the revenue officers, as to the goods, affords no ground for detaining it.

1 Op., 67, Lee, 1796.

The profits of a capture made by individuals acting without a commission, inure to the Government, but it has not been the practice to exact them. On the contrary, it has been the practice to recompense gratuitous enterprise, courage, and patriotism, by assigning the captors a part, and sometimes the whole prize.

1 Op., 463, Wirt, 1821.

In the case of the proceeds of the prize the Dos Hermanos, the Attorney-General gave an opinion, based on the facts of the case as reported in 2 Wheaton, 77, that, in strict law, the whole of the proceeds belonged to the United States, if they thought proper to assert their claim.

*Ibid.*

The Isabella having been condemned by the Supreme Court of the United States as a British vessel falsely and fraudulently covered by Spanish documents, and consequently held to be good prize of war (6 Wheat., 1–100), and a claim having been made by Alonzo Benigno Munoz for reimbursement by Congress, and the Attorney General having been requested by the Judiciary Committee to communicate information upon the subject, an answer was filed approving the reasons of the action of the executive and the judiciary.

1 Op., 536, Wirt, 1822.

The 4th section of the act of 3d March, 1800, adopts the rules which have been or might be provided by law for the distribution of prize-money. These rules were taken from the 5th and 6th sections of the act of the 23d of April, 1800, by which the whole of the prize is given to the captors when the vessel captured is of equal or superior force to the vessel making the capture; and when of inferior force, the prize is directed to be divided equally between the United States and the captors.

1 Op., 594, Wirt, 1823.

The condemnation of a vessel and cargo in a prize court is not a criminal sentence, and the President cannot remit the forfeiture and restore the property, or its proceeds, to the claimant.

10 Op., 452, Bates, 1863.

The President may lawfully direct the release of prize property in which the captors took no interest, it being in their possession and subject to their control.

11 Op., 484, Ashton, 1866.

A Mexican vessel captured as a blockade runner in May, 1846, and brought into New Orleans, as to which no prize proceedings had been instituted, was, with her cargo, to be "considered as Mexican property found in the port of New Orleans after the existence of war between the countries."

Mr. Buchanan, Sec. of State, to Mr. Wagner, June 12, 1846. MSS. Dom. Let.

Articles on the law and practice of prize courts, by Prof. Bulmerincq, of Heidelberg, are in the Revue de droit int., vol. 10, pp. 185, 388, 595; vol. 11, pp. 152, 321, 561; vol. 14, pp. 114 *ff.*

The practice in prize courts is discussed by Mr. Dana in Dana's Wheaton, § 388, note.

"The Supreme Court of the United States has followed the English rule, and has held valid the condemnation, by a belligerent court, of prizes carried into a neutral port and remaining there, the practice be-

ing justifiable on the ground of convenience to belligerents as well as neutrals; and though the prize was in fact within neutral territory, it was still to be deemed under the control or *sub potestate* of the captor, whose possession is considered as that of his sovereign. It may also be remarked that the rule thus established by the highest courts of England and the United States is sanctioned by the practice of France, Spain, and Holland, but several French publicists deny its legality. For the same reason that a prize court of the captor may condemn captured property while in a neutral port, it may condemn such property situate in any foreign port which is in the military possession of the captor. 'As a general rule,' says Chief-Justice Taney, delivering the opinion of the Supreme Court, 'it is the duty of the captor to bring it within the jurisdiction of the prize court of the nation to which it belongs, and to institute proceedings to have it condemned. This is required by the act of Congress in cases of capture by ships-of-war of the United States; and this act merely enforces the performance of a duty imposed upon the captor by the law of nations, which, in all civilized countries, secures to the captured a trial in a court of competent jurisdiction before he can be finally deprived of his property. But there are cases where, from existing circumstances, the captor may be excused from the performance of this duty, and may sell or otherwise dispose of the property before condemnation. And where the commander of a national ship cannot, without weakening inconveniently the force under his command, spare a sufficient prize crew to man the captured vessel, or where the orders of his Government prohibit him from doing so, he may lawfully sell or otherwise dispose of the captured property in a foreign country, and may afterwards proceed to adjudication in a court of the United States.' Wheat. Hist. Law of Nations, 321; Jecker *et al. v.* Montgomery, 13 How., 516; The Peacock, 4 Rob., 185; Hudson *v.* Guestier, 4 Cranch, 293; Williams *et al. v.* Armoyd, 7 Cranch, 523; The Arabella and Madeira, 2 Gallis, 368; The Henric and Maria, 6 Rob., 138, note; the Falcon, 6 Rob., 198; La Dame Cécile, 6 Rob., 257."

2 Halleck's Int. Law (Baker's ed.), 427. See as to sale of prizes, *supra*, §§ 329 *ff; infra*, § 400.

The following opinion on the general principles of proceeding in prize courts was drawn up in the form of a letter to Mr. Jay, on the behalf and at the request of the Government of the United States, by Sir W. Scott and Sir J. Nicholl, in 1794, as follows:

"We have the honor of transmitting, agreeably to your excellency's request, a statement of the general principles of proceeding in prize causes in British courts of admiralty, and of the measures proper to be taken when a ship and cargo are brought in as prize within their jurisdiction.

"The general principles of proceeding cannot, in our judgment, be stated more correctly or succinctly than we find them laid down in the following extract from a report made to his late Majesty in the year 1753 by Sir G. Lee, then judge of the prerogative court; Dr. Paul, His Majesty's advocate-general; Sir Dudley Rider, His Majesty's attorney-general, and Mr. Murray (afterwards Lord Mansfield), His Majesty's solicitor-general:

"'When two powere are at war they have a right to make prizes of the ships, goods, and effects of each other upon the high seas; whatever is the property of the enemy may be acquired by capture at sea, but the property of a friend cannot he taken, provided he observes his neutrality.

"'Hence the law of nations has established:

"'That the goods of an enemy, on board the ship of a friend may be taken.

"'That the lawful goods of a friend, on board the ship of an enemy, ought to be restored.

"'That contraband goods going to the enemy, though the property of a friend, may be taken as prize; because supplying the enemy with what enables him better to carry on the war is a departure from neutrality.

"'By the maritime law of nations, universally and immemorially received, there is an established method of determination whether the capture be or be not lawful prize.

"'Before the ship or goods can be disposed of by the captor there must be a regular judicial proceeding, wherein both parties may be heard, and condemnation thereupon as prize in a court of admiralty, judging by the law of nations and treaties.

"'The proper and regular court for these condemnations is the court of that state to whom the captor belongs.

"'The evidence to acquit or condemn, with or without costs and damages, must in the first instance, come merely from the ship taken, viz, the papers on board and the examination on oath of the master and other principal officers; for which purpose there are officers of admiralty, in all the considerable sea-ports of every maritime power at war, to examine the captains and other principal officers of every ship brought in as a prize upon general and impartial interrogatories; if there do not appear from thence ground to condemn, as enemy's property or contraband, goods going to the enemy, there must be an acquittal, unless from the aforesaid evidence the property shall appear so doubtful that it is reasonable to go into further proof thereof.

"'A claim of ship or goods must be supported by the oath of somebody, at least as to belief.

"'The law of nations requires good faith. Therefore every ship must be provided with complete and genuine papers, and the master, at least, should be privy to the truth of the transaction.

"'To enforce these rules, if there be false or colorable papers; if any papers be thrown overboard; if the master and officers examined *in preparatorio* grossly prevaricate; if proper ship's papers are not on board; or if the master and crew cannot say whether the ship or cargo be the property of a friend or enemy, the law of nations allows, according to the different degrees of misbehavior or suspicion arising from the fault of the ship taken and other circumstances of the case, costs to be paid, or not to be received by the claimant, in case of acquittal and restitution. On the other hand, if a seizure is made without probable cause, the captor is adjudged to pay costs and damages; for which purpose all privateers are obliged to give security for their good behavior, and this is referred to and expressly stipulated by many treaties.

"'Though from the ship's papers and the preparatory examinations the property does not sufficiently appear to be neutral, the claimant is often indulged with time to send over affidavits to supply that defect; if he will not show the property, by sufficient affidavits, to be neutral, it is presumed to belong to the enemy. Where the property appears from evidence not on board the ship, the captor is justified in bringing her in and excused paying costs, because he is not in fault, or, according to the circumstances of the case, may justly be entitled to receive his costs.

"'If the sentence of the court of admiralty is thought to be erroneous, there is in every maritime country a superior court of review, consisting of the most considerable persons, to which the parties who think themselves aggrieved may appeal; and this superior court judges by the same rule which governs the court of admiralty, viz, the law of nations and the treaties subsisting with that neutral power whose subject is a party before them.

"'If no appeal is offered, it is an acknowledgment of the justice of the sentence by the parties themselves, and conclusive.

"'This manner of trial and adjudication is supported, alluded to, and enforced, by many treaties.

"'In this method, all captures at sea were tried, during the last war, by Great Britain, France, and Spain, and submitted to by the neutral powers. In this method by courts of admiralty, acting according to the law of nations and particular treaties, all captures at sea have immemorially been judged of, in every country in Europe. Any other method of trial would be manifestly unjust, absurd, and impracticable.'

"Such are the principles which govern the proceedings of the prize courts.

"The following are the measures which ought to be taken by the captor and by the neutral claimant, upon a ship and cargo being brought in as a prize: The captor, immediately upon bringing his prize into port, sends up or delivers upon oath to the registry of the court of admiralty all papers found on board the captured ship. In the course of a few days the examinations in preparatory of the captain and some of the crew of the captured ship are taken, upon a set of standing interrogatories, before the commissioners of the port to which the prize is brought, and which are also forwarded to the registry of the admiralty as soon as taken. A monition is extracted by the captor from the registry and served upon the Royal Exchange, notifying the capture, and calling upon all persons interested to appear and show cause why the ship and goods should not be condemned. At the expiration of twenty days the monition is returned into the registry, with a certificate of its services, and if any claim has been given, the cause is then ready for hearing upon the evidence arising out of the ship's papers and preparatory examinations.

"The measures taken on the part of the neutral master or proprietor of the cargo are as follows: Upon being brought into port the master usually makes a protest, which he forwards to London, as instructions (or with such further directions as he thinks proper), either to the correspondent of his owners or to the consul of his nation, in order to claim the ship and such parts of the cargo as belong to his owners, or with which he was particularly intrusted; or the master himself, as soon as he has undergone his examination, goes to London to take the necessary steps.

"The master, correspondent, or consul applies to a proctor, who prepares a claim, supported by an affidavit of the claimant, stating briefly to whom, as he believes, the ship and goods claimed belong, and that no enemy has any right or interest in them. Security must be given to the amount of sixty pounds to answer costs, if the case should appear so grossly fraudulent on the part of the claimant as to subject him to be condemned therein. If the captor has neglected in the mean time to take the usual steps (but which seldom happens, as he is strictly enjoined both by his instructions and by the prize act to proceed immediately to adjudication), a process issues against him on the application of the claimant's proctor, to bring in the ship's papers and preparatory examinations, and to proceed in the usual way.

"As soon as the claim is given, copies of the ship's papers and examinations are procured from the registry, and upon the return of the monition the cause may be heard. It, however, seldoms happens (owing to the great pressure of business, especially at the commencement of a war), that causes can possibly be prepared for hearing immediately upon the expiration of the time for the return of the monition; in that case, each cause must necessarily take its regular turn. Correspondent measures must be taken by the neutral master, if carried within the jurisdiction of a vice-admiralty court, by giving a claim supported by his affidavit, and offering a security for costs, if the claim should be pronounced grossly fraudulent.

"If the claimant be dissatisfied with the sentence, his proctor enters an appeal in the registry of the court where the sentence was given, or before a notary public (which regularly should be entered within fourteen days after the sentence), and he afterwards applies at the registry of the lords of appeal in prize causes, which is held at the same place as the registry of the high court of admiralty, for an instrument called an inhibition, and which should be taken out within three months, if the sentence be in the high court of admiralty, and within nine months if within a vice-admiralty court, but may be taken out at later periods if a reasonable cause

can be assigned for the delay that has intervened. This instrument directs the judge, whose sentence is appealed from, to proceed no further in the cause; it directs the registry to transmit a copy of all the proceedings of the inferior courts; and it directs the party who has obtained the sentence to appear before the superior tribunal to answer to the appeal. On applying for this inhibition, security is given on the part of the appellant to the amount of two hundred pounds, to answer costs in case it should appear to the court of appeal that the appeal is merely vexatious. The inhibition is to be served on the judge, the registrar, and the adverse party and his proctor, by showing the instrument under seal and delivering a note or copy of the contents. If the party cannot be found, and the proctor will not accept the service, the instrument is to be served *viis et modis;* that is, by affixing it to the door of the last place of residence, or by hanging it on the pillars of the Royal Exchange.

"That part of the process above described, which is to be executed abroad, may be performed by any person to whom it is committed, and the formal part at home is executed by the officer of the court. A certificate of the service is indorsed upon the back of the instrument, sworn before a surrogate of the superior court, or before a notary public, if the service is abroad.

"If the cause be adjudged in the vice-admiralty court, it is usual, upon entering an appeal there, to procure a copy of the proceedings, which the appellant sends over to his correspondent in England, who carries it to a proctor; and the same steps are taken to procure and serve an inhibition as where the cause has been adjudged in the high court of admiralty. But if a copy of the proceedings cannot be procured in due time, an inhibition may be obtained by sending over a copy of the instrument of appeal, or by writing to the correspondent an account only of the time and substance of the sentence.

"Upon an appeal fresh evidence may be introduced, if, upon hearing the cause, the lords of appeal shall be of opinion that the case is of such doubt as that further proof ought to have been ordered by the court below. Further proof usually consists of affidavits made by the asserted proprietors of the goods, in which they are sometimes joined by their clerks and others acquainted with the transaction, and with the real property of the goods claimed. In corroboration of these affidavits may be annexed original correspondence, duplicates of bills of lading, invoices, extracts from books, etc. These papers must be proved by the affidavits of persons who can speak of their authenticity; and, if copies or extracts, they should be collated and certified by public notaries. The affidavits are sworn before the magistrates or others competent to administer oaths, in the country where they are made, and authenticated by a certificate from the British consul.

"The degree of proof to be required depends upon the degree of suspicion and doubt that belongs to the case. In cases of heavy suspicion and great importance, the court may order what is called 'plea and proof'; that is, instead of admitting affidavits and documents, introduced by the claimants only, each party is at liberty to allege in regular pleadings, such circumstances as may tend to acquit or condemn the capture, and to examine witnesses in support of the allegations, to whom the se party may administer interrogatories. The depositions of the witnesses are ken in writing. If the witnesses are to be examined abroad, a commission issues for that purpose; but in no case is it necessary for them to come to England. These solemn proceedings are not often resorted to.

"Standing commissions may be sent to America for the general purpose of receiving examinations of witnesses in all cases where the court may find it necessary for the purposes of justice to decree an inquiry to be conducted in that manner.

"With respect to captures and condemnations at Martinico, which are the subjects of another inquiry contained in your note, we can only answer, in general, that we are not informed of the particulars of such captures and condemnations; but as we know of no legal court of admiralty established at Martinico, we are clearly of opin-

ion that the legality of any prizes taken there must be tried in the high court of admiralty of England, upon claims given in the manner above described, by such persons as may thiuk themselves aggrieved by the said capture."

1 Am. St. Pap. (For. Rel.), 494 *ff;* imperfectly given in 2 Halleck's Int. Law (Baker's ed.), 416 *ff.*

## VIII. *IMPRESSMENT.*

### Its history and abandonment.

### § 331.

"It will be expedient that you take proper opportunities, in the mean time, of conferring with the minister on this subject (that of impressment), in order to form some arrangement for the protection of our seamen on those occasions. We entirely reject the mode which was the subject of the conversation between Mr. Morris and him, which was that our seamen should always carry about them certificates of their citizenship; this is a condition never yet submitted to by any nation; one with which seamen would never have the precaution to comply. The casualties of their calling would expose them to the constant destruction or loss of this paper evidence, and thus the British Government would be armed with *legal authority* to impress the whole of our seamen. The simplest rule will be that the vessel being American shall be evidence that the seamen on board her are such. If they apprehend that our vessels might thus become asylums for the fugitives of their own nation from impress gangs, the number of men to be protected by a vessel may be limited by her tonnage, and one or two officers only be permitted to enter the vessel in order to examine the numbers aboard; but no press-gang should be allowed ever to go on board an American vessel till after it shall be found that there are more than their stipulated number on board, nor till after the master shall have refused to deliver the supernumeraries (to be named by himself) to the press-officer who has come on board for that purpose; and even then the American consul should be called in. In order to urge a settlement of this point before a new occasion may arise, it may not be amiss to draw their attention to the peculiar irritation excited on the last occasion, and the difficulty of avoiding our making immediate reprisals on their seamen here. You will be so good as to communicate to me what shall pass on this subject, and it may be made an article of convention to be entered into either there or here."

Mr. Jefferson, Sec. of State, to Mr. Pinckney, June 11, 1792. MSS. Inst., Ministers.

"You are desired to persevere till you obtain a regulation to guard our vessels from having their hands impressed and to inhibit the British navy officers from taking them under the pretext of their being British subjects. There appears but one practicable rule, that the ves-

sel being American shall be conclusive evidence that the hands are so, to a certain number proportioned to her tonnage. Not more than one or two officers should be permitted to visit a vessel."

Same to same, May 7, 1793; *ibid.*

"Your information that we are not likely to obtain any protection for our seamen in British ports, or against British officers on the high seas, is of a serious nature indeed; it contrasts remarkably with the multiplied applications we are receiving from the British minister here for protection to their seamen, vessels, and property within our ports and bays, which we are complying with, with the most exact justice."

Same to same, June 4, 1793; *ibid.*

The report of Mr. Pickering, Sec. of State, of Feb. 28, 1797, on impressments, is given in 1 Am. St. Pap. (For. Rel.), 761.

For letter of Mr. Pickering, Sec. of State, in reference to impressment, to Mr. King, of June 14, 1799, see MSS. Inst., Ministers.

"With regard to the insult on our flag, it will readily occur that the right of searching and stripping public vessels-of-war of their hands, if it exists at all, must be reciprocal; and it need not be asked whether a British naval commander would submit to it; neither will ours. But if such search for and taking away of seamen were at all admissible in practice, it should be in our favor; because American seamen are generally on board British ships only by *impressments;* whereas the British seamen to be found in the armed vessels of the United States are all *volunteers.* And you will recollect that the British Government have made a distinction between *volunteer* and *impressed* Americans, releasing the latter when their citizenship was proved, but detaining the former although they had entered and taken the bounty only in consequence of a *previous impressment.*"

Mr. Pickering, Sec. of State, to Mr. King, Jan. 8, 1799. MSS. Inst., Ministers.

"The impressment of our seamen is an injury of very serious magnitude which deeply affects the feelings and the honor of the nation.

"This valuable class of men is composed of natives and foreigners who engage voluntarily in our service.

"No right has been asserted to impress the natives of America. Yet they are impressed; they are dragged on board British ships-of-war, with the evidence of citizenship in their hands, and forced by violence there to serve until conclusive testimonials of their birth can be obtained. These must, most generally, be sought for on this side the Atlantic. In the mean time acknowledged violence is practiced on a free citizen of the United States, by compelling him to engage and to continue in foreign service. Although the lords of the admiralty uniformly direct their discharge on the production of this testimony, yet many must perish unrelieved, and all are detained a considerable time in lawless and injurious confinement. * * *

"The case of British subjects, whether naturalized or not, is more questionable, but the right even to impress them is denied. The practice of the British Government itself may certainly, in a controversy with that Government, be relied on. The privileges it claims and exercises ought to be conceded to others. To deny this would be to deny the equality of nations, and to make it a question of power and not of right.

"If the practice of the British Government may be quoted, that practice is to maintain and defend in their sea service all those of any nation who have voluntarily engaged in it, or who, according to their laws, have become British subjects.

"Alien seamen not British subjects engaged in our merchant service ought to be equally exempt with citizens from impressments. We have a right to engage them, and have a right to and an interest in their persons to the extent of the service contracted to be performed. Britain has no pretext of right to their persons or to their service. To tear them from our possession is at the same time an insult and an injury. It is an act of violence for which there exists no palliative."

Mr. Marshall, Sec. of State, to Mr. King, Sept. 20, 1800; *ibid.*

In a letter of Mr. Madison, Sec. of State, to Mr. Monroe, Jan. 5, 1804 (MSS. Inst., Ministers), the claim of Great Britain, to the right of visitation and impressment, are discussed at large, and the claim unqualifiedly rejected. See 2 Am. St. Pap. (For. Rel.), 130, and in same volume, 777 *ff.*, a list of American seamen impressed into British ships.

"On the impressment of our seamen our remonstrances have never been intermitted. A hope existed at one moment of an arrangement which might have been submitted to, but it soon passed away, and the practice, though relaxed at times in the distant seas, has been constantly pursued in those of our neighborhood. The grounds on which the reclamations on this subject have been urged will appear in an extract from instructions to our minister at London now communicated."

President Jefferson, Special Message, Jan. 17, 1806.

In Mr. Madison's letter of Feb. 3, 1807, to Messrs. Monroe and Pinkney (MSS. Inst., Ministers), it is stated that the President (Mr. Jefferson) declined to enter into any new treaty with Great Britain which did not settle the disputed question of impressment. See also letter of same to same of May 20, 1807. *Cf.* reasons given *supra*, §§ 107, 150*b*, for Mr. Jefferson's disapproval of the Monroe-Pinkney draft treaty.

For the reasons of Messrs. Pinkney and Monroe in dropping the question of impressment from the treaty of 1807, see letter to Mr. Madison, Apr. 22, 1807, Monroe MSS., Dept. of State; and see draft of private letter to Mr. Jefferson, June, 1807; *ibid.* *Supra*, §§ 107, 150*b*.

The returns of British impressments reported by Mr. Madison, Sec. of State, on Mar. 2, 1808 (see 3 Am. St. Pap. (For. Rel.), 36), shows that impressment at that time had assumed such enormous dimensions as to menace the very existence of the United States merchant shipping.

The circular of Admiral Berkeley, commanding on the American waters in the spring of 1807, pushed the British claim of impressment to its ex-

trémest limit. This circular, which bore date the 1st of June, 1807, and was issued from Halifax, recited that many British seamen had deserted the British fleet and were parading the town of Norfolk, protected by the civil authorities and by their own officers, who refused to surrender them. The several British commanders belonging to the squadron were then ordered, in case of meeting the Chesapeake at sea, to proceed, under this order, to search her for deserters, "according to the customs and usages of civilized nations." (See *supra*, §§ 315*b*, 319.) The assumption that the "customs and usages of civilized nations" permitted such a search and arrest was baseless even on British showing, it having been always conceded that a ship-of-war is part of the territory of her sovereign, however strongly such extraterritoriality may have been contested when applied to merchant vessels. The Chesapeake, carrying fifty guns, was ordered to sea in April, 1807, her crew being avowedly Americans by birth, and believed to be such by the officers, although it subsequently appeared that among them was an Englishman, Wilson, or Ratford, who was alleged to be a deserter, and three colored Americans claimed to have deserted the Melampus, a British cruiser. The Chesapeake, with no suspicion in her commander's breast that she was to be overhauled, stood out to sea. In the neighborhood of Hampton Roads the British squadron consisted of the Bellona, of seventy-four guns, the Leopard, of fifty guns, and the Melampus, of thirty-eight guns, under the direction of the circular of Admiral Berkeley above noticed. The Leopard started for sea (she having been in Lynn Haven Bay) at the same time with the Chesapeake, passing her, and standing out to sea a few miles ahead of her. There was nothing in this companionship to awaken suspicion in Commodore Barron, who commanded the Chesapeake, since the British officers of the Atlantic squadron were in the habit of friendly intercourse with the officers of United States vessels, often giving them packages for transport by mail or otherwise to England. The Leopard, stopping in her course, hailed the Chesapeake, asking to send some dispatches by her. Commodore Barron then ordered the Chesapeake to be brought to, when he was visited by a lieutenant, who handed him Admiral Berkeley's circular. Commodore Barron, after acquainting himself with the facts, sent back an answer in which he denied that there were any British deserters on board the Chesapeake, stating, also, that his orders had been to recruit no deserters, and that, in any view, he could not permit his men to be mustered by any but his own officers. The Chesapeake had put to sea with no conception of anything but a peaceful cruise; her decks were lumbered; her guns not arranged for action; her crew had not had any practice with the guns. Commodore Barron, however, put on his guard by the tone of the demand, ordered his crew to quarters. When his reply reached the Leopard, the Leopard's captain answered, "Commodore Barron must be aware that the orders of the vice-admiral must be obeyed," which message was several times repeated. There being no response from the Chesapeake, a shot from the Leopard was sent across her bows; this was soon followed by a broadside, by which Commodore Barron was wounded. He then proposed to send a boat on board the Leopard for the purpose of inquiry. No notice was taken of this by the Leopard, which fired several additional broadsides, lodging twenty shot in the hull of the Chesapeake, killing three men and wounding severely twenty others. So unprepared was the Chesapeake for action that but a single gun was fired in reply. The Chesapeake lowered her flag and surrendered, and was then boarded by three officers of the Leopard, who mustered the crew,

and after ransacking the vessel discovered the alleged English deserter, Wilson (or Ratford), in a coal-hole, while the three alleged colored deserters from the Melampus were seized when among the crew. Commodore Barron, while his vessel was in the hands of the British officer, sent a note to the captain of the Leopard saying that the Chesapeake was surrendered as a prize. The captain replied that having fulfilled his duty his concern with the Chesapeake was over; and he expressed his regret at the loss of life which had occurred, which, he took the opportunity to say, might have been avoided had the Chesapeake not objected to being overhauled. The two cruisers then went their ways. The Leopard took the four alleged deserters to Halifax, where they were tried by court-martial. Ratford (or Wilson), who, it was declared, was proved to have been a British subject, was hanged. The three colored "deserters," as they were called, after a lecture from Admiral Berkeley on the ill effects of their conduct, were required to enlist in the British service, as the only escape from the gallows. The Chesapeake brought into Norfolk the news of her humiliation, and this news was received with indignation through the whole land, an indignation on the part of the extreme Federalists mingled with an unconcealed feeling of disapproval of the tardiness of the Government in its naval preparations, and of the incautiousness of Commodore Barron in proceeding to sea so ill-prepared for action. The answer to this, however, was that an attack of such a character on a national ship was an act of lawless atrocity which no one could expect from a civilized belligerent. But however this may be, the municipal authorities of Norfolk, backed by the entire sense of the community, informed the British officers commanding the fleet who had previously been hospitably received, that they could no longer be permitted to communicate with the shore. The reply from Captain Douglass, who was in command, was so insolent and menacing that Governor Cabell at once ordered the neighboring militia to arms for the coast defense. A proclamation was issued by the President, which, while expressing a conviction that the outrage committed on the Chesapeake was without authority from the British Government, called on them to leave the territorial waters of the United States, and prohibited any intercourse with them from the shore. A court-martial was ordered on Commodore Barron; a hundred thousand militia were called for, though without pay; the fortifications of New York, New Orleans, and Charleston were strengthened; Congress was called together a month in advance of its regular session; and instructions were immediately sent to our minister at London to call for explanation and reparation. This message, however, was anticipated by a report from the British admiral, on receiving which Mr. Canning immediately disavowed the action of Admiral Berkeley, tendered indemnity, and recalled Berkeley from his command. But this was, very properly, not considered an adequate reparation, even though the British Government offered to restore the men who were still unhung, and whose American citizenship could not be disputed. The President, however, asked for not only indemnity, but security. (See *supra*, § 315*b*.) He also called on the British Government to abandon their claim to impressment. This they declined to do, insisting on the position which Sir Robert Phillimore, one of the most eminent of English publicists, has lately declared to be untenable, that British cruisers had a right to search American ships of all kinds. They also resented the President's proclamation excluding British cruisers from the ports of the United States, which they insisted was in conflict with Jay's

treaty. They issued a royal proclamation calling on all British sailors on board foreign vessels, whether armed or otherwise, to leave such vessels, and the right of impressment on merchant vessels was again claimed. The commanders of British cruisers, also, were authorized to call upon the commanders of foreign ships-of-war to deliver up any British seamen on board of them, and if this be refused to report the facts to the British admiralty. The Government of the United States refusing to accept indemnity for the Chesapeake outrage on such a basis as this, the British ministry sent as envoy to the United States Mr. Rose, with special powers of negotiation. Mr. Canning, however, clogged the negotiation by declaring simultaneously to Messrs. Monroe and Pinkney, the American ministers in London, that he would not agree to negotiate again on the basis of the treaty which had been negotiated by them, since he was not willing to give his approval to the doctrine that a Government could repudiate a treaty entered into by its authorized envoys. (*Supra*, § 315*b*.) Mr. Madison, in view of the fact that even in England, where the sole power of negotiation of treaties was in the Crown, it had never been disputed that the Crown could repudiate treaties negotiated by its ministers in departure from their instructions, declined to regard this criticism as valid. The consequence was a continuance, on the part of Great Britain, of that arrogant assumption of mastership of the seas, and of contemptuous disregard of the rights and feelings of American negotiators, which culminated in the war of 1812. (See for character of negotiations, *supra*, § 107.) The only question now open is whether it would not have been better to have declared war when, after the attack on the Chesapeake, the British Government declined to absolutely surrender the claim of right to call on United States ships-of-war to deliver up seamen claimed to be of British descent. But we were not then prepared for war; and if war had then been declared there would have been little likelihood of that gallant resistance on sea which four years' preparation secured. (*Supra*, § 315*b*.)

In a report made to the House of Representatives on November 17, 1807, by a committee to whom the subject was referred, we have the following:

"That the Leopard, shortly after this answer (of Commodore Barron that he knew of no British deserters on his ship, and refusing to permit his crew to be mustered except under his orders) was received by her commander, ranged alongside of the Chesapeake and commenced a heavy fire on her.

"That when the attack upon the Chesapeake commenced, some of her guns were not securely fitted in their carriages; some of her sponges and wads were too large; but few of her powder-horns were filled; her matches were not primed; some of her rammers were not in their proper places; her marines were not supplied with cartridges enough, while those they had were not of the proper size, and she was otherwise unprepared for action.

"That the Chesapeake made no resistance whatever, but remained under the incessant fire of the Leopard from twenty to thirty minutes, when, having suffered much damage in her hull, rigging, and spars, and lost three men killed and eighteen wounded, Commodore Barron ordered his colors to be struck, and they were struck, he says in his log-book, after firing one gun; but the court of inquiry lately held upon his conduct say before a single gun of any kind was fired from her. * * *

"That it has been incontestably proven, as the accompanying printed document No. 8 will show, that William Ware, John Strahan, and Dan-

iel Martin are citizens of the United States, and the two former natives of the State of Maryland; but they conceive it unnecessary for them or for this House to go into any inquiry upon that part of the subject, as, in their opinion, whether the men taken from the Chesapeake were or were not citizens of the United States, and whether the Chesapeake was or was not within the acknowledged limits of the United States at the time they were taken, the character of the act of taking them remains the same.

"From the foregoing facts, it appears to your committee that the outrage committed on the frigate Chesapeake has been stamped with circumstances of indignity and insult of which there is scarcely to be found a parallel in the history of civilized nations, and requires only the sanction of the Government under color of whose authority it was perpetrated to make it just cause of, if not an irresistible call for, instant and severe retaliation."

The following resolution was proposed as a provisional measure:

"*Resolved*, That the attack of the British ship-of-war Leopard, on the United States frigate Chesapeake was a flagrant violation of the jurisdiction of the United States; and that the continuance of the British squadron (of which the Leopard was one) in their waters, after being notified of the proclamation of the President of the United States ordering them to depart from the same, was a further violation thereof."

3 Am. St. Pap., 6. See as to this case further, §§ 315*b*, 319.

The court of inquiry on the conduct of Commodore Barron reported a series of conclusions, among which is the following:

"The court is of opinion that the neglect of Commodore Barron to prepare his ship for action under such circumstances, is a direct breach of the fourth article of the rules and regulations for the government of the Navy of the United States, adopted by an act of the Congress of the United States, passed on the 23d day of April, 1800, entitled 'An act for the better government of the Navy of the United States.'

"It appears to the court that after the British officer left the Chesapeake, bearing a positive refusal from Commodore Barron to the demand which had been made by Captain Humphreys, and after Commodore Barron was himself satisfied that an attack upon his ship would be made, he did not take prompt, necessary, and efficient means to prepare his ship for battle. That his first order was merely to clear his gun-deck, and the second, given after the lapse of some time, was to get his men to quarters secretly, without beat of drum; although, with such a crew as he had on board, and in such a situation as the ship then was, it was not to be expected that such orders could be effectually accomplished.

"It appears to the court that the conduct of Commodore Barron during the attack of the Leopard, manifested great indecision and a disposition to negotiate, rather than a determination bravely to defend his ship; that he repeatedly hailed the Leopard during her attack upon him; that he drew his men from their guns to lower down boats to send on board the attacking ship; and that he ordered his first lieutenant from his quarters during the attack to carry a message on board the Leopard at that time firing upon him.

"It appears to the court that during the attack Commodore Barron used language, in the presence of his men, calculated to dispirit his crew by ordering them to keep down, that they would all be cut to pieces.

"It appears to the court that Commodore Barron ordered the colors of the Chesapeake to be struck and they were struck before a single gun of any kind was fired from her, and that at the time they were so struck her main-deck battery was in a situation which would have enabled the return of a broadside in a very short time.

"The court is therefore of opinion that the Chesapeake was prematurely surrendered at a time when she was nearly prepared for battle, and when the injuries sustained either in the ship or crew did not make such a surrender then necessary; and that for this Commodore Barron falls under a part of the sixth article of the rules and regulations for the government of the Navy of the United States, adopted by an act of the Congress of the United States, passed on the 23d day of April, 1800, entitled, 'An act for the better government of the Navy of the United States.'

"The court is of opinion, that although the conduct of Commodore Barron, before and during the attack of the Leopard, evinced great inattention to his duty and want of decision, yet that, during that attack, he exposed his person, and did not manifest, either by his orders or actions, any personal fear or want of courage.

"It appears to the court, that although the Chesapeake might and ought to have been better defended than she was, yet that she was not in a situation, at the time of the attack made upon her, to have enabled so gallant a defense being made as might be expected. Some of her guns were not securely fitted in their carriages, some of her sponges and wads were too large, but few of her powder-horns were filled, her matches were not primed, some of her rammers were not in their proper places, her marines were neither supplied with enough cartridges nor were those of which they had of the proper size. None of these circumstances, however, could have influenced Commodore Barron in striking his colors, because they were not known to him at the time.

"The court is of opinion, that the conduct of all the other officers of the ship, except those whose duty it was to have remedied the deficiencies before stated, and of the crew generally, was proper, commendable, and honorable."

3 Am. St. Pap. (For. Rel.), 22.

Mr. G. H. Rose, sent by the British minister to the United States in December, 1807, to tender such redress for the attack on the Chesapeake as would be proper, was instructed to limit his mission to the case of the Chesapeake, involving, as Mr. Canning insisted, simply the question of impressing from national ships, and to decline to discuss even this question while the President's proclamation of July 2, 1807, was in force. Mr. Madison answered that the President's proclamation was not caused by the outrage on the Chesapeake alone, but by the general claim of British ships in American waters to impress from American ships of all classes, and that the claim to impress from national ships could not be severed from the general claim.

See full correspondence in 3 Am. St. Pap. (For. Rel.), 213 *ff.* For general notice of negotiation, see *supra*, §§ 107, 150 *b*; and as to the attack on the Chesapeake in other relations, see *supra*, §§ 315 *b*, 319.

The correspondence with the British Government in reference to the outrage on the Chesapeake is given at large in 3 Am. St. Pap. (For. Rel.), 30. As there was no distinctive principle of international law enun-

ciated by our Government in the correspondence beyond that of the inadmissibility of the British claim to impressment, and as the inviolability of ships-of-war was conceded by the British Government, it is unnecessary here to do more than to state these points in the present condensed shape.

The correspondence between Mr. Monroe, minister at London, and Mr. Canning, foreign secretary, in reference to the outrage on the Chesapeake, is given in 3 Am. St. Pap. (For. Rel.) 186 *ff*. See also 6 Wait's St. Pap., 5 *ff*, 51, 86, 124.

The main points of this correspondence are stated *supra*, § 315*b*. The personal relations of the British negotiators at Washington to the Administration are discussed *supra*, §§ 84, 107 *ff*.

It was stated by Mr. Monroe, Sec. of State, July 16, 1811, to Mr. Foster, British minister at Washington, that "no order had been given by the Government for the recovery by force of any citizen so impressed (from American vessels) from any British ship-of-war." This statement was repeated by Mr. Monroe in a note of Sept. 14, 1811.

For President Madison's message of July 6, 1812, with papers on impressments, see 3 Am. St. Pap. (For. Rel.), 573.

As to impressment, see Mr. Crawford to Mr. Clay, June 10, 1814. Colton's Correspondence of Clay, 34 *ff*.

"Peace having happily taken place between the United States and Great Britain, it is desirable to guard against incidents which, during periods of war in Europe, might tend to interrupt it; and, it is believed, in particular, that the navigation of American vessels exclusively by American seamen, either natives or such as are already naturalized, would not only conduce to the attainment of that object, but also to increase the number of our seamen, and consequently to render our commerce and navigation independent of the service of foreigners, who might be recalled by their Governments under circumstances the most inconvenient to the United States. I recommend the subject, therefore, to the consideration of Congress; and in deciding upon it, I am persuaded that they will sufficiently estimate the policy of manifesting to the world a desire on all occasions to cultivate harmony with other nations by any reasonable accommodations which do not impair the enjoyment of any of the essential rights of a free and independent people. The example on the part of the American Government will merit, and may be expected to receive, a reciprocal attention from all the friendly powers of Europe."

Message of President Madison, Feb. 25, 1815. 9 Wait's St. Pap., 438.

"I sincerely congratulate you on the peace, and more especially on the éclat with which the war was closed. The affair of New Orleans was fraught with useful lessons to ourselves, our enemies, and our friends, and will powerfully influence our future relations with the nations of Europe. It will show them we mean to take no part in their wars, and count no odds when engaged in our own. I presume that having spared to the pride of England her formal acknowledgment of the atrocity of impressment in an article of the treaty, she will concur in a convention

for relinquishing it. Without this she must understand that the present is but a truce, determinable on the first act of impressment of an American citizen committed by an officer of hers. Would it not be better that this convention should be a separate act, unconnected with any treaty of commerce, and made an indispensable preliminary to any other treaty. If blended with a treaty of commerce she will make it the price of injurious concessions. Indeed, we are infinitely better without such treaties with any nation. We cannot too distinctly detach ourselves from the European system, which is essentially belligerent, nor too sedulously cultivate an American system, essentially pacific. But if we go into commercial treaties at all, they should be with all at the same time with whom we have important commercial relations. France, Spain, Portugal, Holland, Denmark, Sweden, Russia, all should proceed *pari passu*. Our ministers, marching in phalanx on the same line, and intercommunicating freely, each will be supported by the weight of the whole mass, and the facility with which the other nations will agree to equal terms of intercourse will discountenance the selfish higglings of England, or justify our rejection of them. Perhaps, with all of them, it would be best to have but the single article *gentis amicissimæ*, leaving everything else to the usages and courtesies of civilized nations."

Mr. Jefferson to President Madison, Mar. 23, 1815. 6 Jeff. Works, 453.

"I see by several papers that a very unfair play is going on with respect to the unpublished residue of the dispatches from Ghent. It is given out that the suppression was the act of the Republicans in the Senate, and that an article prohibiting impressment was rejected by the British commissioners in a manner involving an abandonment of the American doctrine. The fact is, that the vote against publication was founded on the report of Mr. King, etc., and that the rejection of the American propositions as to impressment was followed by a protest, neutralizing at least the proceeding on that subject."

Mr. Madison, President, to Mr. Monroe, Sec. of State (unofficial), Apr. 4, 1815. Monroe Papers, Dept. of State.

"If they (the British Government) refuse to settle it (impressment), the first American impressed should be a declaration of war. The depredations on our merchants I would bear with great patience, as it is their desire. They make themselves whole by insurances, very much done in England. If the consequently increased price falls on the consumer, it still costs him less than a war, and still operates as a premium to our own manufactures. The other point, therefore, being settled, I should be slow to wrath on this."

Mr. Jefferson to Mr. Monroe, Sec. of State, July 15, 1815; *ibid.*

"The permanency of peace between the two countries is utterly incompatible with the assumption of the practice of impressing seamen from our vessels on the high seas."

Mr. Adams, Sec. of State, to Messrs. Gallatin and Rush, Nov. 2, 1818.

The negotiations of 1818 in reference to impressment are given in the Brit. and For. St. Pap. for 1818, vol. 6, 626 *ff.*; *ibid.*, 1826–'27, vol. 14, 831, 832.

For discussion in 1818 between Mr. Rush and Lord Castlereagh on this subject, see Rush's Recollections, 3d ed., 302 *ff.*, 307, 383.

By a proclamation issued on October 17, 1822, the British Government expressly disavowed the claim of searching neutral national vessels for deserters.

See Mr. Canning's statement to Messrs. Monroe and Pinkney, Oct. 22, 1807. 3 Am. St. Pap. (For. Rel.), 197. Mr Canning to Mr. Monroe, Sept. 23, 1807; *ibid.*, 200.

While the United States Government declines to further press on Great Britain the express abandonment of all claims to impressment, it is understood that the United States Government will continue to resist any attempts by the British Government to impress sailors from vessels sailing under the flag of the United States.

Mr. Clay, Sec. of State, to Mr. Gallatin, June 21, 1826. MSS. Inst. Ministers, As to a case of impressment in 1826, explained by the British Government, see Mr. Clay, Sec. of State, to Mr. Vaughan, Aug. 15, 1827, Aug. 20, 1827. MSS. Notes, For. Leg. Mr. Clay to Mr. Vaughan, Dec. 6, 1828; *ibid.* Same to same, Dec. 11, 1828.

In reference to certain alleged instances of impressment in 1828, Mr. Clay, Secretary of State, in a letter of January 26, 1829, to Mr. Barbour, minister to England, said: "If these proceedings have had the sanction of the British Government, you will inform it that the American Government cannot tolerate them; that, if persisted in, they will be opposed by the United States, and that the British Government must be answerable for all the consequences, whatever they may be, which may flow from perserverance in a practice utterly irreconcilable with the sovereign rights of the United States. If those proceedings have taken place without the sanction of the British Government you will demand the punishment of the several British naval officers at whose instance they occurred, and the immediate adoption of efficacious measures to guard the navigation of the United States against the occurrence of similar irregularities."

As to certain cases of impressment subsequent to the Treaty of Ghent, see House Doc. 446, 19th Cong., 2d sess. 6 Am. St. Pap. (For. Rel.), 368.

"The pretension set up by the British commander of his right to interfere" [in impressing from a United States vessel] "because the seamen claimed to be British is altogether inadmissible. It is understood that, in time of peace, British seamen are free, under their own laws, to engage in the foreign merchant service; but if it were otherwise, and if such service were forbidden by the laws of England, it can never be admitted that the commander of a British ship-of-war has authority to enforce the municipal law of Great Britain on board a foreign vessel, and within a foreign jurisdiction."

Mr. Forsyth, Sec. of State, to Mr. Vail, July 31, 1834. MSS. Inst., Gr. Brit.

Seamen on board vessels of the United States are protected by their flag from impressment, whether in foreign ports or on the high seas.

Mr. Forsyth, Sec. of State, to Mr. Stovenson, Jan. 20, 1837; *ibid.*

"The American Government, then, is prepared to say that the practice of impressing seamen from American vessels cannot be allowed to take place. That practice is founded on principles which it does not recognize, and is invariably attended by consequences so unjust, so injurious, and of such formidable magnitude as cannot be submitted to."

Mr. Webster, Sec. of State, to Lord Ashburton, Aug. 8, 1842. MSS. Notes, Gr. Brit.

"The impressment of seamen from merchant vessels of this country by British cruisers, although not practiced in time of peace, and therefore not at present a productive cause of difference and irritation, has, nevertheless, hitherto been so prominent a topic of controversy, and is so likely to bring on renewed contentions at the first breaking out of a European war, that it has been thought the part of wisdom now to take it into serious and earnest consideration. The letter from the Secretary of State to the British minister explains the grounds which the Government has assumed and the principles which it means to uphold. For the defense of these grounds and the maintenance of these principles, the most perfect reliance is placed on the intelligence of the American people, and on their firmness and patriotism, in whatever touches the honor of the country, or its great and essential interest."

President Tyler's message, transmitting the Treaty of Washington to the Senate, Aug. 11, 1842. 6 Webster's Works, 350.

The protection given by a national flag to persons sailing under it ceases when such persons leave the ship and go on the shores of a neutral sovereign who directs their surrender.

Mr. Seward, Sec. of State, to Mr. McMath, Apr. 28, 1862. MSS. Inst., Barb. Powers.

Mr. King, at the close of his mission to England, in 1804, entered into an informal agreement with Lord St. Vincent, first lord of the admiralty, that neither nation should for the period of five years take seamen from the ships of the other on the high seas. When, however, this agreement was submitted to the ministry, it was returned with the qualification that it should not apply to the seas immediately washing Great Britain, which, it was alleged, had always been considered under British dominion. As this, in Mr. King's opinion, would be an admission of the right of impressment in those waters, he gave up the project entire.

5 Hildreth's Hist. U. S., 536.

By Gouverneur Morris the surrender to the British Government of impressment was urged, as his life by Sparks shows, with much persistency. But as to how far Gouverneur Morris, after his abandonment of his French mission, became a representative of the British Government, see 1 J. Q. Adams's Mem., 149, 209.

The claim of right by British men-of-war to search American vessels for British seamen, and to impress them when so found, though one of the causes of the war of 1812, was not formally surrendered by the Treaty of Ghent. The Government of the United States did not insist on such surrender as a *sine qua non*. The instructions by the Secretary

of State of October 4, 1814, when the fall of Napoleon left this country the sole power with whom Great Britain was at war, gave the commissioners authority "should you find it impracticable to make an arrangement more conformable to the instructions originally given, to agree to the *status quo ante bellum* as the basis of negotiation." It was added, however, after a clause guarding the fisheries, "nor is anything to be done which would give a sanction to the British claim of impressment on board our vessels." (MSS. Dept. of State, cited in Mr. J. C. B. Davis's Notes on Treaties, 99.) The treaty as executed contained no provision on the subject; but the claim was never afterwards asserted or exercised by Great Britain.

"Rush, according to his instruction, made two successive proposals to the British Government upon impressment—one the 18th of April and the other the 20th of June last. The first was to restrict reciprocally the naturalization of sailors, the other was totally to exclude each other's seamen from the respective service, whether in public or in merchant vessels, with a positive stipulation against the impressment of men in any case. The British Government, in the first instance, rejected both, but afterwards, on the 13th of August, Castlereagh intimated to Rush, as a suggestion of his own, upon which he had not consulted the other members of the Cabinet, that the second proposition might be accepted with two modifications: one, that either party may withdraw from the engagement of the stipulation after three or six months' notice, as in the agreement concerning armaments on the lakes; the other, that if a British officer, after entering an American vessel for purposes admitted to be lawful, should find a seaman there whom he should suspect to be English, he should be authorized to make a record or process verbal of the fact, that it may be brought to the knowledge of the American Government, though not to take the man. The deliberation of this day was whether Messrs. Gallatin and Rush should be instructed to agree to these modifications or not. Strong objections were urged against them both, particularly by Mr. Calhoun. Mr. Crawford inclined to accede to them both, and the President (Monroe) inclined to the same. Mr. Wirt, without expressing himself very decidedly, thought like the President. My own greatest objections were against the proposal as made by ourselves, to which I have always been utterly averse, thinking it an illiberal engagement. * * * As, however, we made the proposal, we must abide by it, if accepted; but its own character may justly make us scrupulous against accepting any modifications which render it still more exceptionable." * * * On the next day "the question upon Lord Castlereagh's proposed modifications to our proposal for abolishing impressment on the high seas was again resumed and argued with much earnestness, Crawford and Wirt adhering to their opinions, Calhoun and I to ours. The President ultimately found a middle term, upon which he concluded, after expressing his regret that he was obliged to decide between us, equally divided in opinion as we were. He determined to reject the second modification; first, because it implied that the boarding officer should have the power of mustering the men of an American vessel and passing them individually under his inspection; and, secondly, because it implied a suspicion that we should not faithfully and sincerely carry our own laws into execution." * * * "He was convinced that if the British Government once brought themselves to contract the engagement not to take men from our ships, though it should be only for a year, they would never resort to the practice again."

4 J. Q. Adams's Memoirs, 146 ff.

In reply to Mr. Webster's statement of August 8, 1842, that "in future in every regularly-documented American merchant ship the crew who navigate it will find their protection in the flag which is over them," Lord Aberdeen wrote on August 9, that "I have much reason to hope that a satisfactory arrangement respecting it (the impressment question) may be made, so as to set at rest all apprehension and anxiety."

2 Curtis' Life of Webster, 124.

As to impressment of seaman, see 2 John Adams' Works, 226, 528; 3 *ibid.*, 503; 8 *ibid.*, 450, 451, 453, 455, 656; 9 *ibid.*, 312, 330; 10 *ibid.*, 207.

For a table of impressments see 4 Am. St. Pap. (For. Rel.), 56 *ff.* As to impressment negotiations, see 1 Ingersoll's Hist. Late War, 1st series, 30.

For an account of the case of the United States sloop-of-war Baltimore, see 3 Life of Pickering, 339 *ff.*

On impressment as cause of the war of 1812, see speech of T. Pickering, 4 Life of Pickering, 236, 242.

Several papers which bear, in the correspondence of the day, on impressment, but which primarily touch on visitation, are found *supra*, § 327.

As is stated in a prior section (*supra*, § 328), it was conceded in 1862, by the Quarterly Review (Conservative) and the Edinburgh Review (Liberal), that the right of impressment was no longer claimed by Great Britain.

# CHAPTER XVII.

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I. *CONDITIONS AND DECLARATION OF.*

(1) MAY BE LIMITED AND CONDITIONED.

§ 333.

War may be conditioned on refusal of an ultimatum.

See Whart. Com. Am. Law, § 211.

There was no formal declaration on the part of the United States in 1798–'99 of war with France, yet a *quasi* war, as it was called, existed in 1799 between the United States and France. (*Supra*, § 248, where this question is examined in relation to the French spoliations before 1799.)

In February, 1799, the French frigate L'Insurgente, of forty guns, having previously captured the United States schooner Retaliation, was herself captured by the United States frigate Constellation, of thirty guns, commanded by Commodore Truxton, who subsequently had an engagement with another French frigate of fifty guns, who struck her colors, but subsequently, in the darkness of the night, escaped with a loss of one hundred and sixty men, killed and wounded. As will hereafter be seen, there was no declaration of war on the part of the United States, but captures were made and prisoners exchanged.

*Infra*, § 335. See also *supra*, § 248.

As to capturing and exchanging French seamen in *quasi* war, see 8 John Adams' Works, 599, 661.

For an account of the relations of the United States and France in 1796–'97, see 3 Life of Pickering, 345 *ff.*; for an account of the mission of Pinckney, Gerry, and Marshall, see *ibid.*, 367 *ff.*; for an account of the mission of Ellsworth, Murray, and Davie, see *ibid.*, 392 *ff.*; *ibid.*, 436 *ff.*; and see *supra*, §§ 81, 83, 85.

A "*quasi* war" also existed on the Mississippi Valley with Spain in 1793.

1 Am. St. Pap. (For. Rel.), 454.

"A perfect war is where one whole nation is at war with another nation, and all the members of both nations are authorized to commit hostilities against all the members of the other, in every case and under every circumstance permitted by the general laws of war. An imperfect war is limited as to places, persons, and things [to which the editor adds:] Such were the limited hostilities authorized by the United States against France in 1798. (Lawrence's Wheaton, 518.)"

Davis, J., Ct. Cls., opinion on French spoliations, May 17, 1886.

On December 6, 1805, President Jefferson, when discussing Spanish depredations on our territory, said: "Considering that Congress alone is constitutionally invested with the power of changing our conditions from peace to war, I have thought it my duty to await their authority *for using force in any degree that could be avoided. I have barely instructed the officers stationed in the neighborhood of the aggressions to protect our citizens from violence, to patrol within the borders actually de-*

*livered to us, and not to go out of them but when necessary to repel an inroad, or to rescue a citizen or his property.*"

See 2 Am. St. Pap. (For. Rel.), 613.

President Madison, in a special message of June 1, 1812, after enumerating the injuries suffered from British spoliation, said: "We behold, in fine, on the side of Great Britain, a state of war against the United States; and on the side of the United States a state of peace towards Great Britain."

See 3 Am. St. Pap. (For. Rel.), 407.

Hostilities between nations may be limited as to places, persons, and things. Such hostilities are termed imperfect war, because not solemn, and because those who are authorized to commit hostilities act under special authority, and can go no further than warranted by their commission. Still it is public war, because it is an external contention by force between some of the members of the two nations authorized by the legitimate powers.

Bas *v.* Tingy, 4 Dall., 37, 40. See *supra*, § 248.

Congress can declare a general war, or may wage a limited war; limited in place, in objects, or in time. If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law of nations; but if a partial war is waged, its extent and operation depend on our municipal law.

Bas *v.* Tingy, 4 Dall., 37.

Congress may authorize general hostilities, in which case the general laws of war apply to our situation, or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed.

Talbot *v.* Seeman, 1 Cranch, 1.

A civil war exists and may be prosecuted on the same footing as if those opposing the Government were foreign invaders whenever the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts cannot be kept open. Civil war begins by insurrection against the lawful authority of the Government, and is never solemnly declared. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence and cast off their allegiance; have organized armies, and commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war.

The Prize Cases, 2 Black, 635.

As to declaration of war, see *infra*, § 334.

(2) DECLARATION MAY BE FORMALLY NECESSARY.

§ 334.

"In the first place, I have to say that the war-making power in this Government rests entirely with Congress; and that the President can authorize belligerent operations only in the cases expressly provided for by the Constitution and the laws. By these no power is given to the Executive to oppose an attack by one independent nation on the possessions of another. We are bound to regard both France and Hawaii as independent states, and equally independent, and though the general policy of the Government might lead it to take part with either in a controversy with the other, still, if this interference be an act of hostile force, it is not within the constitutional power of the President; and still less is it within the power of any subordinate agent of government, civil or military."

Mr. Webster, Sec. of State, to Mr. Severance, July 14, 1851. MSS. Inst., Hawaii.

"This proposition, looking to a participation by the United States in the existing hostilities against China, makes it proper to remind your lordship that, under the Constitution of the United States, the executive branch of this Government is not the war-making power. The exercise of that great attribute of sovereignty is vested in Congress, and the President has no authority to order aggressive hostilities to be undertaken.

"Our naval officers have the right—it is their duty, indeed—to employ the forces under their command, not only in self-defense, but for the protection of the persons and property of our citizens when exposed to acts of lawless outrage, and this they have done both in China and elsewhere, and will do again when necessary. But military expeditions into the Chinese territory cannot be undertaken without the authority of the national legislature."

Mr. Cass, Sec. of State, to Lord Napier, Apr. 10, 1857. MSS. Notes, Gr. Brit.

"I deem it my duty once more earnestly to recommend to Congress the passage of a law authorizing the President to employ the naval force at his command for the purpose of protecting the lives and property of American citizens passing in transit across the Panama, Nicaragua, and Tehuantepec routes against sudden and lawless outbreaks and depredations. I shall not repeat the arguments employed in former messages in support of this measure. Suffice it to say that the lives of many of our people, and the security of vast amounts of treasure passing and repassing over one or more of these routes between the Atlantic and Pacific, may be deeply involved in the action of Congress on this subject. (As to Isthmus, see *supra*, §§ 287 *ff.*)

"I would also again recommend to Congress that authority be given to the President to employ the naval force to protect American mer-

chant vessels, their crews and cargoes, against violent and lawless seizure and confiscation in the ports of Mexico and the Spanish-American states, when these countries may be in a disturbed and revolutionary condition. The mere knowledge that such an authority had been conferred, as I have already stated, would of itself, in a great degree, prevent the evil. Neither would this require any additional appropriation for the naval service.

"The chief objection urged against the grant of this authority is that Congress, by conferring it, would violate the Constitution—that it would be a transfer of the war-making, or, strictly speaking, the war-declaring power to the Executive. If this were well founded it would, of course, be conclusive. A very brief examination, however, will place this objection at rest.

"Congress possess the sole and exclusive power under the Constitution 'to declare war.' They alone can 'raise and support armies,' and 'provide and maintain a navy.' But after Congress shall have declared war, and provided the force necessary to carry it on, the President, as commander-in-chief of the Army and Navy, can alone employ this force in making war against the enemy. This is the plain language, and history proves that it was the well-known intention of the framers of the Constitution."

President Buchanan, Third Annual Message, 1859.

Mr. Calhoun's report, on June 3, 1812, on behalf of the House Committee on Foreign Relations, recommending a declaration of war, is given in 3 Am. St. Pap. (For. Rel.), 567; Mr. Grundy's report, of Jan., 1813, on the war, is in the same vol., 604.

The correspondence between the American legation at London, and Lord Wellesley, British minister of foreign affairs, in 1811 and in 1812, prior to the declaration of war, is given in 3 Am. St. Pap. (For. Rel.), 409.

The correspondence with the British Government, after the declaration of war of June 18, 1812, for the purpose of suspending hostilities, is given in 3 Am. St. Pap. (For. Rel.), 585 *ff.*

Under the seventh section of the act of 1799 (1 Stat. L., 716, repealed, see Rev. Stat., § 4652), France was to be deemed an enemy of the United States in March, 1799.

Bas. *v.* Tingy, 4 Dall., 37, 39. See discussion of this case, *supra*, § 248.

"By the Constitution Congress alone has the power to declare a national or foreign war. It cannot declare war against a State, or any number of States, by virtue of any clause in the Constitution. The Constitution confers on the President the whole executive power. He is bound to take care that the laws be faithfully executed. He is commander-in-chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States. He has no power to initiate or declare a war, either against a foreign nation or a domestic State, but by the acts of Congress of February 28, 1795, and 3d of March, 1807, he is authorized to

call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrections against the government of a State or of the United States.

"If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority; and whether the hostile party be a foreign invader or States organized in rebellion it is none the less a war, although the declaration of it be '*unilateral*.' Lord Stowell (1 Dodson, 247) observes, 'It is not the less a war on *that account*, for war may exist without a declaration on either side. It is so laid down by the best writers on the law of nations. A declaration of war by one country only is not a mere challenge to be accepted or refused at pleasure by the other.

"The battles of Palo Alto and Resaca de la Palma had been fought before the passage of the act of Congress of May 13, 1846, which recognized '*a state of war as existing by the act of the Republic of Mexico*.' This act not only provided for the future prosecution of the war, but was itself a vindication and ratification of the act of the President in accepting the challenge without a previous formal declaration of war by Congress."

Grier, J.; The Prize Cases, 2 Black, 668, Dec., 1862.

A public war, within the Constitution and the rules and articles of war, has existed with the Seminoles since the day Congress recognized their hostilities and appropriated money to suppress them.

3 Op., 307, Butler, 1838.

The war between the United States and Mexico was begun by a military conflict in the disputed territory, and the act of Congress declaring war was not passed until after such collision. (See 2 Twiss, Law of Nat., 69; Abdy's Kent (1878), 172.) *Supra*, §§ 58, 154.

On the subject of war without declaration see Mr. Maurice's "Hostilities without Declaration of War," an abstract of the cases in which hostilities have occurred between civilized powers prior to declaration or warning from 1700 to 1870, and review of same by Professor Holland, Revue de droit int., 1885, No. 6, 63–5. See also "Des Hostilités sans déclaration de guerre," by M. Ferand-Giraud, Revue de droit int. for 1885, No. 1, 19.

(3) BUT NOT PRACTICALLY ESSENTIAL.

§ 335.

On June 23, 1798, after receiving the message of the President announcing the suspension of diplomatic intercourse with France, Congress authorized the President to officer and arm the "provisional army." On June 25, our merchant vessels were authorized to resist by force "any search, restraint, or seizure" from any vessel sailing under French colors, and to capture or recapture such vessels. On June 28,

the President was authorized to treat persons captured in such vessels as prisoners of war. Prisoners so taken were duly exchanged. *Supra*, §§ 228, 248.

"And whereas actual hostilities have long been practiced on the commerce of the United States by the cruisers of the French Republic under the orders of its Government, which orders that Government refuses to revoke or relax; and hence it has become improper any longer to allow the consul-general, consuls, and vice-consuls of the French Republic above-named, or any of its consular persons or agents heretofore admitted in these United States any longer to exercise their consular functions; these are therefore to declare that I do no longer recognize the said citizen Letombe as consul-general or consul, nor the said citizens Rosier and Arcambal as vice-consuls, nor the said citizen Mozard as consul of the French Republic in any part of these United States, nor permit them or any other consular persons or agents of the French Republic, heretofore admitted in the United States, to exercise their functions as such; and I do hereby wholly revoke the *exequaturs* heretofore given to them respectively and do declare them absolutely null and void from this day forward."

Proclamation of July 13, 1798. 9 John Adams's Works, 171.

"I think it clear that whatsoever misunderstanding existed between the United States and France (from 1798 to 1800) it did not amount at any time to open and public war. It is certain that the amicable relations of the two countries were very much disturbed; it is certain that the United States authorized armed resistance to French captures, and the capture of French vessels-of-war found hovering on our coasts; but it is certain also, not only that there was no declaration of war on either side, but that the United States, under all their provocations, never authorized general reprisals on French commerce. At the very moment when the gentleman says war raged between the United States and France, French citizens came into our courts, in their own names claimed restitution for property seized by American cruisers, and obtained decrees of restitution. They claimed as citizens of France, and obtained restitution in our courts as citizens of France." * * * The act of May 28, 1798, "it is true, authorized the use of force, under certain circumstances, and for certain objects, against French vessels. But there may be acts of authorized force, there may be assaults, there may be battles, there may be captures of ships and imprisonment of persons, and yet no general war. Cases of this kind may occur under that practice of *retorsion* which is justified, when adopted for just cause, by the laws and usages of nations, and which all the writers distinguish from general war." "On the same day in which this act was passed, * * * Congress passed another act entitled 'An act authorizing the President of the United States to raise a provisional army,' and the first section declared that the President should be authorized '*in the event of a declaration of war against the United States or of actual invasion of this territory by a foreign power, or of imminent danger of such invasion,*' to cause to be enlisted ten thousand men." Mr. Webster also called attention to the fact that by the act of February 20, 1800, war

was still spoken of as a future contingency; and on May 11, 1800, further warlike preparations were stopped.

Mr. Webster's speech on French spoliations, 4 Webster's Works, 163–5. See *supra*, §§ 333, 334.

As to the spoliations in question, see *supra*, § 248.

"The controversy turned on whether France was an *enemy* of the United States, within the meaning of the law. (See further, as to the effect of this war in extinguishing prior claims, Webster's Works, iv., 162. Benton's Thirty Years in the Senate, 487, 494–509. Cong. Globe, 1854–'55, 372. *Ibid.*, Index, 120.)"

Lawrence's Wheaton (ed. 1863), 878.

In the Brit. and For. St. Pap. of 1812–'14 (vol. i) will be found the legislation of Congress prior to the war of 1812; the correspondence with Great Britain relative to overtures for a suspension of hostilities; the correspondence with Russia as to mediation, and with Great Britain between November, 1813, and December, 1814; the several messages of the President as to the war, the correspondence with the commissioners at Ghent, and reports to the Secretaries of the Navy, of War, and of the Treasury, in their respective Departments, during the war. In the same work, for 1814–'15 (vol. 2), are to be found the action of the Government of the United States on the peace of 1815, and the act of Congress of February 18, 1815, relative to the exclusion of foreign seamen from American vessels.

A naval officer of the United States cannot resort to force to compel delivery to him of American seamen unjustly imprisoned on a vessel in a foreign port. His duty is to demand the delivery of such seamen, and if this is refused, to resort to the civil authorities. He can, however, if there is an attempt forcibly to seize such seamen from their own vessels, forcibly intervene. "The employment of force is justifiable in resisting aggressions before they are complete. But if they are consummated, the intervention of the authority of Government becomes necessary if redress is refused by the aggressor."

Mr. Clay, Sec. of State, to Mr. Rebello, Mar. 22, 1827. MSS. Notes, For. Leg.

"To this state of general peace with which we have been blessed one only exception exists. Tripoli, the least considerable of the Barbary States, had come forward with demands unfounded either in right or in compact, and had permitted itself to denounce war, on our failure to comply before a given day. The style of the demand admitted but one answer. I sent a small squadron of frigates into the Mediterranean, with assurances to that power of our sincere desire to remain in peace, but with orders to protect our commerce against the threatened attack. The measure was seasonable and salutary. The Bey had already declared war. His cruisers were out. Two had arrived at Gibraltar. Our commerce in the Mediterranean was blockaded and that of the Atlantic in peril. The arrival of our squadron dispelled the danger."

President Jefferson, First Annual Message, 1801.

"It is certain that a condition of war can be raised without an authoritative declaration of war, and, on the other hand, the situation of peace may be restored by the long suspension of hostilities, without a treaty of peace being made. History is full of such occurrences. What period of suspension of war is necessary to justify the presumption of the restoration of peace has never yet been settled, and must in every case be determined with reference to collateral facts and circumstances.

"The proceedings of Spain and Chili which have been referred to, although inconclusive, require an explanation on the part of either of those powers which shall insist that the condition of war still exists. Peru, equally with Spain, has as absolute a right to decline the good offices or mediation of the United States for peace as either has to accept the same. The refusal of either would be inconclusive as an evidence of determination to resume or continue the war. It is the interest of the the United States, and of all nations, that the return of peace, however it may be brought about, shall be accepted whenever it has become clearly established. Whenever the United States shall find itself obliged to decide the question whether the war still exists between Spain and Peru, or whether that war has come to an end, it will make that decision only after having carefully examined all the pertinent facts which shall be within its reach, and after having given due consideration to such representations as shall have been made by the several parties interested."

Mr. Seward, Sec. of State, to Mr. Goñi, July 22, 1868. MSS. Notes, Spain; Dip. Corr., 1868.

"Now, if this be the true definition of war, let us see what was the situation of the United States in relation to France. In March, 1799, Congress had raised an army; stopped all intercourse with France; dissolved our treaty; built and equipped ships-of-war, and commissioned private armed ships, enjoining the former and authorizing the latter to defend themselves against the armed ships of France, to attack them on the high seas, to subdue and take them as prize, and to recapture armed vessels found in their possession. Here, then, let me ask, what were the technical characters of an American and French armed vessel, combating on the high seas, with a view the one to subdue the other, and to make prize of his property? They certainly were not friends, because there was a contention by force; nor were they private enemies, because the contention was external, and authorized by the legitimate authority of the two Governments. If they were not our enemies I know not what constitutes an enemy. * * * What, then, is the evidence of legislative will? In fact and in law we are at war."

Washington, J.; Bas *v.* Tingy, 4 Dall., 34. See as to this question in relation to French spoliations, *supra*, § 248.

In the Prize Cases, 2 Black, 636, it was held by the majority of the court that the late civil war began with the President's proclamation of

blockade, April 27, 1861; while by the dissenting judges it was held to have begun on the adoption by Congress of the act of July 13, 1861. "A civil war," said Judge Grier, giving the opinion of the majority, "is never solemnly declared; it becomes such by its accidents." The institution of a blockade was held to be one of these "accidents." On the other hand, Judge Nelson, in an opinion concurred in by Chief-Justice Taney, Judge Catron, and Judge Clifford, declared that the act of July 13, 1861, "recognized a state of civil war between the Government and the Confederate States, *and made it territorial.*"

The United States may be engaged in war, and have all the rights of a belligerent, without any declaration by Congress.

The Amy Warwick, 2 Sprague, 123.

### II. *EFFECT OF, AS TO CIVIL RIGHTS.*

#### (1) Abrogates treaties.

§ 336.

This subject is discussed in a prior section, *supra*, § 135. See also, *supra*, § 302, as to effect of war of 1812 on fisheries.

#### (2) Breaks up business and suspends contracts.

§ 337.

War does not extinguish debts due from the citizens of one belligerent to those of another; it merely suspends the remedy for their recovery.

The State of Georgia *v.* Brailsford, 3 Dall., 1.

After a declaration of war, all intercourse, and not merely trading, is forbidden; and an American citizen cannot lawfully send a vessel to the enemy's country to bring away his property.

The Rapid, 8 Cranch, 155.

In war, all intercourse between the subjects and citizens of the belligerent countries is illegal, unless sanctioned by the authority of the Government or in the exercise of the rights of humanity.

The Julia, *ibid.*, 181.

The sailing on a voyage under the license and passport of protection of the enemy, in furtherance of his views and interests, subjects the ship and cargo to confiscation as prize of war.

*Ibid.* The Aurora, *ibid.*, 203.

The principle of the decision in the Julia (8 Cranch., 181) applies to a case where it was not expressly stated in the license that its object was to supply the enemy with provisions, but where such object was plainly inferable.

The Hiram, *ibid.*, 444.

Property engaged in an illicit intercourse with the enemy is to be condemned to the captors and not to the United States, the municipal forfeiture under the laws of the United States being absorbed in the more general operation of the law of war.

The Sally, *ibid.*, 382.

Trading with an enemy does not *ipso facto* forfeit the property so obtained by a citizen, but only subjects it to condemnation when regularly captured.

The Thomas Gibbons, *ibid.*, 421.

If, upon the breaking out of a war with this country, our citizens have a right to withdraw their property from the enemy's country, it must be done within a reasonable time. Eleven months after the declaration of war is too late.

The Saint Lawrence, 9 Cranch., 120.

Citizens of the United States are equally guilty of trading with the enemy, whether the trade be between an enemy's port and the United States or between the former and some foreign nation. The offense of trading with the enemy is complete the moment the vessel sails from a port of the United States to a port of the enemy.

The Rugen, 1 Wheat., 61.

Under the act of the 6th of July, 1812 (2 Stat. L., 778), "to prohibit American vessels from proceeding to, or trading with, the enemies of the United States, and for other purposes," it was held, that living fat oxen, cows, steers, and heifers are articles of provision and munitions of war within the true intent and meaning of the act. Also, that driving living fat oxen, etc., on foot, is not a transportation thereof within the true intent and meaning of the same act.

U. S. *v.* Shelden, 2 Wheat., 119.

The sailing under the enemy's license constitutes, of itself, an act of illegality, which subjects the property to confiscation, without regard to the object of the voyage or the port of destination.

The Ariadne, *ibid.*, 143.

A vessel and cargo liable to capture as enemy's property, or for sailing under the pass or license of the enemy, or for trading with the enemy, may be seized after arrival in a port of the United States and condemned as prize of war. The *delictum* is not purged by the termination of the voyage.

The Caledonian, 4 Wheat., 100.

The citizens of one belligerent state are incapable of contracting with the citizens of the other belligerent state.

Schofield *v.* ichelberger, 7 Pet., 586.

The rule is inflexible that trade between citizens or subjects of nations at war is forbidden, and property on the high seas, intended for an enemy's port, is lawful prize.

Jecker *v.* Montgomery, 13 How., 498; 18 *ibid.*, 110.

The effect of war is to dissolve a partnership between citizens of hostile nations.

The William Bagaley, 5 Wall., 377.

Where a citizen of a State adhering during the war of the rebellion to the national cause brought suit, after the war, against a citizen residing during the war within the limits of an insurrectionary State, it was held that the period during which the plaintiff was prevented from suing by the state of hostilities should be deducted from the time necessary to bar the action under the statute of limitations.

Hanger *v.* Abbott, 6 Wall., 532; University *v.* Finch, 18 *ibid.*, 106.

A contract made by a consul of a neutral power with a citizen of a belligerent state, that he will "protect," with his neutral name, from capture by the belligerent, merchandise which such citizen has in the enemy's lines, is against public policy and void.

Coppell *v.* Hall, 7 Wall., 542.

Commercial intercourse between states at war with each other is interdicted. It needs no special declaration on the part of the sovereign to accomplish this result, for it follows from the very nature of war that trading between the belligerents should cease.

U. S. *v.* Lane, 8 Wall., 185; McKee *v.* U. S., *ibid.*, 163.

Intercourse with an enemy during war is unlawful to parties standing in the relation of debtor and creditor as much as to those who do not.

U. S. *v.* Grossmayer, 9 Wall., 72.

A transfer of property to a creditor by an enemy debtor, though made to an agent of the creditor and in payment of a debt contracted before the war, is void, and cannot be made lawful by any ratification.

*Ibid.*

Every kind of trading or commercial dealing or intercourse, whether by transmission of money or of goods, or orders for the delivery of either between two countries at war, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, is prohibited.

Quoted in Montgomery *v.* U. S., 15 Wall., 395; from Kershaw *v.* Kelsey, 100 Mass., 561; U. S. *v.* Lapène, 17 Wall., 601.

During the occupation of New Orleans by the Federal forces during the rebellion, a loyal citizen of that place, describing himself as the agent of a certain planter, who was an enemy, residing on a plantation

in the rebellious region, agreed to sell to a British subject, domiciled in New Orleans, a crop belonging to the said planter, and described as his (the planter's) property. It was ruled that the sale was void.

It appeared that the loyal citizen had, prior to the war, made advances to the planter, and it was argued that he had a lien on the property and a power to sell it for the repayment of the advances, and that the sale ought to be regarded as his, and not as a sale by the planter. The court held, however, that the real parties to the transaction were the vendee and a public enemy, at the same time observing that there was nothing in the case inconsistent with the doctrine that a resident in the territory of one belligerent may have in times of war an agent residing in the territory of the other belligerent, to whom his debtor may pay a debt, or deliver property in discharge of it, such payments or deliveries involving no intercourse between enemies.

Montgomery *v.* U. S., 15 Wall., 395.
As to claims based on war, see *supra*, §§ 223 *ff.*

As the enforcement of contracts between enemies made before the war is suspended during the war, statutes of limitation do not run against the right of action of the parties to such contracts during the war.

Brown *v.* Hiatts, 15 Wall., 177; Semmes *v.* Hartford Ins. Co., 13 *ibid.*, 160.

The running of interest also ceases.

Brown *v.* Hiatts, 15 Wall., 177.

The war of the rebellion was accompanied by the general incidents of a war between independent nations. The inhabitants of the rebellious and of the loyal States became enemies to each other, and were liable to be so treated without reference to their individual dispositions or opinions; all commercial intercourse and correspondence between them were interdicted by principles of public law, as well as by express enactments of Congress; all contracts previously made between them were suspended, and the courts of each belligerent were closed to the citizens of the other.

*Ibid.*

A sale of real estate during the rebelion, under a power in a deed of trust previously given to secure the payment of promissory notes of the grantors in the deed, is valid, though said grantors at the time of the sale were citizens and residents of one of the States declared to be in insurrection.

University *v.* Finch, 18 Wall., 106.

The fact that seven months after a ten years' lease was made, a "general order" from the military department of Louisiana, forbade the several bureaus of the municipal government of the city, created by military authority, from disposing of any of the city property for a term extend-

ing beyond a period when the regular civil government of the city might be established, was held not to have invalidated the lease.

New Orleans *v.* Steamboat Company, 20 Wall., 387.

The Government of the United States has power to permit limited commercial intercourse with an enemy in time of war, and to impose such conditions thereon as it sees fit; this power is incident to the power to declare war, and to carry it on to a successful termination. And it would seem that the President alone, who is constitutionally invested with the entire charge of hostile operations, may exercise this power; but whether so or not, there is no doubt that, with the concurrent authority of the Congress, he may exercise it according to his discretion.

Hamilton *v.* Dillin, 21 Wall., 73.

A resident of a loyal State, after the 17th of July, 1861, and just after the civil war had become flagrant, procured a pass from the proper military authority of the United States permitting him to go through the Army lines into the insurrectionary territory, and under it went into the Confederate States and remained there, engaged in business, until the latter part of 1864, when he returned to his old domicil. Prior to his return he purchased a large quantity of cotton (724 bales), which he stored in Savannah, and which fell into the hands of the forces of the United States when that place was captured by them. It was held, on a question whether he had been trading with the enemy, that he had not lost his original domicil, and accordingly that he had been so trading.

Mitchell *v.* U. S., *ibid.*, 350.

It was not until the 16th of August, 1861, that all commercial intercourse between the States designated as in rebellion and the inhabitants thereof, with certain exceptions, and the citizens of other States and other parts of the United States, became unlawful.

Matthews *v.* McStea, 91 U. S., 7.

A foreigner, domiciled during the year 1864 in Texas, who, in order to obtain permission of the Confederate Government to export his cotton, sold at a nominal price and delivered to its agents or officers for its use an equal amount of other cotton, which he subsequently redeemed by paying a stipulated sum therefor, directly contributed to the support of the enemy, and gave him aid and comfort. Out of such a transaction no demand against such agents or officers can arise which will be enforced in the courts of the United States.

Radich *v.* Hutchins, 95 U. S. 210. See *supra*, §§ 223 *ff.*, 227 *ff.*

War puts every individual of the respective Governments, as well as the Governments themselves, in a state of hostility with each other. All treaties, contracts, and rights of property are suspended. The subjects are in all respects considered as enemies. They may seize the

persons and property of each other. They have no *persona standi in judicio*, no power to sue in the public courts of the enemy nation. It becomes, therefore, criminal to comfort or aid the enemy.

The schooner Rapid and Cargo, 1 Gallison, 303.

In war all intercourse between subjects and citizens of the belligerent countries is illegal, unless sanctioned by the authority of the Government, or in the exercise of the rights of humanity. * * * Independent of all authority, it would seem a necessary result of a state of war to suspend all negotiations and intercourse between the subjects of the belligerent nations.

The Julia and Cargo, *ibid.*, 594.

There is no legal difference, as to a plea of alien enemy, between a corporation and an individual.

Society, &c. *v.* Wheeler, 2 Gallison, 105.

A sale by a belligerent of a war ship to a neutral in a neutral port is invalid by the law of nations, as construed both in England and America.

The Georgia, 1 Lowell, 96. See *infra*, §§ 388, 393.

By the law of nations, where a war exists between two distinct and independent powers, there must be a suspension of all commercial intercourse between their citizens; but this principle has not been applied to the States which joined the so-called Southern Confederacy.

U. S. *v.* Six Boxes of Arms, 1 Bond, 446.

The existence of war does not prevent the citizens of one belligerent power from taking proceedings for the protection of their own property, in their own courts, against the citizens of the other, whenever the latter can be reached by process.

Lee *v.* Rogers, 2 Sawyer, 549.

Permission cannot be granted to a citizen of the United States to send a vessel to a port under the dominion of a country with which we are at war to bring away a cargo of merchandise.

1 Op., 175, Rush., 1814.

Debts due by one belligerent state to the citizens of the other, are not extinguished by the war.

12 Op., 72, Stanbery, 1866.

The subject of neutral trade with belligerents is discussed *infra*, § 388; that of extinguishment of international claims by war, *supra*, §§ 240, 248.

Licenses to trade with enemy are considered in Dana's Wheaton, § 410.

Judge Holmes, in a note to 1 Kent, 167, maintains that the rule is "that these contracts (made before the war) are dissolved which cannot be performed except by way of commercial intercourse." In Kershaw *v.* Kelsey (100 Mass., 561), it was held that the rule only prohibited

"intercourse between colonies of the two belligerents which is inconsistent with the state of war between their countries."

"In the treaty of 1848 between the United States and Great Britain it is provided that in case of war between the two nations the mail-packets shall be unmolested for six weeks after notice by either Government that the service is to be discontinued; in which case they shall have safe-conduct to return (U. S. Laws, ix, 965). During the Mexican war British mail steamers were allowed by the United States forces to pass in and out of Vera Cruz. During the civil war in the United States the United States Government adopted a rule that 'public mails of any friendly or neutral power, duly certified and authenticated as such,' found on board captured vessels, 'shall not be searched or opened, but be put, as speedily as may be convenient, on the way to their designated destination. This instruction, however, will not be deemed to protect simulated mails, verified by forged certificates or counterfeited seals.' These instructions from the Secretary of State to the Secretary of the Navy, of October 31, 1862, were communicated to the ministers of foreign Governments. (Dip. Corr., 1863, part i, 402.) In the case of the prize Peterhoff, in which the question was as to the actual ownership and destination of the cargo, the court at first directed the mails found on board to be opened in the presence of the British consul, and that he be requested to select such letters as appeared to him to relate to the cargo and its destination, and reserve the rest of the mail to forward to its destination. The British consul refused to comply with this request, protesting that the mail should be forwarded unopened. On appeal to the Secretary of State, the United States attorney at New York received directions to forward the entire mail to its destination, unexamined, notwithstanding there was reason to believe some letters in it would furnish evidence as to the cargo; and Mr. Seward wrote to to Mr. Adams, April 21, 1863, to that effect, adding, 'I shall, however, improve the occasion to submit some views upon the general question of the immunities of public mails found on board of vessels visited under the belligerent right of search. The subject is one attended with many embarrassments, while it is of great importance. The President believes it not less desirable to Great Britain than it is to the United States and other maritime powers to arrive at some regulation that will at once save the mails of neutrals from unnecessary interruption and exposure, and, at the same time, prevent them from being made use of as auxiliaries to unlawful designs of irresponsible persons seeking to embroil friendly states in the calamities of war.'

"The rule in Mr. Seward's instructions of 31st October, 1862, relates only to public mails duly authenticated; and the capturing Government reserves the right to make sure of the genuineness of the authentication. When the vessel is a private one, but carrying mails under a Government contract, like the Cunard or Peninsula and Oriental steamers, and the lines subsidized by the United States for that purpose, a Government mail agent is usually on board, having them in charge. Although this fact does not, in law, protect the mails from search, yet it affords opportunity for general arrangements between nations, and makes special arrangements between the captors and the mail agent, in particular cases, more probable."

Dana's Wheaton, § 504, note 228. As to Trent case and arrest of dispatches, see §§ 325, 328, 374.

"The protection of the interests and welfare of the state makes the application of this rule [prohibiting intercourse between belligerents] especially necessary to the merchant and trader who, under the temptations of an unlimited intercourse with the enemy, by artifice or fraud, or from motives of cupidity, might be led to sacrifice those interests.

"See United States *v.* Boxes of Arms (1 Bond, 446) as to the application of this rule to the States which joined the Southern Confederacy during the American civil war. See also Gay's Gold (13 Wall., 358) and United States *v.* Homeyer (2 Bond, 217) as to the effect of the acts of Congress, proclamations, etc., on the same rule."

2 Halleck's Int. Law (Baker's ed.), 154.

"The language of Mr. Justice Story in the cases of the Rapid and the Mary in the circuit court amounts to a clear denial of the existence of the right in question [withdrawal of property of one belligerent from the territory of the other] under any circumstances, although in the case of the St. Lawrence, subsequently decided in the Supreme Court, where the opinion of the court was given by the same distinguished judge, any direct decision of this question was studiously avoided, and that case was decided on the ground that the property had not been withdrawn from the enemy's country *within reasonable time* after the knowledge of the war. This exact question, as already remarked, has never been determined by the Supreme Court of the United States, nor is its decision involved as a necessary consequence in the cases which have been adjudicated before that tribunal. In a case decided in the supreme court of the State of New York it was held that a citizen of one belligerent *may* withdraw his property from the country of the other belligerent, provided he does it within a reasonable time after the declaration of the war, and does not himself go to the enemy's country for that purpose. In delivering the opinion of the court in this case (Armory *v.* McGregor) Chief-Justice Thompson remarks that from the guarded and cautious manner in which the Supreme Court of the United States had reserved itself upon this particular question there was reason to conclude that when it should be distinctly presented it would be considered as not coming within the policy of the rule that renders all trading or intercourse with the enemy illegal."

*Ibid.*, 163.

(3) BUT NOT TRUCES.

§ 337*a*.

"If there is one rule of the law of war more clear and peremptory than another, it is that compacts between enemies, such as truces and capitulations, shall be faithfully adhered to, and their non-observance is denounced as being manifestly at variance with the true interest and duty, not only of the immediate parties, but of all mankind."

Mr. Webster, Sec. of State, to Mr. Thompson, Apr. 15, 1842. MSS. Inst., Mex. 6 Webster's Works, 438.

### III. *APPLICATION OF, TO ENEMY'S PROPERTY.*

#### (1) PRIVATE PROPERTY ON LAND NOT USUALLY SUBJECT TO ENEMY'S SEIZURE.

§ 338.

Every nation at war with another is justifiable, by the general and strict law of nations, in seizing and confiscating all movable property of its enemy (of any kind or nature whatsoever), wherever found, whether within its territory or not.

Ware *v.* Hylton, 3 Dall., 199, 226. See App., Vol. III, § 338.

War gives the right to confiscate, but does not itself confiscate, the property of the enemy which may be found in the country at the commencement of the war. When the sovereign authority shall choose to bring the right of confiscation into operation, the judicial department must give effect to its will.

Brown *v.* U. S., 8 Cranch, 110.

In the United States, proceedings to condemn the property of an enemy found within the territory at the declaration of war must be in execution of some existing law.

*Ibid.* But see the Prize Cases, 2 Black, 635.

An act of Congress merely declaring war does not authorize such confiscation.

Brown *v.* U. S., 8 Cranch, 110.

An island conquered and occupied by the enemy is, for belligerent and commercial purposes, his soil. The produce of that soil is liable to condemnation on the high seas while it belongs to the individual proprietor of the soil which produced it, though he is a neutral.

Thirty Hogsheads of Sugar *v.* Boyle, 9 Cranch, 191.

Private property may be taken by a military commander for public use, in cases of necessity, or to prevent it from falling into the hands of the enemy, but the necessity must be urgent, such as will admit of no delay, or the danger must be immediate and impending. But in such cases the Government is bound to make full compensation to the owner.

Mitchell *v.* Harmony, 13 How., 115.

"Being enemies' property, the cotton was liable to capture and confiscation by the adverse party. (Prize Cases, 2 Black, 687.) It is true that this rule, as to property on land, has received very important qualifications from usage, from the reasonings of enlightened publicists, and from judicial decisions. 'It may now be regarded as substantially restricted to special cases dictated by the necessary operation of war' (1 Kent., 92), and as excluding, in general, 'the seizure of the private property of pacific persons for the sake of gain.' (*Ibid.*, 93.) The com-

manding general may determine in what special cases its more stringent application is required by military emergencies; while considerations of public policy and positive provisions of law and the general spirit of legislation must indicate the cases in which its application may properly be denied to the property of non-combatant enemies.

"In the case before us, the capture seems to have been justified by the peculiar character of the property and by legislation. It is well known that cotton has constituted the chief reliance of the rebels for means to purchase the munitions of war in Europe. It is a matter of history, that rather than permit it to come into the possession of the National troops, the rebel Government has everywhere devoted it, however owned, to destruction. The value of that destroyed at New Orleans, just before its capture, has been estimated at eighty millions of dollars. It is in the record before us, that on this very plantation of Mrs. Alexander, one year's crop was destroyed in apprehension of an advance of the Union forces. The rebels regarded it as one of their main sinews of war; and no principle of equity or just policy required, when the national occupation was itself precarious, that it should be spared from capture and allowed to remain, in case of the withdrawal of the Union troops, an element of strength to the rebellion."

Chase, C. J.; Mrs. Alexander's Cotton, 2 Wall., 419.
As to cotton being contraband, see *infra*, § 373.
As to claims for indemnity, see *supra*, §§ 223 *ff.*

The humane maxims of the modern law of nations, which exempt private property of non-combatant enemies from capture as booty of war, found expression in the abandoned and captured property act of March 12, 1863.

U. S. *v.* Klein, 13 Wall., 128. See *supra*, §§ 223 *ff.*

"No titles were divested in the insurgent States, unless in pursuance of a judgment rendered after due legal proceedings. *The Government recognized to the fullest extent the humane maxims of the modern law of nations, which exempt property of non-combatant enemies from capture or booty of war.*"

Chase, C. J.; U. S. *v.* Klein, 13 Wall., 128. See to same general effect, Lamar *v.* Browne, 92 U. S., 194.

Where private property is impressed into public use during an emergency, such as a war, a contract is implied on the part of the Government to make compensation to the owner.

U. S. *v.* Russell, 13 Wall., 623.

During the civil war enemies' property was made liable to confiscation by certain acts of Congress, but the Government of the United States asserted no general right in virtue of conquest to compel the payment of private debts to itself.

Planters' Bank *v.* Union Bank, 16 Wall., 483. *Supra*, §§ 223 *ff.*; *infra*, §§ 352 *ff.*

It is by no means to be admitted that a conquering power may compel private debtors to pay their debts to itself, and that such payments extinguish the claims of the original creditor. The principle of international law, that a conquering state, after the conquest has subsided into Government, may exact payment from the state debtors of the conquered power, and that payments to the conqueror discharge the debt, so that when the former Government returns the debtor is not compellable to pay again, has no applicability to debts not due to the conquered state.

*Ibid.*

W., a resident of Memphis, purchased, on April 12, 1865, in Mobile, from B., a resident of that city, both cities being then in the occupancy of the national forces, cotton which was then in the military lines of the insurgent forces in Alabama and Mississippi, the inhabitants whereof had been declared to be in insurrection. Between June 30 and December 1 of that year, a portion of the cotton, while it was in the hands of the planters from whom it had been originally purchased by the Confederate Government, the agent of which had sold it in Mobile to B. on the 5th of April, was seized by Treasury agents of the United States and sold. The proceeds were paid into the Treasury and W. sued to recover them. It was ruled that his purchase being in violation of law no right arose therefrom which can be enforced against the United States.

Walker's Executors *v.* U. S., 106 U. S., 413. *Supra*, §§ 222 *ff.*; *infra*, §§ 352 *ff.*

By the law of nations the debts, credits, and corporal property of an enemy, found in the country on the breaking out of war, are confiscable.

Cargo of ship Emulous, 1 Gallison, 562.

The seizure of enemy property by the United States as prize of war on land, *jure belli*, is not authorized by the law of nations, and can be upheld only by an act of Congress.

U. S. *v.* Seventeen hundred and fifty-six Shares of Capital Stock, 5 Blatch., 232

"The war of the Revolution has been sometimes appealed to as countenancing the sequestration of debts and the confiscation of property. This was denied by Mr. Hamilton, in his argument on the 10th article of the British treaty of 1794. He said, in reply to those 'who represent the confiscation or sequestration of debts as our best means of retaliation and coercion, as our most powerful, and sometimes as our only means of defense. So degrading an idea will be rejected with disdain by every man who feels a true and well-informed national pride; by every man who recollects and glories that, in a state of still greater immaturity we achieved independence without the aid of this dishonorable expedient. The Federal Government never resorted to it, and a few only of the State governments stained themselves with it. It may, perhaps, be said that the Federal Government had no power on the subject; but the reverse of this is truly the case. The Federal

Government alone had power. The State governments had none, though some of them undertook to exercise it. This position is founded on the solid ground that the confiscation or sequestration of the debts of an enemy is a high act of reprisal and war, necessarily and exclusively incident to the power of making war, which was always in the Federal Government.' (Hamilton's Works, vii, 329, Camillus No. XVIII.)

"To remedy, as far as was practicable, what in this view of the case might be deemed the usurpation of the States under the old Confederation, not only was the provision in reference to debts, noticed in the text (ch. 1, § 12, of this part, p. 542 *supra*), introduced into the treaty of peace of 1783, but another article (V) contained an agreement on the part of Congress to recommend to the legislatures of the respective States to provide for the restitution of all estates, rights, and properties which had been confiscated, and even in cases where the property had been sold, its restoration, on refunding to the persons in possession what they had paid in purchasing it since the confiscation. (8 Stat. L., 82.)"

Lawrence's Wheaton (ed. 1863), 610. See *supra*, § 223.

"It has has been held that the act of Congress declaring war against Great Britain did not work such confiscation. (The Juniata, Newberry, 352.) In Brown *v.* U. S., *ut sup.*, the right to confiscate debts was asserted; and Ware *v.* Hylton (3 Dall., 199), was relied on as authority. But the better view is that the property of the inhabitants of an invaded country should not be taken by an invading army without remuneration. (U. S. *v.* Stevenson, 3 Benedict, 119; Bluntschli, § 657.) In the United States Articles of War of 1863 (§ 2, art. 37) it is said: 'The United States acknowledge and protect, in hostile countries occupied by them, religion and morality, strictly private property, the persons of the inhabitants, especially those of women, and the sacredness of the domestic relations. Offenses to the contrary shall be rigorously punished.' *Infra*, § 349. To the effect that private property cannot be seized by an invading army, unless contraband, see 1 Kent Com., 93 *ff.*; U. S. *v.* Homeyer, 2 Bond, 217; Transactions of the National Association for the Promotion of Social Science, 1860, 163, 279; *ibid.*, 1861, 126, 748, 794; *ibid.*, 1862, 89, 896, 899; *ibid.*, 1863, 851, 878, 884; *ibid.*, 1864, 596, 656; *ibid.*, 1868, 167–187; Hautefeuille, Droits et Devoirs, i, 340–344; Martens, Essai sur les Armateurs, § 45; and other authorities given in Field, *ut sup.* Heffter (Völkerrecht, §§ 130, 132, 139, 140, 175, 192) holds that war gives only actual possession, but not the legal property in such captures.

"Dr. Woolsey (Int. Law, § 118, note), after noticing Hamilton's argument against confiscation (Hamilton's Works, vol. vii, 19th Letter of 'Camillus'), adds, speaking of the confiscation of the private property of the subject of an enemy, 'The foreigner brought his property here, it can at once be said, knowing the risk he might run in the event of a war. Why should he not incur the risk? He should incur it, say the older practice and the older authorities. He should not, says the modern practice, although international law in its rigor involves him in it. He should not, according to the true principles of justice, because his relation the state at war is not the same with the relation of his sovereign or Government; because, in short, he is not in the full sense an enemy.' To this it may be added that whan a foreigner invests property in a country with the permission of its Government, there is an im-

plied understanding that his title thereto will be respected unless divested by his personal act.

"As sustaining the right of seizure of private property in an enemy's country, see The Venus, 8 Cranch, 253; The Ann Green, 1 Gall., 274; The Lilla, 2 Sprague, 177; The Friendschaft, 3 Wheat., 15; 4 *ibid.*, 105. That this does not impress with belligerency a neutral on motion to leave *bona fide* belligerent territory, see The Venus, *ut supra;* The St. Lawrence, 1 Gall., 467. That neutrals and citizens are to be allowed a reasonable time, after breaking out of war, to withdraw from a belligerent country, see The Sarah Starr, Blatch. Pr. Ca., 650; The General Pinckney, *ibid.*, 668."

Whart. Com. Am. Law, § 216.

As to liability to seizure of neutral property in enemy's lines, see *infra*, § 352.

As to wanton destruction of property, see *infra*, § 349.

"The emancipation of an enemy's slaves is not among the acts of legitimate war. As relates to the owners, it is a destruction of private property not warranted by the usages of war."

Mr. Adams, Sec. of State, to Mr. Rush, July 7, 1820. MSS. Inst., Ministers.

It is otherwise when such slaves are a material part of the enemy's resources, in which case they become contraband and may be emancipated.

President Lincoln's Emancipation Proclamation.

As to ravages of British forces in war of 1812, see 1 Ingersoll's Late War, 1st series, 184 *ff.*

For a discussion of the action of the United States with reference to the rights of a sovereign over the private property of subjects of a sovereign with whom he is at war, see 3 Phill. Int. Law (3d ed.), 133 *ff.*

For an account of the action of the United States in reference to the seizure of the private property of non-combatant subjects of enemy States, see 3 Phill. Int. Law (3 ed.), 366.

As to seizure of private property in war, see Judge Holmes' note, 1 Kent Com., 91.

"The Supreme Court of the United States, in Brown *v.* U. S., 8 Cranch, 110, decided primarily and unequivocally that, by the law of nations, the right exists to seize and confiscate any property of an enemy found in the country on the happening of war. On that point the court was unanimous. The case is so treated by all the American commentators. Kent says (i, 59) that 'the point seems no longer open for discussion in this country, and has become definitively settled in favor of the ancient and sterner rule.' Halleck (p. 365) says: 'The Supreme Court of the United States has decided that the right, *stricti juris*, still exists, as a settled and undoubted right of war, recognized by the law of nations.' Woolsey (§ 118) says, 'The Supreme Court of the United States has decided, in accordance with the body of earlier and later text-writers, that by strict right such property is confiscable.' * * *

"Earl Russell, in a dispatch of the 6th December, 1861, to the British consul at Richmond, Va., speaking of an act of the so-called Confederate Congress confiscating the property of all alien enemies (in which class were included all residents in the loyal States, whether Americans or domiciled foreigners), says, 'Whatever may have been the abstract rule of the law of nations on this point in former times, the instances of its application in the manner contemplated by the act

of the Confederate Congress, in modern and more civilized times, are so rare, and have been so generally condemned, that it may be said to have become obsolete.' (Parliamentary Papers, 1862, 108. See note 157, *infra*, on Confiscation of Private Debts, and note 169, *infra*, on Conquest and Belligerent Occupation.)"

Dana's Wheaton, § 304, note 156.

The subject of seizure of aliens' cotton during the late civil war is discussed *supra*, §§ 203, 224, 228; *infra*, §§ 343, 373.

As to wasting of enemy's property, see *infra*, § 349.

(2) CONTRIBUTIONS MAY BE IMPOSED.

§ 339.

"No principle is better established than that a nation at war has the right of shifting the burden off itself and imposing it on the enemy by exacting military contributions. The mode of making such exactions must be left to the discretion of the conqueror, but it should be exercised in a manner conformable to the rules of civilized warfare.

"The right to levy these contributions is essential to the successful prosecution of war in an enemy's country, and the practice of nations has been in accordance with this principle. It is as clearly necessary as the right to fight battles, and its exercise is often essential to the subsistence of the army.

"Entertaining no doubt that the military right to exclude commerce altogether from the ports of the enemy in our military occupation included the minor right of admitting it under prescribed conditions, it became an important question, at the date of the order, whether there should be a discrimination between vessels and cargoes belonging to neutral nations.

"Had the vessels and cargoes belonging to the United States been admitted without the payment of any duty, while a duty was levied on foreign vessels and cargoes, the object of the order would have been defeated. The whole commerce would have been conducted in American vessels; no contributions could have been collected, and the enemy would have been furnished with goods without the exaction from him of any contribution whatever, and would have been thus benefited by our military occupation, instead of being made to feel the evils of the war. In order to levy these contributions, and to make them available for the support of the army, it became, therefore, absolutely necessary that they should be collected upon imports into Mexican ports, whether in vessels belonging to citizens of the United States or to foreigners.

"It was deemed proper to extend the privilege to vessels and their cargoes belonging to neutral nations. It has been my policy, since the commencement of the war with Mexico, to act justly and liberally toward all neutral nations, and to afford to them no just cause of complaint; and we have seen the good consequences of this policy by the general satisfaction which it has given."

President Polk, Special Message, Feb. 10, 1848.

"It is doubted, in the last edition of Kent's Commentaries that was published during the author's life, as to the validity of the powers claimed by the President in his official letter of March 31, 1847, to the Secretary of the Navy. He exercised, as being charged by the Constitution with the prosecution of the war, the right of levying military contributions upon the enemy for the purposes of war, and of opening the Mexican ports to neutral trade, the whole execution of these commercial regulations being placed under the control of the military and naval forces. 'These fiscal and commercial regulations would,' it is said, 'seem to press strongly upon the constitutional powers of Congress to raise and support armies, to lay and collect taxes, and to regulate commerce with foreign nations, and to declare war and make rules for the government and regulation of the land and naval forces, and concerning captures on land and water, and to define offenses against the law of nations. Though the Constitution vests the executive power in the President and declares him Commander-in-Chief of the Army and Navy of the United States, these powers must necessarily be subordinate to the legislative power in Congress. It would appear to me to be the policy or true construction of this simple and general grant of power to the President, not to suffer it to interfere with those specific powers of Congress which are more safely deposited in the legislative department, and that the powers thus assumed by the President do not belong to him but to Congress.' 1 Kent Com., 292, note *b*.)"

Lawrence's Wheaton (ed. 1863), 1014.

(3) STATE MOVABLE PROPERTY MAY BE SEIZED.

§ 340.

Whatever conduces to the support of either belligerent may be seized by the other belligerent on land or sea.

See *infra*, §§ 368 *ff*.

In U. S. *v.* McRae (L. R., 8 Eq., 69), it was held that the Government of the United States was entitled, as of right, to receive from a Confederate agent all moneys, goods, and treasure which were public property of the United States at the breaking out of the war, and that it was entitled to all other such property of the Confederate Government in England which it could claim as successor to the Confederate Government, subject to all prior claims against such Government. But this does not limit the full right to seize an enemy's public treasure in an invasion of such enemy's territory.

As to the burning of Washington in 1815, see *infra*, § 349; 2 Ingersoll's Hist. Late War, 1st series, ch. viii.

(4) SO OF PROPERTY IN ENEMIES' TERRITORIAL WATERS.

§ 341.

Property on an enemy's territorial waters rests, on principle, in this relation, on the same basis as property on his land.

*Supra*, §§ 27 *ff.*; *infra*, §§ 342 *ff*.

As to rights on territorial waters, see Mr. Gallatin's report, Feb. 1, 1810. 3 Am. St. Pap. (For. Rel.), 338.

(5) LIABILITY TO SEIZURE OF ENEMY'S PRIVATE PROPERTY ON HIGH SEAS UNDER NEUTRAL FLAG.

§ 342.

In an opinion already cited (*supra*, § 330), given in 1753 by Sir G. Lee, then judge of the prerogative court; Dr. Paul, His Majesty's advocate-general; Sir D. Rider, His Majesty's attorney-general, and Mr. Murray (afterward Lord Mansfield), His Majesty's solicitor-general, is found the following:

"When two powers are at war they have a right to make prizes of the ships, goods, and effects of each other upon the high seas; whatever is the property of the enemy may be acquired by capture at sea, but the property of a friend cannot be taken, provided he observes his neutrality.

"Hence the law of nations has established:

"That the goods of an enemy, on board the ship of a friend, may be taken.

"That the lawful goods of a friend, on board the ship of an enemy, ought to be restored.

"That contraband goods going to the enemy, though the property of a friend, may be taken as prizes; because supplying the enemy with what enables him better to carry on the war is a departure from neutrality."

This opinion was given to Mr. Jay in 1794 by Sir W. Scott (Lord Stowell) and Sir J. Nicholl, as exhibiting the then practice of the British prize courts.

"I believe it cannot be doubted but that by the general law of nations the goods of a friend found in the vessel of an enemy are free, and the goods of an enemy found in the vessel of a friend are lawful prize.

"It is true that sundry nations, desirous of avoiding the inconveniences of having their vessels stopped at sea, ransacked, carried into port, and detained, under pretense of having enemy's goods on board, have, in many instances, introduced, by their special treaties, another principle between them, that enemy bottoms shall make enemy goods and friendly bottoms friendly goods; a principle much less embarrassing to commerce, and equal to all parties in point of gain and loss; but this is altogether the effect of particular treaty, controlling in special cases the general principle of the law of nations, and therefore taking effect between such nations only as have so agreed to control it."

Mr. Jefferson, Sec. of State, to Mr. Genet, July 24, 1793. 1 Am. St. Pap (For. Rel.), 166. 1 Wait's St. Pap., 134.

To same effect see Mr. Jefferson to Mr. Morris, Aug. 16, 1793. 1 Wait's St. Pap., 148. 1 Am. St. Pap. (For. Rel.), 167. And Mr. Hamilton in "Camillus," 5 Lodge's Hamilton, 218.

That Mr. Jefferson's statement, in his note of July 24, 1793, that "he believed it was not to be doubted that, by the *general* law of nations, the goods of an enemy found in the vessel of a friend are lawful prize," was meant by him as appealing to the law of former times, may be inferred from Mr. Madison's letter to Mr. Jefferson, of June 29, 1793, in which he maintained that the principle that free ships make free goods is already ingrafted in the modern law of nations. And about the same time Mr. Pinckney, the American minister at London, in his correspondence with the British secretary for foreign affairs, Lord Gren-

ville, claimed the principle of free ships making free goods as then actually established by general usage.

3 Rives' Madison, 347. 348; citing 1 Wait's St. Pap., 404.

"Mr. Jefferson's assertion (in his answer to Genet of July 24, 1793), of the principle that enemy's property is liable to capture and condemnation in the vessel of a friend is not absolute. His words are, 'I believe it cannot be doubted.'"

6 J. Q. Adams' Mem., 162 (July 7, 1823).

On June 11, 1824, "Mr. Wirt (at Cabinet meeting) insisted that we could not, without inconsistency, deny the right of belligerents by the law of nations to take the property of enemies in neutral vessels, and read in the State Papers Mr. Jefferson's letter to Genet upon that subject. I considered the law of nations upon this point as unsettled; but Mr. Wirt's argument was supported by decisions of the Supreme Court, against which the executive Government could not safely assume an adversary principle. That knot of national law will ultimately resolve itself into a question of *force*."

*Ibid.*, 382.

That the United States acknowledged that the rule of "free ships, free goods" was not part of the law of nations at the breaking out of the war of the first French Revolution is maintained in 3 Phill., Int. Law. (3 ed.), 315 *ff*. As to subsequent action of the United States in reference to that rule, see *ibid.*, 345, 354, 364. In the same line may be consulted article by Mr. A. H. Everett, 44 N. Am. Rev., 24.

"Another source of complaint with Mr. Genet has been that the English take French goods out of American vessels, which, he says, is against the law of nations, and ought to be prevented by us. On the contrary, we suppose it to be long an established principle of the law of nations that the goods of a friend are free in an enemy's vessel, and an enemy's goods lawful prize in the vessel of a friend. The inconvenience of this principle which subjects merchant vessels to be stopped at sea, searched, ransacked, led out of their course, has induced several nations latterly to stipulate against it by treaty, and to substitute another in its stead, that free bottoms shall make free goods, and enemy's bottoms enemy's goods; a rule equal to the other in point of loss and gain, but less oppressive to commerce. As far as it has been introduced, it depends on the treaties stipulating it, and forms exceptions in special cases to the general operation of the law of nations. We have introduced it into our treaties with France, Holland, and Prussia, and French goods found by the two latter nations in American bottoms are not made prize of. It is our wish to establish it with other nations. But this requires their consent also, is a work of time, and in the meanwhile they have a right to act on the general principle, without giving to us, or to France, cause of complaint."

Mr. Jefferson, Sec. of State, to Mr. Morris, Aug. 16, 1793. MSS. Inst., Ministers.

The maxim "free ships make free goods" is not an accepted principle of the law of nations, but was introduced as an exception thereto

in the 23d section of the first French-American commercial treaty. "This stipulation was intended to operate (indeed it was its sole object, and otherwise could have no operation at all) when one of the parties should be at war with a nation or nations with whom the other should be at peace." The maxim, however, was set aside by France during her war with England in 1796–'97.

Mr. Pickering, Sec. of State, to Mr. Pinckney, Jan. 16, 1797. 1 Am. St. Pap. (For. Rel.), 559.

"It is possible that in the pending negotiations for peace (July, 1797, between Great Britain and France) this principle of free ships making free goods may be adopted by all the great maritime powers; in which case the United States will be among the first of the other powers to accede to it and to observe it as a universal rule."

Mr. Pickering, Sec. of State, to Mr. J. Q. Adams, July 17, 1797. MSS. Inst. Ministers, 2 Am. St. Pap. (For Rel.), 250.

"The principle of making free ships protect enemy's property has always been cherished by the maritime powers who have not had large navies, though stipulations to that effect have been in all wars more or less violated. In the present war, indeed, they have been less respected than usual, because Great Britain has held more uncontrolled the command of the sea, and has been less disposed than ever to concede the principle; and because France has disdained most of the received and established ideas upon the laws of nations, and considered herself as liberated from all the obligations toward other states which interfered with her present objects or the interests of the moment."

Mr. J. Q. Adams, minister at Berlin, to the Sec. of State, Oct. 31, 1797. 2 Am. St. Pap. (For. Rel.), 251.

"It is a general rule that war gives to a belligerent power a right to seize and confiscate the goods of his enemy. However humanity may deplore the application of this principle, there is perhaps no one to which man has more universally assented, or to which jurists have more uniformly agreed. Its theory and its practice have unhappily been maintained in all ages. This right, then, may be exercised on the goods of an enemy wherever found, unless opposed by some superior right. It yields by common consent to the superior right of a neutral nation to protect, by virtue of its sovereignty, the goods of either of the belligerent powers found within its jurisdiction. But can this right of protection, admitted to be possessed by every Government within its mere limits in virtue of its absolute sovereignty, be communicated to a vessel navigating the high seas?

"It is supposed that it cannot be so communicated, because the ocean being common to all nations no absolute sovereignty can be acquired in it. The rights of all are equal, and must necessarily check, limit, and restrain each other. The superior right, therefore, of absolute sovereignty to protect all property within its territory ceases to be superior when the property is no longer within its own territory, and may be encountered by the opposing acknowledged right of a belligerent power to seize and confiscate the goods of his enemy. If the belligerent permits the neutral to attempt, without hazard to himself, thus to serve and aid his enemy, yet he does not relinquish the right of defeating that attempt whenever it shall be in his power to defeat it.

Thus it is admitted that an armed vessel may stop and search at sea a neutral bottom, and may take out goods which are contraband of war without giving cause of offense or being supposed in any degree to infringe neutral rights; but this practice could not be permitted within the rivers, harbors, or other places of a neutral where its sovereignty was complete. It follows, then, that the full right of affording protection to all property whatever within its own territory, which is inherent in every Government, is not transferred to a vessel navigating the high seas. The right of a belligerent over the goods of his enemy within his reach is as complete as his right over contraband of war, and it seems a position not easily to be refuted that a situation that will not protect the one will not protect the other. A neutral bottom, then, does not of right, in cases where no compact exists, protect from his enemy the goods of a belligerent power."

Letter of Messrs. Pinckney, Marshall, and Gerry to the French minister of foreign affairs, M. de Talleyrand, Jan. 17, 1798. 2 Am. St. Pap. (For. Rel.), 171. Quoted, with approval, by Sir W. Vernon-Harcourt, in Historicus on Int. Law, 208, 209.

"The question whether neutral ships shall protect enemy's property is, indeed, important. It is of so much importance that if the principle of *free ships, free goods* were once really established and honestly observed it would put an end forever to all maritime war, and render all military navies useless. However desirable this may be to humanity, how much soever philosophy may approve it and Christianity desire it, I am clearly convinced it will never take place. The dominant power on the ocean will forever trample on it. The French would despise it more than any nation in the world, if they had the maritime superiority of power, and the Russians next to them."

President Adams to Mr. Marshall, Sec. of State, Oct. 3, 1800. 9 John Adams' Works, 86.

"When Europe assumed the general form in which it is occupied by the nations now composing it, and turned its attention to maritime commerce, we found among its earliest practices, that of taking the goods of an enemy from the ship of a friend; and that into this practice every maritime state went sooner or later as it appeared on the theater of the ocean. If, therefore, we are to consider the practice of nations as the sole and sufficient evidence of the law of nature among nations, we should unquestionably place this principle among those of the natural laws. But its inconveniences, as they affected neutral nations peaceably pursuing their commerce, and its tendency to embroil them with the powers happening to be at war, and thus to extend the flames of war, induced nations to introduce by special compacts, from time to time, a more convenient rule, 'that free ships should make free goods;' and this latter principle has, by every maritime nation of Europe, been established, to a greater or less degree, in its treaties with other nations; insomuch, that all of them have, more or less frequently, assented to it as a rule of action in particular cases. Indeed, it is now urged, and I think with great appearance of reason, that this is the genuine principle dictated by national morality; and that the first prac-

tice arose from accident, and the particular convenience of the states which first figured on the water, rather than from well-digested reflections on the relations of friend and enemy, on the rights of territorial jurisdiction, and on the dictates of moral law applied to these. Thus it has never been supposed lawful, in the territory of a friend, to seize the goods of an enemy. On an element which nature has not subjected to the jurisdiction of any particular nation, but has made common to all for the purposes to which it is fitted, it would seem that the particular portion of it which happens to be occupied by the vessel of any nation, in the course of its voyage, is, for the moment, the exclusive property of that nation, and, with the vessel, is exempt from intrusion by any other, and from its jurisdiction, as much as if it were lying in the harbor of its sovereign. In no country, we believe, is the rule otherwise, as to the subjects of property common to all. * * *

"Shall two nations, turning tigers, break up in one instance the peaceable relations of the whole world? Reason and nature clearly pronounce that the neutral is to go on in the enjoyment of all its rights, that its commerce remains free, not subject to the jurisdiction of another, nor consequently its vessels to search or to inquiries whether their contents are the property of an enemy or are of those which have been called contraband of war.

"Nor does this doctrine contravene the right of preventing vessels from entering a blockaded port. This right stands on other ground. When the fleet of any nation actually beleaguers the port of the enemy, no other has a right to enter their line, any more than their line of battle on the open sea, or their lines of circumvallation, or of encampment, or of battle array on land. The space included within their lines in any of those cases, is either the property of their enemy, or it common property assumed and possessed for the moment, which cannot be intruded on, even by a neutral, without committing the very trespass we are now considering, that of intruding into the lawful possession of a friend. * * *

"But though we would not then, nor will we now, engage in war to establish this principle [of free ships making free goods] we are nevertheless sincerely friendly to it. We think that the nations of Europe have originally set out in error; that experience has proved the error oppressive to the rights and interests of the peaceable part of mankind; that every nation but one has acknowledged this by consenting to the change, and that one has consented in particular cases; that nations have a right to correct an erroneous principle, and to establish that which is right as their rule of action; and, if they should adopt measures for effecting this in a peaceable way, we shall wish them success, and not stand in their way to it. But should it become, at any time, expedient for us to co-operate in the establishment of this principle, the opinion of the executive, on the advice of its constitutional

counselors must then be given, and that of the legislature, an independent and essential organ in the operation, must also be expressed; in forming which they will be governed every man by his own judgment, and may, very possibly, judge differently from the Executive. With the same honest views, the most honest men often form different conclusions. As far, however, as we can judge, the principle of 'free bottoms, free goods,' is that which would carry the wishes of our nation."

President Jefferson to Mr. Livingston, Sept. 9, 1801. 4 Jeff. Works, 408 *ff.*

"On the question whether the principle of 'free bottoms making free goods and enemy bottoms enemy goods,' is now to be considered as established in the law of nations, I will state to you a fact within my own knowledge, which may lessen the weight of our authority as having acted in the war of France and England on the ancient principle 'that the goods of an enemy in the bottom of a friend are lawful prize, while those of a friend in an enemy bottom are not so.' England became a party in the general war against France on the 1st of February, 1793. We took immediately the stand of neutrality. We were aware that our great intercourse with these two maritime nations would subject us to harassment by multiplied questions on the duties of neutrality, and that an important and early one would be which of the two principles above stated should be the law of action with us. We wished to act on the new one of 'free bottoms, free goods;' and we had established it in our treaties with other nations, but not with England. We determined, therefore, to avoid, if possible, committing ourselves on this question until we could negotiate with England her acquiescence in the new principle. Although the cases occurring were numerous, and the ministers, Genet and Hammond, eagerly on the watch, we were able to avoid any declaration until the massacre of St. Domingo. The whites, on that occasion, took refuge on board our ships, then in their harbor, with all the property they could find room for, and on their passage to the United States many of them were taken by British cruisers and their cargoes seized as lawful prize. The inflammable temper of Genet kindled at once, and he wrote with his usual passion a letter reclaiming an observance of the principle of 'free bottoms, free goods,' as if already an acknowledged law of neutrality. I pressed him in conversation not to urge this point; that although it had been acted on by convention, by the armed neutrality, it was not yet become a principle of universal admission; that we wished indeed to strengthen it by our adoption, and were negotiating an acquiescence on the part of Great Britain; but if forced to decide prematurely, we must justify ourselves by a declaration of the ancient principle, and that no general consent of nations had as yet changed it. He was immovable, and on the 25th of July wrote a letter so insulting that nothing but a determined system of justice and moderation would have prevented his being shipped home in the first vessel. I had the day before answered his of the 9th, in which I had been obliged in our own justification to declare that the ancient law was the established principle, still existing and authoritative. Our denial, therefore, of the new principle and action on the old one were forced upon us by the precipitation and intemperance of Genet, against our wishes and against our aim; and our involuntary practice, therefore, is of less authority against the new rule."

Mr. Jefferson to Mr. Everett, Feb. 24, 1823. 7 Jeff. Works, 271.

"On the subject of 'free ships, free goods,' the United States cannot, with the same consistency as some other nations, maintain the principle as already a part of the law of nations, having on one occasion admitted and on another stipulated the contrary. They have, however, invariably maintained the utility of the principle, and whilst as a pacific and commercial nation they have as great an interest in the due establishment of it as any nation whatever, they may with perfect consistency promote such an extension of neutral rights. The northern powers, Russia among the rest, having fluctuated in their conduct, may also be under some restraints on this subject. Still they may be ready to renew their concurrence in voluntary and conventional arrangements for giving validity to the principle, and in drawing Great Britain into them."

Mr. Madison, Sec. of State, to Mr. Armstrong, Mar. 14, 1806. MSS. Inst., Ministers. See also President Madison to Mr. Ingersoll, July 28, 1814. 2 Madison's Writings, 585.

"It is also desirable to stipulate with the British Government that free ships shall make free goods, though it is proper to remark that the importance of this rule is much diminished to the United States by their growth as a maritime power, and the capacity and practice of their merchants to become the owners of the merchandise carried in our vessels. It is nevertheless still important to them, in common with all neutral nations, as it would prevent vexatious seizures by belligerent cruisers, and unjust condemnations by their tribunals from which the United States have sustained such heavy losses."

Mr. Monroe, Sec. of State, to Mr. Adams, May 21, 1816. MSS. Inst., Ministers.

It has grown to be a usage among maritime nations that a belligerent may take the property of his enemy from a neutral ship, "paying the neutral his freight, and submitting the question of facts to the tribunals of the belligerent party. It is evident, however, that this usage has no foundation in natural right," and is subject to limitation in special treaties.

Mr. Adams, Sec. of State, to Mr. Anderson, May 27, 1823 (MSS. Inst., Ministers), in which letter the question is discussed at great length.

"This search for and seizure of the property of an enemy in the vessel of a friend is a relic of the barbarous warfare of barbarous ages, the cruel, and, for the most part, now exploded system of *private* war. As it concerns the enemy himself, it is inconsistent with the mitigated usage of modern wars, which respects the private property of individuals on the land. As relates to the neutral, it is a violation of his natural right to pursue, unmolested, his peaceful commercial intercourse with his friend. Invidious as is its character in both these respects, it has other essential characteristics equally obnoxious. It is an uncontrolled exercise of authority by a man in arms over a man without defense; by an officer of one nation over the citizen of another;

by a man intent upon the annoyance of his enemy; responsible for the act of search to no tribunal, and always prompted to balance the disappointment of a fruitless search by the abusive exercise of his power, and to punish the neutral for the very clearness of his neutrality. It has, in short, all the features of unbridled power stimulated by hostile and unsocial passions."

Mr. Adams, Sec. of State, to Mr. Canning, June 24, 1823. MSS. Notes, For. Leg.

"It has been remarked that by the usages of modern war the private property of an enemy is protected from seizure and confiscation as such; and private war itself has been almost universally exploded *upon the land*. By an exception, the reason of which it is not easy to perceive, the private property of an enemy *upon the sea* has not so fully received the benefit of the same principle. Private war, banished by the tacit and general consent of Christian nations from their territories, has taken its last refuge upon the ocean, and there continued to disgrace and afflict them by a system of licensed robbery, bearing all the most atrocious characters of piracy. To a Government intent, from motives of general benevolence and humanity, upon the final and total suppression of the slave trade, it cannot be unreasonable to claim her aid and co-operation to the abolition of private war upon the sea.

"From the time when the United States took their place among the nations of the earth, this has been one of their favorite objects.

"'It is time,' said Dr. Franklin, in a letter of 14 March, 1785, 'it is high time for the sake of humanity that a stop were put to this enormity. The United States of America, though better situated than any European nation to make profit by privateering, are, as far as in them lies, endeavoring to abolish the practice by offering in all their treaties with other powers an article engaging solemnly that in case of future war no privateer shall be commissioned on either side, and that unarmed merchant ships on both sides shall pursue their voyages unmolested. This will be a happy improvement of the law of nations. The humane and the just cannot but wish general success to the proposition.' * * *

"The ninth article contains the usual list of contraband of war, omitting the articles used in the construction or equipment of vessels. These articles are not included in the *principle* upon which contraband of war was originally founded. Several of them are articles of ordinary export from the United States, and the produce of their soil and industry. Others are articles equally important to the commerce of other nations, particularly Russia, whose interests would be unfavorably affected by embracing them in the contraband list. The first effect of including them in a list of contraband with one nation while they are excluded from the same list in treaties with others, is that the belligerent with whom they have been stipulated as contraband acquires, so far as the treaties are observed, an exclusive market for the acquisition

of the articles of which the other belligerent is deprived. The next consequence is that the other belligerent, suffering under the double injury of this contradictory rule, breaks through the obligation of her own treaty and seizes and confiscates upon the principle of *retaliation* upon the enemy. This observation applies to every other point of maritime law in which the neutral interest is sacrificed to the belligerent interest with the one power, while the reverse is stipulated with the other. The uniform and painful experience which we have had of this should operate as a warning to the Government of the United States to introduce the harmony of one congenial system into their federative relations with foreign powers, and never to concede as maritime right to one power a principle the reverse of which they have stipulated with others.

"The tenth article of the draft proposes the adoption of the principle that free ships make free goods and persons, and also that neutral property shall be free, though laden in a vessel of the enemy. The Government of the United States wish for the universal establishment of this principle as a step towards the attainment of the other, the total abolition of private maritime war."

Mr. Adams, Sec. of State, to Mr. Rush, July 28, 1823. MSS. Inst., Ministers. The proposition to abolish by treaty private war by sea, and to restrict contraband, was sent at the same time by Mr. Adams to all the leading European states. It was, however, never acted on so as to bind the United States, except in cases of special treaty.

"The principle upon which the Government of the United States now offers this proposal to the civilized world is, that the same precepts of justice, of charity, and of peace, under the influence of which Christian nations have, by common consent, exempted private property on shore from the destruction or depredation of war, require the same exemption in favor of private property upon the sea. If there be any objection to this conclusion, I know not in what it consists; and if any should occur to the Russian Government, we only wish that it may be made a subject of amicable discussion."

Mr. Adams, Sec. of State, to Mr. Middleton, Aug. 13, 1823. MSS. Inst., Ministers.

"It will be within the recollection of the House that immediately after the close of the war of our independence a measure closely analogous to this congress of Panama was adopted by the Congress of our Confederation, and for purposes of precisely the same character. Three commissioners, with plenipotentiary powers, were appointed to negotiate treaties of amity, navigation, and commerce with all the principal powers of Europe. They met and resided for about one year for that purpose at Paris, and the only result of their negotiations at that time was the first treaty between the United States and Prussia, memorable in the diplomatic annals of the world, and precious as a monument

of the principles in relation to commerce and maritime warfare, with which our country entered upon her career as a member of the great family of independent nations. This treaty, prepared in conformity with the instructions of the American plenipotentiaries, consecrated three fundamental principles of the foreign intercourse which the Congress of that period were desirous of establishing. First, equal reciprocity, and the mutual stipulation of the privileges of the most favored nation in the commercial exchanges of peace; secondly, the abolition of private war upon the ocean; and thirdly, restrictions favorable to neutral commerce upon belligerent practices with regard to contraband of war and blockades. A painful, it may be said a calamitous, experience of more than forty years has demonstrated the deep importance of these same principles to the peace and prosperity of this nation and to the welfare of all maritime states, and has illustrated the profound wisdom with which they were assumed as cardinal points of the policy of the Union."

President J. Q. Adams, Special Message, March 15, 1826.

"Previous to the war which grew out of the American Revolution, the respective rights of neutrals and belligerents had been settled and clearly defined by the conventional law of Europe, to which all the maritime powers had given their sanction in the treaties concluded among themselves. The few practical infractions, in time of war, of the principles thus recognized by them, have been disavowed, upon the return of peace, by new stipulations again acknowledging the existence of the rights of neutrals as set down in the maritime code.

"In addition to the recognition of these rights by the European powers, one of the first acts of the United States, as a nation, was their unequivocal sanction of the principles upon which they are founded, as declared in their treaty of commerce of 1778 with the King of France. These principles were that free ships gave freedom to the merchandise, except contraband goods, which were clearly defined, and that neutrals might freely sail to and between enemies' ports, except such as were blockaded in the manner therein set forth. These principles having thus been established by universal consent, became the rule by which it was expected that the belligerents would be governed in the war which broke out about that time between France and Spain on the one hand, and Great Britain on the other. The latter power, however, having soon betrayed a disposition to deviate from them in some of the most material points, the Governments which had preserved a neutral course in the contest became alarmed at the danger with which their maritime rights were threatened by the encroachments and naval supremacy of England, and the Empress of Russia, at their head, undertook to unite them in the defense of those rights. On the 28th February, 1780, she issued her celebrated declaration, containing the principles according to which the com-

manders of her naval armaments would be instructed to protect the neutral rights of her subjects. Those principles were as follows:

"1st. Neutral vessels may freely sail from port to port, and on the coasts of the nations parties to the war.

"2d. The goods belonging to the subjects of the said nations are, with the exception of contraband articles, free on board neutral vessels.

"3d. With respect to the definition of contraband articles, the Empress adheres to the provisions of the 10th and 11th articles of her treaty of commerce with Great Britain, and extends the obligations therein contained to all the nations at war.

"4th. To determine what constitutes a blockaded port, this denomination is confined to those the entrance into which is manifestly rendered dangerous in consequence of the dispositions made by the attacking power with ships stationed and sufficiently near.

"5th. These principles are to serve as a rule in proceedings and judgments with respect to the legality of prizes.

"This declaration was communicated to the belligerent Governments with a request that the principles it contained should be observed by them in the prosecution of the war. From France and Spain it received the most cordial and unequivocal approbation, as being founded upon the maxims of public law which had been their rule of conduct. Great Britain, without directly approving or condemning those maxims, promised that the rights of Russia would be respected agreeably to existing treaties. The declaration was likewise communicated to the other European powers, and the accession by treaties or solemn declarations of Denmark, Sweden, Russia, Holland, Austria, Portugal, and the two Sicilies to the principles asserted by the Empress of Russia, formed the league, which, under the name of 'armed neutrality,' undertook to preserve inviolate the maritime rights of neutrals.

"Whatever may have been the conduct of the belligerents in that war with respect to the rights of neutrals as declared by the armed neutrality, the principles asserted by the declaration of the Empress Catharine were again solemnly recognized by the treaty of peace concluded by Great Britain and France at Versailles on the 3d September, 1783. Among the several treaties thereby renewed and confirmed was that of Utrecht, in 1713, by which the same contracting parties had, nearly a century before, given the most solemn sanction to the principles of the armed neutrality, which were thus again proclaimed by the most deliberate acts both of belligerents and neutrals as forming the basis of the universal code of maritime legislation among the naval powers of the world.

"Such may be said to have been the established law of nations at the period of the peace of 1783, when the United States, recognized as independent by all the powers of the earth, took their station amongst them. These principles, to which they had given their sanction in their treaties with France in 1778, were again confirmed in those of 1782 with

Sweden, and in 1785 with Prussia, and continued, uncontroverted by other nations, until the wars of the French Revolution broke out and became almost general in Europe in 1793. The maxims then advanced by Great Britain in her instructions to her naval commanders and in her orders in council regulating their conduct and that of her privateers with regard to neutrals, being in direct contravention of the principles set forth in the declaration of the armed neutrality and in her own treaty stipulations, compelled the European powers which had remained neutral in the contest to unite again for the protection of their rights. It was with this view that the Emperor Paul, of Russia, appealed to these powers, and that, at his instance, making common cause in behalf of the general interests of nations, Russia, Sweden, Denmark, and Prussia united in a new league of armed neutrality, bound themselves by new treaties, reasserted the principles laid down in the declaration of 1780, and added thereto some new clauses extending still further the privileges of neutral commerce."

Mr. Van Buren, Sec. of State, to Mr. Randolph, June 18, 1830. MSS. Inst., Ministers.

"That the neutral flag shall protect all the property on board is not established from any fanciful idea that the cargo is supposed to be neutral because it is covered by a neutral flag. No such fiction is admitted even in argument. That hostile property is found in neutral ships is supposed by the rule, and it is protected, not because the flag is supposed to change it into neutral property, but for the extension of commerce, for avoiding some of the evils of war, and principally for the purpose of protecting the merchant ships of the parties from vexatious visits, seizures, and arrests. The rule would be more correctly expressed by saying the neutral flag shall protect hostile property than by the phrase *free ships make free goods*—a figurative expression which, considered in a literal sense, has given rise to the false deduction we are considering. The reasoning is, if free ships make free goods, then the goods derive their character from the vessel. Then, if a neutral bottom makes the cargo neutral, though it belong to an enemy, by the same rule a belligerent bottom must make the cargo hostile property, though it belong to a friend.

"It will rarely happen that, as a neutral nation, we shall ever find it convenient to use the vessels of a belligerent as our carriers. But it is our interest to give every possible extension and freedom to commerce; therefore, although you are to endeavor to procure the last-mentioned modification, yet you are not to make it a point in your negotiation should the principle in its full extent that the neutral flag shall protect hostile property be admitted, and that, on the contrary, neutral property found in an enemy's ship shall be safe. Then it will be well to make a positive stipulation of both parts of the rule (as is done in all our treaties with the Barbary powers), because, although by the ac-

knowledged law of nations neutral property in a hostile bottom is protected, yet in a case arising between two powers who had acknowledged the principle that free ships make free goods by treaty, the same process of erroneous reasoning I have pointed out might perhaps be employed to show that, as between them, the false consequence should follow of making neutral property good prize in an enemy's ship.

Mr. Livingston, Sec. of State, to Mr. Buchanan, Nov. 22, 1832. MSS. Inst., Ministers.

"The British, in case of war, seize every vessel in their ports belonging to the enemy. With this single exception, the relic of an age of barbarism and piracy, and which makes part of the King's droits of admiralty, I am not aware that any civilized nation does at this time, even in case of war, seize the property of private individuals which in time of peace had been trusted to the hospitality and good faith of the country. I am certain that the United States never were guilty of such an act as a nation, neither in 1793, when the British were plundering without notice our West India trade, and when an unsuccessful motion to that effect was made, never to be again repeated, nor in 1798, at the time of the greatest excitement and quasi-war against France, nor when war was declared against England, in 1812. Since the motion of 1793, which, if brought to the test, would have been indignantly rejected, during the various periods when our trade was exposed to the depredations of one or both the belligerents amongst all the devices and expedients proposed in order to avoid war, never was the iniquitous proposal of seizing property confided to the protection of our laws again suggested. And I trust that, whilst so much is said of what is due to the honor of the nation (how applicable to the present state of things is another question), such truly dishonorable act is not in contemplation.

"The preceding observation is strictly correct with respect to seizures in time of peace, and is intended to show the gross impropriety of supposing that such seizures are a peace measure. I admit that they have sometimes taken place in time of war. Such was the sequestration by several of the States of the British debts during the war of Independence. Russia also suspended the payment of the interest on a loan formerly contracted in Holland whilst she was at war with France, of which Holland had become a province. Yet these are not examples for imitation. The seizure without violence of property belonging to the offending Government and not to individuals would, I think, be legitimate in some cases.

"With respect to letters of marque and reprisal, if we were to judge of the act on the immutable principles of justice and in conformity with those which regulate the conduct of nations by land, private war of every description must be disallowed altogether. But we are compelled, in this as in many other instances, to recur to the practice of nations, to their actual practice at this time, and not to what it was in Grotius's time, or even in that of Vattel, who has, by the bye, often copied the first writer without attending to changes which had since taken place, and asserted doctrines which in practice were already obsolete. The change in this case has been produced by the progress of civilization, and may, in fact, be considered as an amelioration.

"It is undeniable that at present general letters of marque and reprisal are war to all intents and purposes, that they are never granted

but in consequence of an existing war, or as a way of making war without a formal declaration. Both the Seven Years' War, and that of 1778 between France and England, commenced in that way, and were long so continued before war was actually declared.

"It is equally true that special letters of reprisal granted to injured individuals and authorizing them to capture at sea an equivalent for their losses from subjects of the offending country, have fallen into entire disuse. Some cases may have escaped my notice. I recollect no one instance (in time of peace) since Cromwell. In short, the present practice or law of nations admits private war by sea (privateering) in time of war; never in time of peace, any more by sea than by land."

Mr. Gallatin to Mr. Everett, Jan. 5, 1835. 2 Gallatin's Writings, 476.

The treaty provision that free ships make free goods, "having been agreed to with Spain when Colombia was in Spanish possession, continued obligatory on that country not only so long as it remained subject to Spain, but after it had achieved its independence and had been acknowledged by the United States."

Mr. Forsyth, Sec. of State, to Mr. Semple, Feb. 13, 1839. MSS. Inst., Colombia.

"The treaty of 1828, between the United States and Prussia, recognizes the rule that free ships shall make free goods. It does not stipulate, however, that the converse of this rule, namely, that enemy's ships shall make enemy's goods, shall be inoperative. * * *

"Merchants domiciled and carrying on business in a country at war with another, must be regarded as enemies. This rule has even been applied to citizens of the United States engaged in commerce in an enemy's country. * * *

"The liability of this Government to make amends to those Prussian subjects who complained of maltreatment and robbery by soldiers in the service of the United States in Mexico, cannot be acknowledged."

Mr. Marcy, Sec. of State, to Baron Gerolt, Feb. 15, 1854. MSS. Notes, Prussia.

"The propositions submitted to you—the same, I presume, which Mr. Crampton has confidentially submitted to me—are, 1st, that free ships make free goods, except articles contraband of war; and, 2d, that neutral property, not contraband, found on board enemies' ships is not liable to confiscation. The United States have long favored the doctrine that the neutral flag should protect the cargo, and endeavored to have it regarded and acted on as a part of the law of nations. There is now, I believe, a fair prospect of getting this sound and salutary principle incorporated into the international code.

"There can be, I presume, no doubt that France cheerfully concurs with Great Britain in adopting this principle as the rule of conduct in the pending war. I have just received a dispatch from Mr. Mason, in which he details conferences he has had with the French ministers on the subject of neutral rights; but it does not appear from the accounts he has given of them that the French Government had intimated to him the course it intended to pursue in regard to neutral ships and neutral

property on board enemies' ships. I have no doubt, however, that France has more readily acquiesced in the indicated policy than Great Britain."

Mr. Marcy, Sec. of State, to Mr. Buchanan, Apr. 13, 1854. MSS. Inst., Gr. Brit. House Ex. Doc. 103, 33d Cong., 1st sess.

"The right of search has heretofore been so freely used, and so much abused, to the injury of our commerce, that it is regarded as an odious doctrine in this country, and if exercised against us harshly in the approaching war will excite deep and wide-spread indignation. Caution on the part of belligerents in exercising it towards us, in cases where sanctioned by usage, would be a wise procedure. As the law has been declared by the decisions of courts of admiralty and elementary writers, it allows belligerents to search neutral vessels for articles contraband of war, and for enemies' goods. If the doctrine is so modified as to exempt from seizure and confiscation enemies' property under a neutral flag, still the right to seize articles contraband of war, on board of neutral vessels, implies the right to ascertain the character of the cargo. If used for such a purpose and in a proper manner, it is not probable that serious collisions would occur between neutrals and belligerents.

"A persistent resistance by a neutral vessel to submit to a search renders it confiscable, according to the settled determinations of the English admiralty. It would be much to be regretted if any of our vessels should be condemned for this cause, unless under circumstances which compromitted their neutrality."

*Ibid.*

"Russia has always been foremost among the maritime European powers to respect neutral rights, and this Government does not entertain a doubt that she will in the present conflict maintain the liberal spirit which has hitherto distinguished her conduct towards neutral powers. In the earliest period of this Republic, attempts were made to procure the recognition of the doctrine that 'free ships make free goods' as a principle of international law; but those attempts were unavailing, and up to this time enemies' property on board of a neutral vessel has been held liable to seizure and confiscation. Russia has the merit of having favored the liberal view of this question; France has been willing to concede the doctrine, but Great Britain strenuously resisted. Her maritime ascendency has inclined her to maintain extreme doctrines in regard to belligerent rights. It may now be regarded as a settled principle of maritime law that a neutral flag does not protect all the property under it. Notwithstanding this rule it is now quite certain that both Great Britain and France in the war in which they are likely to be engaged will consent to refrain from the seizure of any property which may be found under the flag of a neutral nation except articles that are contraband of war. They will also respect the property, if not contraband, of a neutral owner found on board of an enemy's

ship. This, however, is no concession to neutrals, for the international code protects their property thus situated."

Mr. Marcy, Sec. of State, to Mr. de Stoeckl, Apr. 14, 1854. MSS. Notes, Russia.

"You will observe that there is a suggestion in the inclosed for a convention among the principal maritime nations to unite in a declaration that free ships should make free goods, except articles contraband of war. This doctrine has had heretofore the sanction of Russia, and no reluctance is apprehended on her part to becoming a partner to such an arrangement. Great Britain is the only considerable power which has heretofore made a sturdy opposition to it. Having yielded it for the present in the existing war, she thereby recognizes the justice and fairness of the principle, and would hardly be consistent if she should withhold her consent to an agreement to have it hereafter regarded as a rule of international law."

Mr. Marcy, Sec. of State, to Mr. Seymour, May 9, 1854. MSS. Inst., Russia.

"You are aware that this Government has strenuously contended that free ships should make free goods, articles contraband of war excepted. Great Britain is believed to be almost the only maritime power which has constantly refused to regard this as a rule of international law, and her policy in this respect may, it is presumed, be ascribed rather to a consciousness of power, than a sense of right. The admiralty courts of the United States have followed English precedents in their decisions against this rule. It has, however, been expressly recognized in several treaties between the United States and France."

Mr. Marcy, Sec. of State, to Mr. Mason, Aug. 7, 1854. MSS. Inst., France.

"The Government of the United States, as you are aware, has strenuously contended for the doctrine that free ships make free goods, contraband articles excepted. There is not, I believe, a maritime power which has not incorporated it in some of its treaties; but Great Britain, which is the most considerable of them, has constantly refused to regard it as a rule of international law. Her admiralty courts have rejected it and ours have followed after them. When Great Britain and France, at the commencement of the present war with Russia, agreed to act upon that principle for the time being, this Government believed that a fair occasion was presented for obtaining the general consent of commercial nations to recognize it as a principle of the law of nations."

Mr. Marcy, Sec. of State, to Mr. Buchanan, Aug. 7, 1854. MSS. Inst., Gr. Brit.

The objections by the Government of the United States to the declaration of the Paris conference of 1856 are that (1) "All the four propositions must be taken or none;" (2) they limit the future sovereign power of the parties concerned; (3) they exact the surrender of privateering, a surrender the United States cannot make; (4) they do not exempt private property of non-belligerents from confiscation.

Mr. Marcy, Sec. of State, to Mr. Seibels, July 14, 1856. MSS. Inst., Belgium.
As to declaration of Paris, see 144 Edinb. Rev., 353.

"You are instructed by the President to propose to the Government of Mexico to enter into an arrangement for its adherence with the United States to the four principles of the declaration of the congress, provided the first of them is amended, as specified in my note to the Count de Sartiges. Without such amendment, the President is constrained for many weighty reasons, some of which are stated in that note, to decline acceding to the first principle of the 'declaration.' The President, however, will readily give his consent to the remaining three principles."

Mr. Marcy, Sec. of State, to Mr. Forsyth, Aug. 29, 1856. MSS. Inst., Mex.

"Long experience has shown that, in general, when the principal powers of Europe are engaged in war, the rights of neutral nations are endangered. This consideration led, in the progress of the war of our independence, to the formation of the celebrated confederacy of armed neutrality, a primary object of which was to assert the doctrine that free ships make free goods, except in the case of articles contraband of war; a doctrine which, from the very commencement of our national being, has been a cherished idea of the statesmen of this country. At one period or another every maritime power has, by some solemn treaty stipulation, recognized that principle; and it might have been hoped that it would come to be universally received and respected as a rule of international law; but the refusal of one power prevented this, and in the next great war which ensued, that of the French Revolution, it failed to be respected among the belligerent states of Europe. Notwithstanding this, the principle is generally admitted to be a sound and salutary one; so much so that at the commencement of the existing war in Europe, Great Britain and France announced their purpose to observe it for the present; not, however, as a recognized international right, but as a mere concession for the time being. The co-operation, however, of these two powerful maritime nations in the interest of neutral rights appeared to me to afford an occasion inviting and justifying, on the part of the United States, a renewed effort to make the doctrine in question a principle of international law, by means of special conventions between the several powers of Europe and America. Accordingly, a proposition, embracing not only the rule that free ships make free goods, except contraband articles, but also the less contested one, that neutral property other than contraband, though on board enemy's ships, shall be exempt from confiscation, has been submitted by this Government to those of Europe and America.

"Russia acted promptly in this matter, and a convention was concluded between that country and the United States, providing for the observance of the principles announced, not only as between themselves, but also as between them and all other nations which shall enter into like stipulations. None of the other powers have as yet taken final action on the subject. I am not aware, however, that any objection

to the proposed stipulations has been made; but, on the contrary, they are acknowledged to be essential to the security of neutral commerce; and the only apparent obstacle to their general adoption is the possibility that it may be encumbered by inadmissible conditions.

"The King of the Two Sicilies has expressed to our minister at Naples his readiness to concur in our proposition relative to neutral rights, and to enter into a convention on that subject."

President Pierce, Second Annual Message, 1854. See 144 Edinb. Rev., 353.

"Soon after the commencement of the late war in Europe this Government submitted to the consideration of all maritime nations two principles for the security of neutral commerce; one, that the neutral flag should cover enemies' goods, except articles contraband of war; and the other, that neutral property on board merchant vessels of belligerents should be exempt from condemnation, with the exception of contraband articles. These were not presented as new rules of international law; having been generally claimed by neutrals, though not always admitted by belligerents. One of the parties to the war—Russia—as well as several neutral powers, promptly acceded to these propositions; and the two other principal belligerents, Great Britain and France, having consented to observe them for the present occasion, a favorable opportunity seemed to be presented for obtaining a general recognition of them both in Europe and America.

"But Great Britain and France, in common with most of the states of Europe, while forbearing to reject, did not affirmatively act upon the overtures of the United States.

"While the question was in this position, the representatives of Russia, France, Great Britain, Austria, Prussia, Sardinia, and Turkey, assembled at Paris, took into consideration the subject of maritime rights, and put forth a declaration containing the two principles which this Government had submitted nearly two years before, to the consideration of maritime powers, and adding thereto the following propositions: 'Privateering is and remains abolished,' and 'blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy;' and to the declaration thus composed of four points, two of which had already been proposed by the United States, this Government has been invited to accede by all the powers represented at Paris, except Great Britain and Turkey. To the last of the two additional propositions, that in relation to blockades, there can certainly be no objection. It is merely the definition of what shall constitute the effectual investment of a blockaded place, a definition for which this Government has always contended, claiming indemnity for losses where a practical violation of the rule thus defined has been injurious to our commerce. As to the remaining article of the declaration of the conference of Paris, 'that privateering is and remains abolished,' I certainly cannot ascribe to the

powers represented in the conference of Paris any but liberal and philanthropic views in the attempt to change the unquestionable rule of maritime law in regard to privateering. This proposition was doubtless intended to imply approval of the principle that private property upon the ocean, although it might belong to the citizen of a belligerent state, should be exempted from capture; and had that proposition been so framed as to give full effect to the principle, it would have received my ready assent on behalf of the United States. But the measure proposed is inadequate to that purpose. It is true that, if adopted, private property upon the ocean would be withdrawn from one method of plunder, but left exposed, meanwhile, to another mode, which could be used with increased effectiveness. The aggressive capacity of great naval powers would be thereby augmented, while the defensive ability of others would be reduced. Though the surrender of the means of prosecuting hostilities by employing privateers, as proposed by the conference of Paris, is neutral in terms, yet, in practical effect, it would be the relinquishment of a right of little value to one class of states, but of essential importance to another and a far larger class. It ought not to have been anticipated that a measure so inadequate to the accomplishment of the proposed object, and so unequal in its operation, would receive the assent of all maritime powers. Private property would be still left to the depredations of the public armed cruisers.

"I have expressed a readiness on the part of this Government to accede to all the principles contained in the declaration of the conference of Paris, provided that the one relating to the abandonment of privateering can be so amended as to effect the object for which, as is presumed, it was intended, the immunity of private property on the ocean from hostile capture. To effect this object, it is proposed to add to the declaration that 'privateering is and remains abolished,' the following amendment:

"'And that the private property of subjects and citizens of a belligerent on the high seas, shall be exempt from seizure by the public armed vessels of the other belligerent, except it be contraband.' This amendment has been presented not only to the powers which have asked our assent to the declaration to abolish privateering, but to all other maritime states. Thus far it has not been rejected by any, and is favorably entertained by all which have made any communication in reply.

"Several of the Governments, regarding with favor the proposition of the United States, have delayed definite action upon it only for the purpose of consulting with others parties to the conference of Paris. I have the satisfaction of stating, however, that the Emperor of Russia has entirely and explicitly approved of that modification, and will cooperate in endeavoring to obtain the assent of other powers; and that assurances of a similar purport have been received in relation to the disposition of the Emperor of the French."

President Pierce, Fourth Annual Message, 1856.

"It is unfortunate that various claims have been advanced and enforced by belligerent powers, in the prosecution of wars, for which it would be vain to seek any sufficient justification in the law of nations, and this consideration adds to the importance of some acceptable arrangement by which this source of apprehension may be removed and all danger of collision avoided by clearly defining the rights of the parties in all doubtful cases.

"If the belligerent powers should substitute their own views for the fair provisions of the general law, the most serious consequences may be apprehended. It becomes all prudent Governments engaged in hostilities to take into consideration the actual condition of public sentiment, whenever measures of doubtful character are proposed, and satisfy themselves, not only that they are theoretically right, but that they are also practically expedient. * * *

"With respect to the protection of the vessel and cargo by the flag which waves over them, the United States look upon that principle as established, and they maintain that belligerent property on board a neutral ship is not liable to capture, and from existing indications they hope to receive the general concurrence of all commercial powers in this position. * * *

"The countries engaged in the pending war have adopted a much wiser policy. They hold on to the power of the flag to protect both vessel and cargo from all violation, and have proclaimed by public declarations their determination to respect the principle of exemption so happily established. And well is it, in the general interest, that this tribute has been rendered to the opinions of the age. The stopping of neutral vessels upon the high seas; their forcible entrance, and the overhauling and examination of their cargoes, the seizure of their freight at the will of a foreign officer, the frequent interruption of their voyages by compelling them to change their destination in order to seek redress, and above all the assumption of jurisdiction by a foreign armed party over what has been aptly termed the extension of the territory of an independent state, and with all the abuses which are so prone to accompany the exercise of unlimited power, where responsibility is remote, these are indeed serious 'obstructions' little likely to be submitted to in the present state of the world without a formidable effort to prevent them. * * *

"It is not necessary that a neutral power should have announced its adherence to this declaration (of Paris) in order to entitle its vessels to the immunity promised. * * *

"The United States, indeed, declined to become a party to the Paris conference, though that circumstance does not affect the position they occupy."

Mr. Cass, Sec. of State, to Mr. Mason, June 17, 1859. MSS. Inst., France. See 144 Ed. Rev., 353.

The following papers were communicated to Congress by President Lincoln in connection with his annual message of 1861:

"*Mr. Seward, Secretary of State, to ministers of the United States in Great Britain, France, Russia, Prussia, Austria, Belgium, Italy, and Denmark.*

"DEPARTMENT OF STATE,
"*Washington, April* 24, 1861.

"The advocates of benevolence and the believers in human progress, encouraged by the slow though marked meliorations of the barbarities of war which have obtained in modern times, have been, as you are well aware, recently engaged with much assiduity in endeavoring to effect some modifications of the law of nations in regard to the rights of neutrals in maritime war. In the spirit of these movements the President of the United States, in the year 1854, submitted to the several maritime nations two propositions, to which he solicited their assent, as permanent principles of international law, which were as follows:

"1. Free ships make free goods; that is to say, that the effects or goods belonging to subjects or citizens of a power or state at war are free from capture or confiscation when found on board of neutral vessels, with the exception of articles contraband of war.

"2. That the property of neutrals on board an enemy's vessel is not subject to confiscation unless the same be contraband of war.

"Several of the Governments to which these propositions were submitted expressed their willingness to accept them, while some others, which were in a state of war, intimated a desire to defer acting thereon until the return of peace should present what they thought would be a more auspicious season for such interesting negotiations.

"On the 16th of April, 1856, a congress was in session at Paris. It consisted of several maritime powers, represented by their plenipotentiaries, namely, Great Britain, Austria, France, Russia, Prussia, Sardinia, and Turkey. That congress having taken up the general subject to which allusion has already been made in this letter, on the day before mentioned, came to an agreement, which they adopted in the form of a declaration, to the effect followiug, namely: ...

"1. Privateering is and remains abolished.

"2. The neutral flag covers enemy's goods, with the exception of contraband of war.

"3. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag.

"4. Blockades, in order to be binding must be effective; that is to say, maintained by forces really sufficient to prevent access to the coast of the enemy.

"The agreement pledged the parties constituting the congress to bring the declaration thus made to the knowledge of the states which had not

been represented in that body, and to invite them to accede to it. The congress, however, at the same time insisted, in the first place, that the declaration should be binding only on the powers who were or should become parties to it as one whole and indivisible compact; and, secondly, that the parties who had agreed, and those who should afterwards accede to it, should, after the adoption of the same, enter into no arrangement on the application of maritime law in time of war without stipulating for a strict observance of the four points resolved by the declaration.

"The declaration which I have thus substantially recited of course prevented all the powers which became parties to it from accepting the two propositions which had been before submitted to the maritime nations by the President of the United States.

"The declaration was, in due time, submitted by the Governments represented in the congress at Paris to the Government of the United States.

"The President, about the 14th of July, 1856, made known to the states concerned his unwillingness to accede to the declaration. In making that announcement on behalf of this Government, my predecessor, Mr. Marcy, called the attention of those states to the following points, namely:

"1st. That the second and third propositions contained in the Paris declaration are substantially the same with the two propositions which had before been submitted to the maritime states by the President.

"2d. That the Paris declaration, with the conditions annexed, was inadmissible by the United States in three respects, namely: 1st. That the Government of the United States could not give its assent to the first proposition contained in the declaration, namely, that "Privateering is and remains abolished," although it was willing to accept it with an amendment which should exempt the private property of individuals, though belonging to belligerent states, from seizure or confiscation by national vessels in maritime war. 2d. That for this reason the stipulation annexed to the declaration, viz, that the propositions must be taken altogether or rejected altogether, without modification, could not be allowed. 3d. That the fourth condition annexed to the declaration, which provided that the parties acceding to it should enter into no negotiation for any modifications of the law of maritime war with nations which should not contain the four points contained in the Paris declaration, seemed inconsistent with a proper regard to the national sovereignty of the United Sates.

"On the 29th of July, 1856, Mr. Mason, then minister of the United States at Paris, was instructed by the President to propose to the Government of France to enter into an arrangement for its adherence, with the United States, to the four principles of the declaration of the congress of Paris, provided the first of them should be amended as specified in Mr. Marcy's note to the Count de Sartiges on the 28th of July, 1856. Mr.

Mason accordingly brought the subject to the notice of the Imperial Government of France, which was disposed to entertain the matter favorably, but which failed to communicate its decision on the subject to him. Similar instructions regarding the matter were addressed by this Department to Mr. Dallas, our minister at London, on the 31st day of January, 1857; but the proposition above referred to had not been directly presented to the British Government by him when the administration of this Government by Franklin Pierce, during whose term these proceedings occurred, came to an end, on the 3d of March, 1857, and was succeeded by that of James Buchanan, who directed the negotiations to be arrested for the purpose of enabling him to examine the questions involved, and they have ever since remained in that state of suspension.

"The President of the United States has now taken the subject into consideration, and he is prepared to communicate his views upon it, with a disposition to bring the negotiation to a speedy and satisfactory conclusion.

"For that purpose you are hereby instructed to seek an early opportunity to call the attention of her Majesty's Government to the subject, and to ascertain whether it is disposed to enter into negotiations for the accession of the Government of the United States to the declaration of the Paris congress, with the conditions annexed by that body to the same; and if you shall find that Government so disposed, you will then enter into a convention to that effect, substantially in the form of a project for that purpose herewith transmitted to you; the convention to take effect from the time when the due ratifications of the same shall have been exchanged. It is presumed that you will need no special explanation of the sentiments of the President on this subject for the purpose of conducting the necessary conferences with the Government to which you are accredited. Its assent is expected on the ground that the proposition is accepted at its suggestion, and in the form it has preferred. For your own information it will be sufficient to say that the President adheres to the opinion expressed by my predecessor, Mr. Marcy, that it would be eminently desirable for the good of all nations that the property and effects of private individuals, not contraband, should be exempt from seizure and confiscation by national vessels in maritime war. If the time and circumstances were propitious to a prosecution of the negotiation with that object in view, he would direct that it should be assiduously pursued. But the right season seems to have passed, at least for the present. Europe seems once more on the verge of quite general wars. On the other hand, a portion of the American people have raised the standard of insurrection, and proclaimed a provisional Government, and, through their organs, have taken the bad resolution to invite privateers to prey upon the peaceful commerce of the United States.

"Prudence and humanity combine in persuading the President, under the circumstances, that it is wise to secure the lesser good offered

by the Paris congress, without waiting indefinitely in hope to obtain the greater one offered to the maritime nations by the President of the United States.

I am, sir, respectfully, your obedient servant,

"WILLIAM H. SEWARD."

The same, *mutatis mutandis*, to the ministers of the United States in France, Russia, Prussia, Austria, Belgium, Italy, and Denmark.

*Convention upon the subject of the rights of belligerents and neutrals in time of war, between the United States of America and Her Majesty the Queen of Great Britain and Ireland.*

The United States of America and Her Majesty the Queen of Great Britain and Ireland, being equally animated by a desire to define with more precision the rights of belligerent and neutrals in time of war, have, for that purpose, conferred full powers, the President of the United States upon Charles F. Adams, accredited as their envoy extraordinary and minister plenipotentiary to her said Majesty, and Her Majesty the Queen of Great Britain and Ireland, upon ———.

And the said plenipotentiaries, after having exchanged their full powers, have concluded the following articles:

ARTICLE I.

1. Privateering is and remains abolished. 2. The neutral flag covers enemy's goods, with the exception of contraband of war. 3. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag. 4. Blockades, in order to be binding, must be effective; that is to say, maintained by a force sufficient cient really to prevent access to the coast of the enemy.

ARTICLE II.

The present convention shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate, and by Her Majesty the Queen of Great Britain and Ireland, and the ratifications shall be exchanged at Washington, within the space of six months from the signature, or sooner if possible. In faith whereof, the respective plenipotentiaries have signed the present convention in duplicate, and have thereto affixed their seals.

Done at London, the —— day of ———, in the year of our Lord one thousand eight hundred and sixty-one (1861).

"The rights which it asserts that France expects, as a neutral, from the United States, as a belligerent, are even less than this Government, on the 25th of April, instructed you to concede and guarantee to her by treaty, as a friend. On that day we offered to her our adhesion to the declaration of Paris, which contains four propositions, namely: 1st. That privateering shall be abolished. 2d. That a neutral flag covers enemy's goods not contraband of war. 3d. That goods of a neutral, not contraband, shall not be confiscated though found in an enemy's vessel. 4th. That blockades, in order to be lawful, must be maintained by competent force. We have always, when at war, conceded the three last of these rights to neutrals, *a fortiori*, we could not when at peace deny them to friendly nations. The first-named concession was proposed on the grounds already mentioned. We are still ready to guar-

anteo these rights, by convention with France, whenever she shall authorize either you or her minister here to enter into convention. There is no reservation or difficulty about their application in the present case. We hold all the citizens of the United States, loyal or disloyal, alike included by the law of nations and treaties; and we hold ourselves bound by the same obligations to see, so far as may be in our power, that all our citizens, whether maintaining this Government or engaged in overthrowing it, respect those rights in favor of France and of every other friendly nation. In any case, not only shall we allow no privateer or national vessel to violate the rights of friendly nations as I have thus described them, but we shall also employ all our naval force to prevent the insurgents from violating them just as much as we do to prevent them from violating the laws of our own country."

Mr. Seward, Sec. of State, to Mr. Dayton, June 6, 1861. MSS. Inst, France; Dip. Corr., 1861.

"You are aware that the declaration of Paris enjoins each of the parties that had signed it not to negotiate any other changes of the law of nations concerning the rights of neutrals in maritime wars. We have supposed that this would operate to prevent Great Britain, and probably France, from receiving our accession to the declaration if we should insist on the amendment proposed by Mr. Marcy, namely, the exemption of private property of non-belligerents from confiscation. But we should now, as the instructions heretofore given you have already informed you, vastly prefer to have the amendment accepted. Nevertheless, if this cannot be done, let the convention be made for adherence to the declaration, pure and simple."

Mr. Seward, Sec. of State, to Mr. Sandford, June 21, 1861. MSS. Inst., Belgium.

"Your dispatch No. 12 (dated June 22) has been received. It relates to our proposition for accession to the declaration of Paris. This affair has become very much complicated, by reason of the irregular and extraordinary proceeding of the French Government in proposing to take notice of the domestic disturbance which has occurred in this country. I do not know that even now I can clear the matter up effectually without knowing what may be the result of the communication which, in my dispatch No. 19, I instructed you to make to the French Government. I will try, nevertheless, to do so. The instructions contained in my dispatch No. 4, dated 24th of April last, required you to tender to the French Government, without delay, our adhesion to the declaration of the congress of Paris, pure and simple.

"The reason why we wished it done immediately was, that we supposed the French Government would naturally feel a deep anxiety about the safety of their commerce, threatened distinctly with privateering by the insurgents, while at the same time, as this Government had heretofore persistently declined to relinquish the right of issuing letters of marque, it would be apprehended by France that we too should take up that form

of maritime warfare in the present domestic controversy. We apprehended that the danger of such a case of depredation upon commerce equally by the Government itself, and by its enemies, would operate as a provocation to France and other commercial nations to recognize the insurrectionary party in violation of our national rights and sovereignty. On the contrary, we did not desire to depredate on friendly commerce ourselves, and we thought it our duty to prevent such depredations by the insurgents by executing our own laws, which make privateering by disloyal citizens piracy, and punish its pursuit as such. We thought it wise, just, and prudent to give, unasked, guarantees to France and other friendly nations for the security of their commerce from exposure to such depredations on either side, at the very moment when we were delivering to them our protest against the recognition of the insurgents. The accession to the declaration of Paris would be the form in which these guarantees could be given—that for obvious reasons must be more unobjectionable to France and to other commercial nations than any other. It was safe on our part, because we tendered it, of course, as the act of this Federal Government, to be obligatory equally upon disloyal as upon loyal citizens.

"The instructions waived the Marcy amendment (which proposed to exempt private property from confiscation in maritime war), and required you to propose our accession to the declaration of the congress of Paris, pure and simple. These were the reasons for this course, namely: First. It was as well understood by this Government then, as it is now by yourself, that an article of that celebrated declaration prohibits every one of the parties to it from negotiating upon the subject of neutral rights in maritime warefare with any nation not a party to it, except for the adhesion of such outstanding party to the declaration of the congress of Paris, pure and simple. An attempt to obtain an acceptance of Mr. Marcy's amendment would require a negotiation not merely with France alone, but with all the other original parties of the congress of Paris and every Government that has since acceded to the declaration. Nay, more; we must obtain their unanimous consent to the amendment before being able to commit ourselves or to engage any other nation, however well disposed, to commit itself to us on the propositions actually contained in the declaration. On the other hand, each nation which is a party to the declaration of Paris is at liberty to stipulate singly with us for acceptance of that declaration for the government of our neutral relations. If, therefore, we should waive the Marcy proposition, or leave it for ultimate consideration, we could establish a complete agreement between ourselves and France on a subject which, if it should be left open, might produce consequences very much to be deprecated. It is almost unnecessary to say that what we proposed to France was equally and simultaneously proposed to every other maritime power. In this way we expected to remove every cause that any foreign power could have for the recognition of the insurgents as a belligerent power.

"The matter stood in this plain and intelligible way until certain declarations or expressions of the French Government induced you to believe that they would recognize and treat the insurgents as a distinct national power for belligerent purposes. It was not altogether unreasonable that you, being at Paris, should suppose that this Government would think itself obliged to acquiesce in such a course by the Government of France. So assuming, you thought that we would not adhere to our proposition to accede to the declaration, pure and simple, since such a course would, as you thought, be effective to bind this Government without binding the insurgents, and would leave France at liberty to hold us bound and the insurgents free from the obligations created by our adhesion. Moreover, if we correctly understand your dispatch on that subject, you supposed that you might propose our adhesion to the Treaty of Paris, not pure and simple, but with the addition of the Marcy proposition in the first instance, and might afterwards, in case of its being declined in that form, withdraw the addition, and then propose our accession to the declaration of Paris, pure and simple.

"While you were acting on these views on your side of the Atlantic, we on this side, not less confident in our strength than in our rights, as you are now aware, were acting on another view, which is altogether different, namely, that we shall not acquiesce in any declaration of the Government of France that assumes that this Government is not now, as it always has been, exclusive sovereign, for war as well as for peace, within the States and Territories of the Federal Union, and over all citizens, the disloyal and loyal all alike. We treat in that character, which is our legal character, or we do not treat at all, and we in no way consent to compromise that character in the least degree. We do not even suffer this character to become the subject of discussion. Good faith and honor, as well as the same expediency which prompted the proffer of our accession to the declaration of Paris, pure and simple, in the first instance, now require us to adhere to that proposition and abide by it; and we do adhere to it, not, however, as a divided, but as an undivided nation. The proposition is tendered to France not as a neutral, but as a friend, and the agreement is to be obligatory upon the United States and France and all their legal dependencies just alike.

"The case was peculiar, and in the aspect in which it presented itself to you portentous. We were content that you might risk the experiment, so, however, that you should not bring any responsibility for delay upon this Government. But you now see that by incorporating the Marcy amendment in your proposition you have encountered the very difficulty which was at first foreseen by us. The following nations are parties to the declaration of Paris, namely: Baden, Bavaria, Belgium, Bremen, Brazil, Duchy of Brunswick, Chili, the Argentine Confederation, the Germanic Confederation, Denmark, the two Sicilies, the Republic of the Equator, the Roman States, Greece, Guatemala, Hayti,

Hamburg, Hanover, the two Hesses, Lubeck, Mecklenburg-Strelitz, Mecklenburg-Schwerin, Nassau, Oldenburg, Parma, Holland, Peru, Portugal, Saxony, Saxe-Altenburg, Saxe-Coburg-Gotha, Saxe-Meiningen, Saxe-Weimar, Sweden, Switzerland, Tuscany, Würtemberg, Anhalt Dessau, Modena, New Granada, and Uruguay.

"The great exigency in our affairs will have passed away—for preservation or destruction of the American Union—before we could bring all these nations to unanimity on the subject, as you have submitted it to Mr. Thouvenel. It is a time not for propagandism, but for energetic acting to arrest the worst of all national calamities. We therefore expect you now to renew the proposition in the form originally prescribed, but in doing this you will neither unnecessarily raise a question about the character in which this Government acts (being exclusive sovereign), nor, on the other hand, in any way compromise that character in any degree. Whenever such a question occurs to hinder you, let it come up from the other party in the negotiation. It will be time then to stop and wait for such further instructions as the new exigency may require.

"One word more. You will, in any case, avow our preference for the proposition with the Marcy amendment incorporated, and will assure the Government of France that whenever there shall be any hope for the adoption of that beneficent feature by the necessary parties as a principle of the law of nations we shall be ready not only to agree to it, but even to propose it and to lead in the necessary negotiations.

"This paper is, in one view, a conversation merely between yourself and us. It is not to be made public. On the other hand, we confide in your discretion to make such explanations as will relieve yourself of embarrassments and this Government of any suspicion of inconsistency or indirection in its intercourse with the enlightened and friendly Government of France."

Mr. Seward, Sec. of State, to Mr. Dayton, July 6, 1861. MSS. Inst., France; Dip. Corr., 1861.

The United States adheres to the following principles:

1st. The neutral flag covers enemy's goods, with the exception of contraband of war.

2d. Neutral goods, not contraband of war, are not liable to confiscation under enemy's flag.

3d. Blockades, in order to be binding, must be effective.

Mr. Seward, Sec. of State, to Mr. Jones, Aug. 12, 1861. MSS. Inst., Austria.

"Your dispatch of August 2 (No. 22) has been received. It is accompanied by a correspondence which has just taken place between yourself and Lord John Russell, with a view, on your part, to remove possible obstructions against the entrance upon negotiations, with which you have so long been charged, for an accession on our part to the declaration of the congress in Paris on the subject of the rights of

neutrals in maritime war. It was also understood by you that a further result of the correspondence would be to facilitate, indirectly, the opening of similar negotiations for a like object, by Mr. Dayton, with the Government of France.

"Your letter to Lord John Russell is judicious, and is approved. Lord John Russell's answer is satisfactory, with the exception of a single passage, upon which it is my duty to instruct you to ask the British secretary for foreign affairs for an explanation.

"That passage is as follows:

"'I need scarcely add that on the part of Great Britain the engagement will be prospective, and will not invalidate anything already done.'

"A brief statement of the objects of the proposed negotiation will bring the necessity for an explanation of this passage into a strong light. We have heretofore proposed to other maritime states certain meliorations of the laws of maritime war affecting the rights of neutrals. The meliorations are: 1st. That the neutral flag shall protect enemy's goods not contraband of war. 2d. That the goods of neutrals, not contraband, though found under an enemy's flag, shall not be confiscated. 3d. That blockades, to be respected, must be effective.

"The congress at Paris adopted these three principles, adding a fourth, namely, that privateering shall be abolished. The powers which constituted that congress invited the adhesion of the United States to that declaration. The United States answered that they would accede on condition that the others powers would accept a fifth proposition, namely, that the goods of private persons, non-combatants, should be exempt from confiscation in maritime war.

"When this answer was given by the United States, the British Government declined to accept the proposed amendment, or fifth proposition, thus offered by the United States, and the negotiation was then suspended. We have now proposed to resume the negotiation, offering our adhesion to the declaration of Paris, as before, with the amendment which would exempt private property from confiscation in maritime war.

"The British Government now, as before, declares this amendment or fifth proposition inadmissible. It results that, if the United States can at all become a party to the declaration of the congress of Paris by the necessary consent of the parties already committed to it, this can be done only by their accepting that declaration without any amendment whatever; in other words, 'pure and simple.' Under these circumstances you have proposed, in your letter to Lord John Russell, to negotiate our adhesion to the declaration in that form. It is at this stage of the affair that Lord John Russell interposes, by way of caution, the remark that 'on the part of Great Britain the engagement will be prospective, and will not invalidate anything already done.'

"I need dwell on this remark only one moment to show that, although expressed in a very simple form and in a quite casual manner, it con-

tains what amounts to a preliminary condition, which must be conceded by the United States to Great Britain, and either be inserted in the convention, and so modify our adhesion to the declaration of Paris, or else must be in some confidential manner implied and reserved, with the same effect.

"Upon principle this Government could not consent to enter into formal negotiations, the result of which, as expressed in a convention, should be modified or restricted by a tacit or implied reservation. Even if such a proceeding was compatible with our convictions of propriety or of expediency, there would yet remain an insuperable obstacle in the way of such a measure.

"The President can only initiate a treaty. The treaty negotiated can come into life only through an express and deliberate act of ratification by the Senate of the United States, which ratification sanctions, in any case, only what is set down in the treaty itself. I am not, by any means, to be understood in these remarks as implying a belief that Lord John Russell desires, expects, or contemplates the practice of any reservation on the part of the United States or of Great Britain. The fact of his having given you the caution upon which I am remarking would be sufficient, if evidence were necessary, to exclude any apprehension of that sort. It results from these remarks that the convention into which we are to enter must contain a provision to the effect that 'the engagements' to be made therein are, 'on the part of Great Britain, prospective, and will not invalidate anything already done.'

"I must, therefore, now discuss the propriety of inserting such a stipulation in the convention which you have been authorized to consummate. The proposed stipulation is divisible into two parts, namely: First. That the engagements of Great Britain are 'prospective' [only].

"I do not see any great objection to such an amendment. But why should it be important? A contract is always prospective, and prospective only, if it contains no express stipulation that it shall be retrospective in its operation. So much, therefore, of the stipulation asked is unnecessary, while, if conceded, it might possibly give occasion to misapprehension as to its effect. You will, therefore, decline to make such a condition without first receiving a satisfactory explanation of its meaning and its importance.

"The second part of the proposed condition is, that the 'engagement will not invalidate anything already done.' I am not sure that I should think this proposed condition exceptionable, if its effect were clearly understood. It is necessary, however, to go outside of his lordship's letter to find out what is meant by the words 'anything already done.' If 'anything' pertinent to the subject 'has been already done' which ought not to be invalidated, it is clear that it must have been done either by the joint action of the United States and Great Britain, or by the United States only, or by Great Britain acting alone. There has been no joint action of the United States and Great Britain upon the

subject. The United States have done nothing affecting it; certainly nothing which they apprehend would be invalidated by the simple form of convention which they propose. I am left to conclude, therefore, that the 'thing' which 'has been done already,' and which Great Britain desires shall not be invalidated by the convention, must be something which she herself has done. At the same time, we are left to conjecture what that thing is which is thus to be carefully saved. It would be hazardous on our part to assume to know, while I have no doubt that the British Government, with its accustomed frankness, and in view of the desirableness of a perfect understanding of the matter, will at once specify what the thing which has been done by her, and which is not to be invalidated, really is. You will, therefore, respectfully ask the right honorable secretary for foreign affairs for an explanation of the part of his letter which I have thus drawn under review, as a preliminary to any further proceedings in the proposed negotiation.

"You will perform this in such a manner as to show that the explanation is asked in no querulous or hypercritical spirit. Secondly, you will perform it with reasonable promptness, so that the attainment of the important object of the negotiation may not be unnecessarily delayed; and, thirdly, you will assure the British Government that while the United States at present see no reason to think that the stipulation proposed is necessary or expedient, yet, in view of the great interests of commerce and of civilization which are involved, they will refuse nothing which shall be really just, or even non-essential and not injurious to themselves, while of course I suppose they are not expected in any way to compromise their own national integrity, safety, or honor."

Mr. Seward, Sec. of State, to Mr. Adams, Aug. 17, 1861. MSS. Inst., Gr. Brit.; Dip. Corr., 1861. See Mr. Seward, Sec. of State, to Mr. Hülsemann, Aug. 22, 1861. MSS. Notes, Austria.

"I have received your dispatch of August 23, number 32. It is accompanied by a note which was addressed to you by Lord Russell on the 19th of the same month, and a paper containing the form of an official declaration which he proposes to make on the part of Her Majesty on the occasion of affixing his signature to the projected convention between the United States and Great Britain for the accession of the former power to the articles of the declaration of the congress of Paris for the melioration of the rigor of international law in regard to neutrals in maritime war. The instrument thus submitted to us by Lord Russell is in the following words: 'Draft of declaration.—In affixing his signature to the convention of this day, between Her Majesty the Queen of Great Britain and Ireland and the United States of America, the Earl Russell declares, by order of Her Majesty, that Her Majesty does not intend thereby to undertake any engagement which shall have any

bearing, direct or indirect, on the internal differences now prevailing in the United States.'

"Lord Russell, in his note to you, explains the object of the instrument by saying that it is intended to prevent any misconception as to the nature of the engagement to be taken by Her Majesty.

"You have judged very rightly in considering this proceeding on the part of the British Government as one so grave and so novel in its character as to render further action on your part in regard to the projected convention inadmissible until you shall have special instructions from this Department.

"Long before the present communication can reach you, my instructions of August 17, No. 61, will have come to your hands. That paper directed you to ask Lord Russell to explain a passage in a note written to you, and then lying before me, in which he said: 'I need scarcely add that on the part of Great Britain the engagement (to be contained in the projected convention) will be prospective, and will not invalidate anything already done,' which explanation I stated would be expected as a preliminary before you could proceed further in the transaction.

"You have thus been already prepared for the information that your resolution to await special instructions in the present emergency is approved.

"I feel myself at liberty, perhaps bound, to assume that Lord Russell's proposed declaration, which I have herein recited, will have been already regarded, as well by him as by yourself, as sufficiently answering the request for preliminary explanations which you were instructed to make.

"I may, therefore, assume that the case is fully before me, and that the question whether this Government will consent to enter into the projected treaty with Great Britain, subject to the condition of admitting the simultaneous declaration on Her Majesty's part, proposed by Lord Russell, is ready to be decided.

"I am instructed by the President to say that the proposed declaration is inadmissible.

"It would be virtually a new and distinct article incorporated into the projected convention. To admit such a new article would, for the first time in the history of the United States, be to permit a foreign power to take cognizance of and adjust its relations upon assumed internal and purely domestic differences existing within our own country.

"This broad consideration supersedes any necessity for considering in what manner or in what degree the projected convention, if completed either subject to the explanation proposed or not, would bear directly or indirectly on the internal differences which the British Government assume to be prevailing in the United States.

"I do not enlarge upon this branch of the subject. It is enough to say that the view thus adopted by the President seems to be in harmony

equally with a prudent regard to the safety of the Republic and a just sense of its honor and dignity.

"The proposed declaration is inadmissible, among other reasons, because it is not mutual. It proposes a special rule by which Her Majesty's obligations shall be meliorated in their bearing upon internal difficulties now prevailing in the United States, while the obligations to be assumed by the United States shall not be similarly meliorated or at all affected in their bearing on internal differences that may now be prevailing, or may hereafter arise and prevail, in Great Britain.

"It is inadmissible, because it would be a substantial and even a radical departure from the declaration of the congress at Paris. That declaration makes no exception in favor of any of the parties to it in regard to the bearing of their obligations upon internal differences which may prevail in the territories or dominions of other parties.

"The declaration of the congress of Paris is the joint act of forty-six great and enlightened powers, designing to alleviate the evils of maritime war and to promote the first interest of humanity, which is peace. The Government of Great Britain will not, I am sure, expect us to accede to this noble act otherwise than upon the same equal footing upon which all the other parties to it are standing. We could not consent to accede to the declaration with a modification of its terms unless all the present parties to it should stipulate that the modification should be adopted as one of universal application. The British Government cannot but know that there would be little prospect of an entire reformation of the declaration of Paris at the present time, and it has not even told us that it would accept the modification as a general one if it were proposed.

"It results that the United States must accede to the declaration of the congress of Paris on the same terms with all the other parties to it, or that they do not accede to it at all.

"You will present these considerations to Lord Russell, not as arguments why the British Government ought to recede from the position it has assumed, but as the grounds upon which the United States decline to enter into the projected convention recognizing that exceptional position of Her Majesty.

"If, therefore, Her Britannic Majesty's Government shall adhere to the proposition thus disallowed, you will inform Lord Russell that the negotiation must for the present be suspended.

"I forbear purposely from a review of the past correspondence, to ascertain the relative responsibilities of the parties for this failure of negotiations, from which I had hoped results would flow beneficial, not only to the two nations, but to the whole world—beneficial, not in the present age only, but in future ages.

"It is my desire that we may withdraw from the subject carrying away no feelings of passion, prejudice, or jealousy, so that in some hap-

pier time it may be resumed, and the important objects of the proposed convention may be fully secured. I believe that that propitious time is even now not distant; and I will hope that when it comes Great Britain will not only willingly and unconditionally accept the adhesion of the United States to all the benignant articles of the declaration of the congress of Paris, but will even go further, and, relinquishing her present objections, consent, as the United States have so constantly invited, that the private property, not contraband, of citizens and subjects of nations in collision shall be exempted from confiscation equally in warfare waged on the land and in warfare waged upon the seas, which are the common highways of all nations.

"Regarding this negotiation as at an end, the question arises, what, then, are to be the views and policy of the United States in regard to the rights of neutrals in maritime war in the present case. My previous dispatches leave no uncertainty upon this point. We regard Great Britain as a friend. Her Majesty's flag, according to our traditional principles, covers enemy's goods not contraband of war. Goods of Her Majesty's subjects, not contraband of war, are exempt from confiscation, though found under a neutral or disloyal flag. No depredation shall be committed by our naval forces or by those of any of our citizens, so far as we can prevent it, upon the vessels or property of British subjects. Our blockade, being effective, must be respected.

"The unfortunate failure of our negotiations to amend the law of nations in regard to maritime war does not make us enemies, although, if they had been successful, we should have perhaps been more assured friends.

"Civil war is a calamity from which certainly no people or nation that has ever existed has been always exempt. It is one which probably no nation ever will escape. Perhaps its most injurious trait is its tendency to subvert the good understanding and break up the relations existing between the distracted state and friendly nations, and to involve them, sooner or later, in war. It is the desire of the United States that the internal differences existing in this country may be confined within our own borders. I do not suffer myself for a moment to doubt that Great Britain has a desire that we may be successful in attaining that object, and that she looks with dread upon the possibility of being herself drawn into this unhappy internal controversy of our own. I do not think it can be regarded as disrespectful if you should remind Lord Russell that when, in 1838, a civil war broke out in Canada, a part of the British dominions adjacent to the United States, the Congress of the United States passed and the President executed a law which effectually prevented any intervention against the Government of Great Britain in those internal differences by American citizens, whatever might be their motives, real or pretended, whether of interest or sympathy. I send you a copy of that enactment. The British Government will judge for itself whether it is suggestive of any measures on the part of

Great Britain that might tend to preserve the peace of the two countries, and through that way the peace of all nations."

Mr. Seward, Sec. of State, to Mr. Adams, Sept. 7, 1861. MSS. Inst., Gr. Brit.; Dip. Corr., 1861.

"I have the honor to acknowledge the reception of dispatches from the Department, numbered from 61 to 67, both inclusive.

"Since the date of your No. 61, of the 17th of August, you will have learned ere this that the enigmatical extract from Lord Russell's note to me, of which you instructed me to ask an explanation, has taken a very distinct and unequivocal shape, superseding all necessity for further inquiry. I may take occasion to remark upon the similarity of some of the reasoning in your dispatch with that which you will find already made use of in my letter to his lordship, of the 23d August, declining to conclude the negotiation. On the whole, it seems to me that it is perhaps as well to let it stay for the present in the situation in which Her Majesty's ministers have placed it. But in this I remain to be directed at the pleasure of the President.

"In this connection I have the honor to transmit a copy of Lord Russell's note of the 28th of August, in reply to mine of the 23d of that month to him, already referred to in the preceding paragraph. I likewise send a copy of his instructions to Lord Lyons, which he seems to have furnished to me as an evidence of his good faith in the representation he made of them to me at the conference."

Mr. Adams to Mr. Seward, Sept. 7, 1861. MSS. Dispatch, Gr. Brit.; Dip. Corr., 1861.

"The undersigned, Her Majesty's principal secretary of state for foreign affairs, has had the honor to receive the note, of the 23d instant, of Mr. Adams, envoy extraordinary and minister plenipotentiary of the United States.

"Mr. Adams has accounted satisfactorily for the delay in answering the note of the undersigned of the 19th instant. Her Majesty's Government in all these transactions has acted in concert with the Government of the Emperor of the French, and the undersigned cannot be surprised that Mr. Adams should wish to communicate with Mr. Dayton, at Paris, before replying to his note.

"The undersigned is quite prepared, following Mr. Adams, to recapitulate the particulars of this negotiation, and he is happy to think that in matters of fact there is no ground for any controversy between them. He need only supply omissions.

"Mr. Adams, at his first interview with the undersigned, on the 18th of May last, mentioned the subject of the declaration of Paris as one on which he had power to negotiate, and the undersigned then told him that the matter had been already committed to the care of Lord Lyons, at Washington, with authority to agree with the Government of the United States on the basis of the adoption of three of the articles and the omission of the first, being that relating to privateering. So far, the statement of Mr. Adams agrees substantially with that which is here made. But the representation of the undersigned was strictly accurate, and in the faith of it he subjoins the dispatch by which Lord Lyons was authorized to negotiate on the basis of the three latter articles of the declaration of Paris. Lord Lyons, however, was not empowered to sign a convention, because that form had not been

adopted by the powers who originally signed the declaration, nor by any of the numerous states which afterwards gave their adherence to its articles.

"At a later period, when Mr. Adams brought a copy of his full powers to the foreign office, the undersigned asked why the adherence of the United States should not be given in the same form as that of other powers, and he was told, in reply, that as the Constitution of the United States required the consent of the Senate to any agreement with foreign powers, that agreement must necessarily, or at least would most conveniently, be made in the shape of a convention.

"The undersigned yielded to this argument, and proposed to the Government of the Emperor of the French, with which Her Majesty's Government have been acting throughout in complete agreement, to concur likewise in this departure from the form in which the declaration of Paris had been adopted by the maritime powers of Europe.

"But the British Government could not sign the convention proposed by the United States as an act of Great Britain singly and alone, and they found to their surprise that in case of France and of some of the other European powers the addition of Mr. Marcy relating to private property at sea had been proposed by the ministers of the United States at the courts of those powers.

"The undersigned concurs in the statement made by Mr. Adams respecting the transactions which followed. Her Majesty's Government, like Mr. Adams, wished to establish a doctrine for all time, with a view to lessen the horrors of war all over the globe. The instructions sent to Lord Lyons prove the sincerity of their wish to give permanence and fixity of principles to this part of the law of nations.

"The undersigned has now arrived at that part of the subject upon which the negotiation is interrupted.

"The undersigned has notified Mr. Adams of his intention to accompany his signature of the proposed convention with a declaration to the effect that Her Majesty 'does not intend thereby to undertake any engagement which shall have any bearing, direct or indirect, on the internal differences now prevailing in the United States.'

"The reasons for this course can be easily explained. On some recent occasions, as on the fulfillment of the treaty of 1846, respecting the boundary, and with respect to the treaty called by the name of the 'Clayton-Bulwer treaty,' serious differences have arisen with regard to the precise meaning of words, and the intention of those who framed them.

"It was most desirable in framing a new agreement not to give rise to a fresh dispute.

"But the different attitude of Great Britain and of the United States in regard to the internal dissensions now unhappily prevailing in the United States gave warning that such a dispute might arise out of the proposed convention.

"Her Majesty's Government, upon receiving intelligence that the President had declared by proclamation his intention to blockade the ports of nine of the States of the Union, and that Mr. Davis, speaking in the name of those nine States, had declared his intention to issue letters of marque and reprisals, and having also received certain information of the design of both sides to arm, had come to the conclusion that civil war existed in America, and Her Majesty had thereupon proclaimed her neutrality in the approaching contest.

"The Government of the United States, on the other hand, spoke only of unlawful combinations, and designated those concerned in them as rebels and pirates. It would follow logically and consistently, from the attitude taken by Her Majesty's Government, that the so-called Confederate States, being acknowledged as a belligerent, might, by the law of nations, arm privateers, and that their privateers must be regarded as the armed vessels of a belligerent.

"With equal logic and consistency it would follow, from the position taken by the United States, that the privateers of the Southern States might be decreed to be pirates, and it might be further argued by the Government of the United States that a European power signing a convention with the United States, declaring that privateering was and remains abolished, would be bound to treat the privateers of the so-called Confederate States as pirates.

"Hence, instead of an agreement, charges of bad faith and violation of a convention might be brought in the United States against the power signing such a convention, and treating the privateers of the so-called Confederate States as those of a belligerent power.

"The undersigned had at first intended to make verbally the declaration proposed. But he considered it would be more clear, more open, more fair to Mr. Adams to put the declaration in writing, and give notice of it to Mr. Adams before signing the convention.

"The undersigned will not now reply to the reasons given by Mr. Adams for not signing the convention if accompanied by the proposed declaration. Her Majesty's Government wish the question to be fairly weighed by the United States Government. The undersigned, like Mr. Adams, wishes to maintain and perpetuate the most friendly relations between Her Majesty's Kingdom and the United States. It is in this spirit that Her Majesty's Government decline to bind themselves without a clear explanation on their part to a convention which, seemingly confined to an adoption of the declaration of Paris of 1856, might be construed as an engagement to interfere in the unhappy dissensions now prevailing in the United States—an interference which would be contrary to Her Majesty's public declarations, and would be a reversal of the policy which Her Majesty has deliberately sanctioned."

Earl Russell to Mr. Adams, August 28, 1861; *ibid.*

The following instructions were inclosed:

"FOREIGN OFFICE, *May* 18, 1861.

"MY LORD: Her Majesty's Government deeply lament the outbreak of hostilities in North America, and they would gladly lend their aid to the restoration of peace.

"You are instructed, therefore, in case you should be asked to employ your good offices, either singly or in conjunction with the representatives of other powers, to give your assistance in promoting the work of reconciliation. But as it is most probable, especially after a recent letter of Mr. Seward, that foreign advice is not likely to be accepted, you will refrain from offering it unasked. Such being the case, and supposing the contest not to be at once ended by signal success on one side or by the return of friendly feeling between the two contending parties, Her Majesty's Government have to consider what will be the position of Great Britain as a neutral between the two belligerents.

"So far as the position of Great Britain in this respect toward the European powers is concerned, that position has been greatly modified by the declaration of Paris of April 16, 1856. That declaration was signed by the ministers of Austria, France, Great Britain, Prussia, Russia, Sardinia, and Turkey.

"The motives for making that declaration, and for agreeing to the articles of maritime law which it proposes to introduce with a view to the establishment of a 'uniform doctrine' and 'fixed principles,' are thus shortly enumerated in the declaration:

"'Considering that maritime law in time of war has long been the subject of deplorable disputes;

"'That the uncertainty of the law and of the duties in such a matter gives rise to differences of opinion between neutrals and belligerents which may occasion serious difficulties, and even conflicts;

"'That it is consequently advantageous to establish a uniform doctrine on so important a point;

"'That the plenipotentiaries assembled in congress at Paris cannot better respond to the intentions by which their Governments are animated than by seeking to introduce into international relations fixed principles in this respect —

"'The above-mentioned plenipotentiaries, being duly authorized, resolved to concert among themselves as to the means of attaining this object, and having come to an agreement have adopted the following solemn declaration:'

"1st. Privateering is and remains abolished.

"2d. The neutral flag covers enemy's goods, with the exception of contraband of war.

"3d. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag.

"4th. Blockades, in order to be binding, must be effective—that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

"The powers signing the declaration engaged to bring it to the knowledge of the states which had not taken part in the Congress of Paris, and to invite those states to accede to it. They finally agreed that 'the present declaration is not and shall not be binding, except between those powers who have acceded or who shall accede to it.'

"The powers which acceded to the declaration are Baden, Bavaria, Belgium, Bremen, Brazil, Duchy of Brunswick, Chili, the Argentine Confederation, the Germanic Confederation, Denmark, the Two Sicilies, the Republic of the Equator, the Roman States, Greece, Guatemala, Hayti, Hamburg, Hanover, the two Hesses, Lubeck, Mecklenburg-Strelitz, Mecklenburg-Schwerin, Nassau, Oldenburg, Parma, Holland, Peru, Portugal, Saxony, Saxe-Altenburg, Saxe-Coburg-Gotha, Saxe-Meiningen, Saxe-Weimer, Sweden, Switzerland, Tuscany, Würtemberg, Anhalt Dessau, Modena, New Granada, and Uruguay.

"Mr. Secretary Marcy, in acknowledging, on the 28th of July, 1856, the communication of the declaration of Paris made to the Government of the United States by the Count de Sartiges, proposed to add to the first article thereof the following words: 'and that the private property of the subjects or citizens of a belligerent on the high seas shall be exempted from seizure by public armed vessels of the other belligerents, except it be contrabaud;' and Mr. Marcy expressed the willingness of the Government of the United States to adopt the clause so amended, together with the other three principles contained in the declaration.

"Mr. Marcy also stated that he was directed to communicate the approval of the President of the second, third, and fourth propositions, independently of the first, should the proposed amendment of the first article be unacceptable.

"The United States minister in London, on the 24th of February, 1857, renewed the proposal in regard to the first article, and submitted a draft of convention, in which the article so amended would be embodied with the other three articles. But, before any decision was taken on this proposal, a change took place in the American Government by the election of a new President of the United States, and Mr. Dallas announced, on the 25th of April, 1857, that he was directed to suspend negotiations on the subject; up to the present time those negotiations have not been renewed.

"The consequence is, that the United States remaining outside the provisions of the declaration of Paris, the uncertainty of the law and of international duties with regard to such matters may give rise to differences of opinion between neutrals and belligerents which may occasion serious difficulties and even conflicts.

"It is with a view to remove beforehand such 'difficulties,' and to prevent such 'conflicts,' that I now address you.

"For this purpose I proceed to remark on the four articles, beginning, not with the first, but with the last:

"In a letter to the Earl of Clarendon of the 24th of February, 1857, Mr. Dallas, the minister of the United States, while submitting the draft of a new convention, explains the views of the Government of the United States on the four articles.

"In reference to the last article he says: 'The fourth of those principles, respecting blockades, had, it is believed, long since become a fixed rule of the law of war.'

"There can be no difference of opinion, therefore, with regard to the fourth article.

"With respect to the third article, the principle laid down in it has long been recognized as law, both in Great Britain and in the United States. Indeed this part of the law is stated by Chancellor Kent to be uniform in the two countries.

"With respect to the second article, Mr. Dallas says, in the letter before quoted: 'About two years prior to the meeting of the congress at Paris, negotiations had been originated and were in train with the maritime nations for the adoption of the second and third propositions substantially as enumerated in the declaration.'

"The United States have therefore no objection in principle to the second proposition.

"Indeed, Her Majesty's Government have to remark that this principle is adopted in the treaties between the United States and Russia of the 22d of July, 1854, and was sanctioned by the United States in the earliest period of the history of their independence by their accession to the armed neutrality.

"With Great Britain the case has been different. She formerly contended for the opposite principles as the established rule of the law of nations.

"But having, in 1856, upon full consideration, determined to depart from that rule, she means to adhere to the principle she then adopted. The United States, who have always desired this change, can, it may be presumed, have no difficulty in assenting to the principle set forth in the second article of the declaration of Paris.

"There remains only to be considered the first article, namely, that relating to privateering, from which the Government of the United States withhold their assent. Under these circumstances it is expedient to consider what is required on this subject by the general law of nations. Now, it must be borne in mind that privateers bearing the flag of one or other of the belligerents may be manned by lawless and abandoned men, who may commit, for the sake of plunder, the most destructive and sanguinary outrages.

"There can be no question but that the commander and crew of the ship bearing a letter of marque must, by law of nations, carry on their hostilities according to the established laws of war. Her Majesty's Government must, therefore, hold any Government issuing such letters of marque responsible for, and liable to make good, any losses sustained by Her Majesty's subjects in consequence of wrongful proceeding of vessels sailing under such letters of marque.

"In this way the object of the declaration of Paris may, to a certain extent, be attained without the adoption of any new principle.

"You will urge these views upon Mr. Seward.

"The proposals of Her Majesty's Government are made with a view to limit and restrain that destruction of property and that interruption of trade which must, in a greater or less degree, be the inevitable consequence of the present hostilities. Her Majesty's Government expect that these proposals will be received by the United States Government in a friendly spirit. If such shall be the case, you will endeavor

(in concert with M. Mercier) to come to an agreement on the subject binding France, Great Britain, and the United States.

"If these proposals should, however, be rejected, Her Majesty's Government will consider what other steps should be taken with a view to protect from wrong and injury the trade and the property and persons of British subjects.

"I am, &c.,

"J. RUSSELL.

"The Lord LYONS."

For discussion by Mr. Seward of the Treaty of Paris, see Mr. Seward, Sec. of State, to Mr. Clay, Apr. 24, 1861. MSS. Inst., Russia.

"Your dispatch of August 22, No. 35, has been received. I learn from it that Mr. Thouvenel is unwilling to negotiate for an accession by the United States to the declaration of the congress of Paris concerning the rights of neutrals in maritime war, except 'on a distinct understanding that it is to have no bearing, directly or indirectly, on the question of the domestic difficulty now existing in our country,' and that to render the matter certain, Mr. Thouvenel proposes to make a written declaration simultaneously with his execution of the projected convention for that accession.

"You have sent me a copy of a note to this effect addressed to you by Mr. Thouvenel, and have also represented to me an official conversation which he has held with you upon the same subject. The declaration which Mr. Thouvenel thus proposes to make is in these words:

"'In affixing his signature to the convention concluded on date of this day between France and the United States, the undersigned declares, in execution of the orders of the Emperor, that the Government of His Majesty does not intend to undertake by the said convention any engagements of a nature to implicate it, directly or indirectly, in the interual conflict now existing in the United States.'

"My dispatch of the 17th day of August last, No. 41, which you must have received some time ago, will already have prepared you to expect my approval of the decision to wait for specific instructions in this new emergency at which you have arrived.

"The obscurity of the text of the declaration which Mr. Thouvenel submits to us is sufficiently relieved by his verbal explanations. According to your report of the conversation, before referred to, he said that both France and Great Britain had already announced that they would take no part in our domestic controversy, and they thought that a frank and open declaration in advance of the execution of the projected convention might save difficulty and misconception hereafter. He further said, in the way of specification, that the provisions of the convention standing alone might bind England and France to pursue and punish the privateers of the South as pirates; that they are unwilling to do this, and had so declared. He said, also, that we could deal with these people as we choose, and they (England and France) could only express their regrets on the score of humanity if we should deal with them as pirates, but that they could not participate in such a course. He added

that although both England and France are anxious to have the adhesion of the United States to the declaration of Paris, yet that they would rather dispense with it altogether than be drawn into our domestic controversy. He insisted somewhat pointedly that we cou'd take no just exception to this outside declaration, to be made simultaneously with the execution of the convention, unless we intended that they (England and France) shall be made parties to our controversy, and that the very fact of your hesitation was an additional reason why they should insist upon making such contemporaneous declaration as they proposed.

"These remarks of Mr. Thouvenel are certainly distinguished by entire frankness. It shall be my effort to reply to them with moderation and candor.

"In 1856, France, Great Britain, Russia, Prussia, Sardinia, and Turkey, being assembled in congress at Paris, with a view to modify the law of nations so as to meliorate the evils of maritime war, adopted and set forth a declaration, which is in the following words:

"1st. Privateering is and remains abolished.

"2d. The neutral flag covers enemy's goods, with the exception of contraband of war.

"3d. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag.

"4th. Blockades, in order to be binding, must be effective—that is to say, maintained by forces sufficient really to prevent access to the coast of the enemy.

"The states which constituted the congress mutually agreed to submit the declaration to all other nations and invite them to accede to it. It was to be submitted as no special or narrow treaty between particular states for limited periods or special purposes of advantage, or under peculiar circumstances; but, on the contrary, its several articles were, by voluntary acceptance of maritime powers, to constitute a new chapter in the law of nations, and each one of the articles was to be universal and eternal in its application and obligation. France especially invited the United States to accede to these articles. An invitation was equally tendered to all other civilized nations, and the articles have been already adopted by forty-one of the powers thus invited. The United States hesitated, but only for the purpose of making an effort to induce the other parties to enlarge the beneficent scope of the declaration. Having failed in that effort, they now, after a delay not unusual in such great international discussions, offer their adhesion to that declaration, pure and simple, in the form, words and manner in which it was originally adopted and accepted by all of the forty-six nations which have become parties to it. France declines to receive that adhesion, unless she be allowed to make a special declaration, which would constitute an additional and qualifying article, limiting the obligations of France to the United States to a narrower range

than the obligations which the United States must assume towards France and towards every other one of the forty-six sovereigns who are parties to it, and narrower than the mutual obligations of all those parties, including France herself.

"If we should accede to that condition, it manifestly would not be the declaration of the congress of Paris to which we would be adhering, but a different and special and peculiar treaty between France and the United States only. Even as such a treaty it would be unequal. Assuming that Mr. Thouvenel's reasoning is correct, we should in that case be contracting an obligation, directly or indirectly, to implicate ourselves in any internal conflict that may now be existing or that may hereafter occur in France, while she would be distinctly excused by us from any similar duty towards the United States.

"I know that France is a friend, and means to be just and equal towards the United States. I must assume, therefore, that she means not to make an exceptional arrangement with us, but to carry out the same arrangement in her interpretation of the obligations of the declaration of the congress of Paris in regard to other powers. Thus carried out, the declaration of Paris would be expounded so as to exclude all internal conflicts in states from the application of the articles of that celebrated declaration. Most of the wars of modern times—perhaps of all times—have been insurrectionary wars, or "internal conflicts." If the position now assumed by France should thus be taken by all the other parties to the declaration, then it would follow that the first article of that instrument, instead of being, in fact, an universal and effectual inhibition of the practice of privateering, would abrogate it only in wars between foreign nations, while it would enjoy universal toleration in civil and social wars. With great deference I cannot but think that thus modified the declaration of the congress of Paris would lose much of the reverence which it has hitherto received from Christian nations. If it were proper for me to pursue the argument further I might add that sedition, insurrection, and treason would find in such a new reading of the declaration of Paris encouragement which would tend to render the most stable and even the most beneficent systems of government insecure. Nor do I know on what grounds it can be contended that practices more destructive to property and life ought to be tolerated in civil or fratricidal wars than are allowed in wars between independent nations.

"I cannot, indeed, admit that the engagement which France is required to make without the qualifying declaration in question would, directly or indirectly, implicate her in our internal conflicts. But if such should be its effect, I must, in the first place, disclaim any desire for such an intervention on the part of the United States. The whole of this long correspondence has had for one of its objects the purpose of averting any such intervention. If, however, such an intervention would be the result of the unqualified execution of the convention by

France, then the fault clearly must be inherent in the declaration of the congress of Paris itself, and it is not a result of anything that the United States have done or proposed.

"Two motives induced them to tender their adhesion to that declaration—first, a sincere desire to co-operate with other progressive nations in the melioration of the rigors of maritime war; second, a desire to relieve France from any apprehension of danger to the lives or property of her people from violence to occur in the course of the civil conflict in which we are engaged, by giving her, unasked, all the guarantees in that respect which are contained in the declaration of the congress of Paris. The latter of these two motives is now put to rest, insomuch as France declines the guarantees we offer. Doubtlessly, she is satisfied that they are unnecessary. We have always practiced on the principles of the declaration. We did so long before they were adopted by the congress of Paris, so far as the rights of neutrals or friendly states are concerned. While our relations with France remain as they now are we shall continue the same practice none the less faithfully than if bound to do so by a solemn convention.

"The other and higher motive will remain unsatisfied, and it will lose none of its force. We shall be ready to accede to the declaration of Paris with every power that will agree to adopt its principles for the government of its relations to us, and which shall be content to accept our adhesion on the same basis upon which all the other parties to it have acceded.

"We know that France has a high and generous ambition. We shall wait for her to accept hereafter that co-operation on our part in a great reform which she now declines. We shall not doubt that when the present embarrassment which causes her to decline this co-operation shall have been removed, as it soon will be, she will then agree with us to go still further, and abolish the confiscation of property of non-belligerent citizens and subjects in maritime war.

"You will inform Mr. Thouvenel that the proposed declaration on the part of the Emperor is deemed inadmissible by the President of the United States; and if it shall be still insisted upon, you will then inform him that you are instructed for the present to desist from further negotiation on the subject involved."

Mr. Seward, Sec. of State, to Mr. Dayton, Sept. 10, 1861. MSS. Inst., France; Dip. Corr., 1861.

"I have the honor to acknowledge the receipt of your letter of the 19th instant, communicating to this Government the text of a dispatch from Count Bismarck, to the effect that private property on the high seas will be exempt from seizure by the ships of His Majesty the King of Prussia, without regard to reciprocity.

"In compliance with the request further contained in your note, that communication has been officially made public from this Department.

"It is now nearly a century since the United States, through Thomas Jefferson, Benjamin Franklin, and John Adams, their plenipotentiaries, and Prussia, under the guidance of the great Frederick, entered into a treaty of amity and commerce, to be in force for ten years from its date, whereby it was agreed that if war should unhappily arise between the two contracting parties, 'all merchant and trading vessels employed in exchanging the products of different places, and thereby rendering the necessaries, conveniences, and comforts of human life more easy to be obtained, and more general, should be allowed to pass free and unmolested; and that neither of the contracting powers should grant or issue any commission to any private armed vessels, empowering them to take or destroy such trading vessels, or interrupt such commerce.'

"The Government of the United States receives with great pleasure the renewed adherence of a great and enlightened German Government to the principle temporarily established by the treaty of 1785, and since then advocated by this Government whenever opportunity has offered. In 1854, President Pierce, in his annual message to Congress, said: 'Should the leading powers of Europe concur in proposing as a rule of international law, to exempt private property upon the ocean from seizure by public armed cruisers, as well as by privateers, the United States will readily meet them on that broad ground.' In 1856 this Government was invited to give its adhesion to the declaration of Paris. Mr. Marcy, the then Secretary of State, replied: 'The President proposes to add to the first proposition in the declaration of the congress at Paris the following words: "And that the private property of the subjects or citizens of a belligerent on the high seas shall be exempted from seizure by public armed vessels of the other belligerent, unless it be contraband." Thus amended, the Government of the United States will adopt it, together with the other three principles contained in that declaration.' And again, in 1861, Mr. Seward renewed the offer to give the adhesion of the United States to the declaration of the congress at Paris, and expressed a preference that the same amendment should be retained.

"Count Bismarck's dispatch, communicated in your letter of the 19th instant, shows that North Germany is willing to recognize this principle (even without reciprocity) in the war which has now unhappily broken out between that country and France. This gives reason to hope that the Government and the people of the United States may soon be gratified by seeing it universally recognized as another restraining and harmonizing influence imposed by modern civilization upon the art of war."

Mr. Fish, Sec. of State, to Mr. Gerolt, July 22, 1870. MSS. Notes, Germ.; For. Rel., 1870.

"You are informed that you are authorized to obtain the recognition of the principle of the exemption of private property of citizens or subjects

of either of the two parties (to the Franco-German war) from capture on the high seas by either privateers or public vessels of the other."

Mr. Fish, Sec. of State, to Mr. Bancroft, Oct. 28, 1870. MSS. Inst., Germ.; For. Rel., 1870.

"The undersigned, Secretary of State of the United States, has the honor to acknowledge the receipt of the note of Baron Gerolt, the envoy and minister plenipotentiary of the North German Union, of the 14th instant, inclosing a translation of a telegram from Count Bismarck, of the 13th instant, to the North German legation at Washington, in the following words:

"The treatment of German merchant ships by France obliges us to revoke the declaration made by us at the beginning of the war, exempting all French merchant vessels, not carrying contraband of war articles, from capture by our war vessels.

"As neutral property may have been shipped on board of French vessels in confidence of the above declaration, the new measure will not be carried into effect until four weeks after this date.

"In informing Baron Gerolt that the information so communicated will be made public, the undersigned has the honor further to express the great regret with which the Government of the United States receives the information that circumstances have arisen which in the opinion of the Government of North Germany justifies its withdrawal from a position which the Government of the United States regarded with very great satisfaction, as taken in the best interests of civilization.

"The telegram from Count Bismarck, which was communicated to the undersigned by Baron Gerolt on the 19th day of July last, was in the following language:

"Private property on high seas will be exempted from seizure by His Majesty's ships, without regard to reciprocity.

"The notice now communicated to the undersigned by Baron Gerolt relates in terms to French merchant vessels, and makes no mention of American merchant vessels. To avoid misapprehension and future difficulty, the undersigned has the honor to inquire of Baron Gerolt whether the merchant vessels of the United States are to continue exempt from seizure, or whether they are to be considered at the expiration of the term named as relegated to their rights under the 13th article of the treaty of 1799 between the United States and Prussia, which was revived by the 12th article of the treaty of 1828.

"'ART. XIII. And in the same case of one of the contracting parties being engaged in war with any other power, to prevent all the difficulties and misunderstandings that usually arise respecting merchandise of contraband, such as arms, ammunition, and military stores of every kind, no such articles carried in the vessels, or by the subjects or citizens of either party, to the enemies of the other, shall be deemed contraband, so as to induce confiscation or condemnation and a loss of property to individuals. Nevertheless, it shall be lawful to stop such vessels and articles, and to detain them for such length of time as the captors may think necessary to prevent the inconvenience or damage that might ensue from their proceeding, paying, however, a reasonable compensation for the loss such arrest shall occasion to the proprietors;

and it shall further be allowed to use in the service of the captors the whole or any part of the military stores so detained, paying the owners the full value of the same, to be ascertained by the current price at the place of its destination. But in the case supposed of a vessel stopped for articles of contraband, if the master of the vessel stopped will deliver out the goods supposed to be of contraband nature, he shall be admitted to do it, and the vessel shall not in that case be carried into any port, nor further detained, but shall be allowed to proceed on her voyage.

"'All cannon, mortars, fire-arms, pistols, bombs, grenades, bullets, balls, muskets, flints, matches, powder, saltpeter, sulphur, cuirasses, pikes, swords, belts, cartouch boxes, saddles, and bridles, beyond the quantity necessary for the use of the ship, or beyond that which every man serving on board the vessel, or passenger, ought to have; and in general whatever is comprised under the denomination of arms and military stores, of what description soever, shall be deemed objects of contraband.'"

Mr. Fish, Sec. of State, to Mr. Gerolt, Jan. 14, 1871. MSS. Notes, Germ.; For. Rel., 1871.

"The undersigned, Secretary of State of the United States, has the honor to acknowledge the receipt of the note which Baron Gerolt, envoy and minister plenipotentiary of the North German Union, did him the honor, on the 16th instant, to address to him upon the revocation of the declaration made by the North German Government at the commencement of the war with France, for the protection of all private property at sea. Baron Gerolt apparently labors under a mistake in supposing that the undersigned, in his note of the 14th instant, inquired whether the merchant vessels of the United States would, after the inauguration of the new measures, still be protected from capture as before, and would be treated according to the provisions of the treaty between Prussia and the United States which was cited by the undersigned.

"The undersigned was unfortunate in the use of language in his note of the 14th instant, if it is capable of being construed as implying any doubt of the purpose of the Government of His Majesty the King of Prussia, or of the Government of North Germany, to observe faithfully its treaty obligations toward the United States. The telegram of Count Bismarck, communicated to the undersigned by Baron Gerolt on the 14th instant, related to terms to French vessels alone.

"It was the object of the undersigned to ascertain whether the vessels of the United States were to continue at liberty to transport contraband of war without liability to seizure, in accordance with the terms of the notice communicated to the undersigned on the 19th of July last. If it should appear that it was the purpose of the North German Government to withdraw the privilege so conceded, it would follow that the vessels of the United States would be remitted to the rights secured to them by the treaty cited in the undersigned's note of the 14th instant. The undersigned hopes to receive at an early day information on this subject which may be made public.

"The undersigned observes with some surprise that Baron Gerolt thinks that it might be considered as a matter of course that articles contraband of war were not intended to be embraced among the items of 'private property on the high seas to be exempted from seizure,'

under the notice of the 19th of July last. The undersigned takes the liberty to refer Baron Gerolt to the very precise language in the telegram of Count Bismarck, and to say that it seems to the undersigned scarcely probable or even possible that a statesman so distinguished as Count Bismarck, and so accurate in the choice of words to express his meaning, would have failed to set forth so important an exception, had he not intended to extend the exemption from seizure to all private property."

Same to same, Jan. 19, 1871; *ibid.*

"Your dispatch, No. 106, of the 21st January last, has been received. It is accompanied by translations of certain recent decrees of the Peruvian Government and copies of circulars addressed by the minister of foreign affairs of Peru to the representatives of friendly nations. All these inclosures, with the exception of those which you number 6 and 7, relate to internal affairs of that country, and do not appear to call for any special instructions. One of the papers referred to, however, assumes that Chili has seized those nitrates on the Peruvian coast which Peru claims as her own, and is exporting their products in neutral vessels, and that, therefore, Peruvian cruisers will not respect a neutral flag detected in that business.

"Although in the present subdued condition of the Peruvian navy there may not be much risk of capture of neutral vessels by the Peruvian men-of-war, it is proper that you should remind that Government of the eighteenth article of its treaty of 1870 with the United States, which expressly stipulates that free ships shall give freedom to goods, and that everything shall be deemed free which shall be found on board the vessels belonging to citizens of either of the contracting parties, although the whole lading or a part thereof should belong to the enemies of either, articles contraband of war always excepted. It seems clear, therefore, that if a Peruvian cruiser should capture an American vessel whose cargo, in whole or in part, should consist of the nitrate referred to, the treaty would be violated in a case for which it was specially intended to provide. For such an act that Government would certainly be held accountable. It is hoped, therefore, that that Government, as a proof of its friendly disposition toward that of the United States, and of its desire to observe in good faith its formal treaty stipulations, will either so modify the circular referred to or will give such orders as may prevent an act of which we should have such just cause to complain.

"I have received copies of the two circulars through the chargé d'affaires of Peru in Washington, and have prepared replies thereto, which I inclose. You will please retain copies of the same on your files and deliver the originals."

Mr. Evarts, Sec. of State, to Mr. Christiancy, Mar. 1, 1880. MSS. Inst., Peru; For. Rel., 1880.

"It is natural that Peru should be incensed at the exportation of nitrate for the benefit and account of her adversary. It is to be regretted, however, that she should allow her resentment to lead her to claim a belligerent right not acknowledged by any authority, that of capturing on the high seas vessels of a neutral for having on board a cargo from a place which she owned before the war. In this case, however, her title to it was annulled, or at least suspended, by the armed occupation by Chili of the region whence the article was taken. The attempt of Peru, therefore, to avenge upon neutrals her want of good fortune in the contest will not, it is to be feared, add to her reputation for magnanimity or regard to public law, and certainly will not be acquiesced in by the Governments of neutrals, whose interests may thereby be affected."

Same to same, Mar. 2, 1880; *ibid.;* Doc. with President's message of Jan. 26, 1882.

The object of the armed neutrality entered into by the northern European maritime powers in 1780, frequently above referred to, was to establish, as against England, the rights of neutral property on the high seas. By the treaty of July 11, 1799, between the United States and Prussia, the doctrine of free ships making free goods was reaffirmed. Russia, Sweden, and Denmark having about the same time entered into separate treaties for renewing the principles of the armed neutrality, Great Britain laid an embargo on the shipping of those nations, and sent a squadron to the Baltic, whose operations culminated in the destruction of the Danish fleet.

47 West. Rev., 349. See *supra*, §§ 149, 159.

"That the American amendment was necessary to give to the 'declaration' of Paris full effect, was soon recognized by most of the European Governments, as the writer of these notes has reason to know from the perusal of the papers in the Department of State at Washington, which were placed at his disposition by the late Secretaries with a view to the preparation of the present edition of this work. Among the minor maritime states there was a clear unanimity of sentiment, but they naturally awaited, before giving a formal reply, the answer of the great powers. The adhesion of Russia was promptly rendered. Prince Gortschakoff instructed, so early as September, 1856, the Russian minister at Washington to communicate to Secretary Marcy a copy of his instructions to Baron Brurow. He says: 'Your excellency will have an opportunity in Paris of taking cognizance of Mr. Marcy's note, in which the American proposition is developed in that cautious and lucid manner which commands conviction. The Secretary of State does not argue the exclusive interests of the United States; his plea is put for the whole of mankind. It grows out of a generous thought, the embodiment of which rests upon arguments which admit of no reply. The attention of the Emperor has, in an eminent degree, been enlisted by the overtures of the American Cabinet. In his view of the question they deserve to be taken into serious consideration by the powers which signed the Treaty of Paris. They would honor themselves should they, by a resolution taken in common and proclaimed to the world, apply to private property on the seas the principle of inviolability which they have ever professed for it on land. They would crown the work

of pacification which has called them together, and give it an additional guarantee of permanence. By order of the Emperor you are invited to entertain this idea before the minister of foreign affairs, and to apprise him forthwith that should the American proposition become the subject of common deliberation among the powers, it would receive a most decisive support at the hands of the representative of His Imperial Majesty. You are even authorized to declare that our august master would be disposed to take the initiative of this question.'

"The American minister at Paris was assured by Count Walewski, in November, 1856, that the French Government would agree to the 'declaration' as modified by us, though a formal assent was deferred with a view to consultation with the other parties to the Treaty of Paris. Prussia formally announced in May, 1857, to Mr. Cass, Secretary of State, who had replaced Mr. Marcy, that the Cabinet of Berlin gave its adhesion to the proposition made by the President of the United States to be added to the principles agreed on at Paris, declaring, at the same time, that 'if this proposition should become the subject of a collective deliberation, it can rely on the most marked support of Prussia, which earnestly desires that other states will unite in a determination, the benefits of which will apply to all nations.'"

Lawrence's Wheaton (ed. 1863), 640, 641.

"This point appears not to have escaped the attention of foreign powers, and with a view to remove difficulties and to prevent conflicts which might arise from differences of opinion between belligerents and neutrals while the United States remained outside of the Treaty of Paris, Lord J. Russell, on the 18th of May, 1861, instructed Lord Lyons to waive (as mentioned in a note to chap. 2, §10, of this part) the privateer clause, and, in concert with the French minister at Washington, M. Mercier, to come to an agreement on the other articles binding on France, Great Britain, and the United States. (Papers relating to foreign affairs, etc., accompanying President's message, December, 1861, 133). * * *

"For the reason already explained, the Executive alone is not, under the Constitution of the United States, competent to effect modifications of the public law, and should the case come before the judiciary, the courts might not deem themselves bound by the assurance contained in Mr. Seward's instructions of the 7th of September, 1861, to Mr. Adams, and reiterated in the note of December 26, 1861, to Lord Lyons, that the neutral flag should cover enemy's goods not contraband of war."

*Ibid.*, 778.

So far, however, as relates to the interpretation of existing laws, the above statement is open to criticism. The executive department, being charged with the foreign relations of the Government, is the only authority to which foreign powers can look as determining these relations, and the law to which they are subject. Nor, as has been seen, is the executive department, when directing its officers to take or not take an enemy's goods on neutral ships, in any way bound by the rulings of the courts.

*Supra*, §§ 78, 138, 238.

"During the civil war in the United States, the French Government felt uneasy lest France should suffer by reason of the fact that, under her treaty of 1800, the United States might condemn French goods in

rebel vessels, while it would not do so with the goods of other nations with whom the United States had no such treaty. This, no doubt, added a motive for the French to unite with England to arrange the difficulties that lay in the way of the accession of the United States to the declaration of Paris. Mr. Seward's letter to Mr. Adams of 7th September, 1861, in which he breaks off the negotiations for an accession to the declaration of Paris, still declares that the United States, in this war, will adopt the policy 'according to our traditional principles, that Her Majesty's flag covers enemy's goods not contraband of war. Goods of Her Majesty's subjects not contraband of war are exempt from confiscation, though found under a disloyal flag.' (Dip. Corr., 1861, 143.) And, in his letter to Mr. Dayton, of September 10, 1861, on the same subject, Mr. Seward says: 'We have always practiced on the principles of the declaration. We did so long before they were adopted by the congress of Paris, so far as the rights of neutral or friendly states are concerned. While our relations with France remain as they now are, we shall continue the same practice, none the less faithfully than if bound to do so by a solemn convention.' (Dip. Corr., 1861, 251.)

"The British and French Governments, through their consuls at Charleston, made an arrangement with the Confederacy, by which the Confederates agreed to adopt the third, fourth, and fifth articles of Paris, but not the first. (British Parl. Papers, North America, No. 3.) And in his letter to Lord Lyons on the Trent affair, Mr. Seward refers to the fact that the United States had, in this war, made known its intention to act in accordance with the second and third articles of the declaration of Paris."

Dana's Wheaton, § 475, note 223.

"Mr. Dana, in his edition of Wheaton's Elements of International Law, page 610, has observed in a note upon the second resolution of the declaration of Paris, that 'if a nation party to the declaration is at war with one that is not, the former is not bound to abandon its right to take enemy's goods from vessels of neutral nations, which are parties to the declaration, and as the stipulation is made not from any doubts that as between belligerents only such captures are the natural and proper results of war, but for the benefit of neutrals vexed thereby, all parties to the declaration, when they are neutral, are in danger of losing the benefits of it.' The conclusion at which Mr. Dana arrives seems to be insufficiently warranted if the circumstances which led to the declaration of Paris are taken into account, seeing that the declaration of the seven powers assembled in congress was simply a confirmation on their part of a reform in the practice of maritime warfare, which had been inaugurated by France and Great Britain in 1854, under a mutual agreement with respect to neutrals in a war against an enemy who was no party to the agreement. A memoir read by M. Drouyn de Lhuys before the French Academy on 4th April, 1868, may be cited in illustration of the views upon which France and Great Britain acted in 1854. His excellency, who was minister of foreign affairs in Paris in 1854, and who in that capacity initiated the mutual compromise between France and Great Britain, which was subsequently embodied in the second and third resolutions of the declaration of 1856, thus expresses himself: 'The system inaugurated by the war of 1854 responded so well to the common wants of all countries that it took without difficulty the character of a definitive reform of international law. At the congress of peace assembled in Paris in 1856, the plenipotentiaries, whose mission it was to consecrate the results of the war, found themselves naturally led to comprise in it the confirmation of the rules, which had been observed by the belligerent powers with regard to neutrals. This was the object of the declaration of Paris of 1856.'

"Mr. Dana does not appear to have been aware at the time when he so interpreted the declaration of Paris, that France and Great Britain, the two powers with whom the declaration originated, had in practice put an interpretation on the second and third resolutions which is calculated to relieve all neutrals, who have adhered to the declaration of Paris, from all risk of losing the benefit of their adherence to it under the circumstances contemplated by Mr. Dana. For instance, in anticipation of a joint war against China, which power has not acceded to the declaration of Paris, France and Great Britain, as allies in the event of war, issued each of them an ordinance 'as to the observance of the rules of maritime law under the declaration of the congress of Paris of 1856 towards the vessels and goods of the enemy and of neutral powers.'"

Sir T. Twiss on Belligerent Rights, &c., London, 1884.

"The declaration of Paris, 1856," says Dr. Woolsey (Int. Law App., iii., note 25), "by which the neutral flag covers enemies' goods, destroyed the force of the rule of 1756, for the new rule protects neutral trade in innocent articles between two hostile ports, whether such trade had been opened to neutrals in time of peace or not. The rule is expressed in the most general terms. But, although this rule is obsolete, and has gone into history for the most part, the United States, not being a party to the above-mentioned declaration, may yet be under the operation of the old British law in regard to coasting and colonial trade. Here two questions may be asked, the one touching the lawfulness of coasting trade proper, the other touching the conveyance by neutrals of their goods, brought out of foreign ports, from one port of the enemy to another. Our Government has contended for the right of neutrals to engage in both descriptions of trade, if we are not in an error, while some of our publicists hold the first to be reasonably forbidden, the other to be allowed. Judge Story says (Life and Letters, i, 285–289) that, in his private opinion, 'the coasting trade of nations, in its strictest character, is so exclusively a national trade that neutrals can never be permitted to engage in it during war without being affected with the penalty of confiscation. The British have unjustly extended the doctrine to cases where a neutral has traded between ports of the enemy with a cargo taken in at a neutral country.' He is 'as clearly satisfied that the colonial trade between the mother country and the colony, where that trade is thrown open merely in war, is liable, in most instances, to the same penalty. But the British have extended their doctrine to all intercourse with the colonies, even from or to a neutral country, and herein, it seems [to him], they have abused the rule.' There seems to be reason for such a difference. To open coasting trade to neutrals is a confession of inability to carry on that branch of trade on account of apprehensions from the enemy's force, and an invitation to neutrals to afford relief from the pressure of war. It is to adopt a new kind of vessel, on the ground that they cannot be captured. The belligerent surely has the right to say that his attempts to injure his enemy shall not be paralyzed in this manner. But he has no right to forbid the neutral to carry his own goods from hostile port to hostile port, when he might have done it before. Every right of innocent trade, then, enjoyed by the neutral in peace, should be allowed after the breaking out of the war; but new rights, given to them on account of the war, may be disregarded by the belligerent as injuring his interests.

"Hautefeuille remarks, on the other side, that the sovereign who can interdict can also permit a certain kind of commerce. But this is begging the question. Can he, by such privileges, restrain his enemy

from annoying him—privileges which are nothing but taking the neutral trader into a kind of partnership? Suppose that he hired war vessels from a neutral sovereign, would that exempt them from capture?"

"There are many reasons which render the maritime trade of Great Britain the most valuable, as it is the largest, in the world, and indeed because it is the largest; and were our navy of ten times the strength and numbers it is, our trade would be still more valuable."

144 Edinb. Rev., 363, in stating why Great Britain should accept the doctrine of free ships making free goods.

As to Russia's vacillating attitude as to armed neutrality, see 8 John Quincy Adams' Memoirs, 67.

For an account of the action of the United States in reference to the rule of 1756, see 3 Phill., Int. Law (3 ed.), 378, 382.

Mr. J. Q. Adams' correspondence, when at Berlin in 1798, as to the neutrality of free ships, is given in 2 Am. St. Pap. (For. Rel.), 252 *ff.*

The full text of the exposition of the doctrine of neutral rights at sea by Mr. J. Q. Adams, Sec. of State, in his instructions to Mr. Rush, of July 28, 1823, is given in Senate Ex. Doc. 396, 18th Cong., 2d sess., 5 Am. St. Pap. (For. Rel.), 529.

The correspondence in 1854 between the United States and other countries as to belligerent rights as affected by the then pending war, is given in President Pierce's message of May 11, 1854, House Ex. Doc. 103, 33d Cong., 1st sess.

The Brit. and For. St. Pap. for 1855–'56, vol. 46, 821, gives correspondence between the United States and Denmark, France, Great Britain, Russia and Sweden and Norway, relative to rights of neutrality and rights of belligerents in war. Among these papers are the following: The Danish minister to Mr. Marcy, Sec. of State, Jan. 20, 1854, as to the Russian war then beginning. The Swedish chargé d'affaires to Mr. Marcy, Jan. 28, 1854, on same subject. Mr. Marcy, Sec. of State, to Mr. Buchanan, Feb. 14, 1854. Mr. Buchanan, U. S. Minister at London, to Mr. Marcy, Feb. 24, Mar. 17, 1854 (elsewhere noted). Mr. Mason, U. S. minister in Paris, to Mr. Marcy, as to French Government's view on privateering.

Much of the correspondence as to the Treaty of Paris is given in Brit. and For. St. Pap., 1864–'65, vol. 55.

By the President's instructions of the 28th of August, 1812, issued under and in accordance with the prize act of that year (2 Stat. L., 761), British and American property, shipped in Great Britain, on board a vessel of the United States, after a knowledge of the war, but in consequence of the repeal of the British orders in council, are protected from forfeiture.

The Thomas Gibbons, 8 Cranch, 421; The Mary, 9 *ibid.*, 126.

Goods appearing by ship's papers to be a consignment from alien enemies to American merchants, condemned *in toto* as prize, although further proof was offered that American merchants were jointly interested, and that they had a lien upon the goods in consequence of advances made by them.

The Frances, 8 Cranch, 335.

If a British merchant purchase with his own funds, two cargoes of goods, in consequence of, but not in strict conformity with, the orders of an American house, and ship them to America, giving the consignors an option within 24 hours after receipt of his letter to take or reject both cargoes, and if they give notice within the time that they will take one cargo, but will consider as to the other, this puts it in the power of the British merchant either to cast the whole upon the American house, or to resume his property, and make them accountable for that which came to their hands; and, therefore the right of property in cargo, does not, *in transitu*, vest in the American house, but remains in the British subject, and is liable to condemnation, he being an enemy.

The Frances, 9 Cranch, 183.

A vessel of the United States, which went to England after the war was known, and brought thence a cargo belonging chiefly to British subjects, condemned.

The St. Lawrence, 8 Cranch, 434.

The rules, that neutral bottoms make neutral goods, and that enemies' bottoms make enemies' goods, are not only separable in their nature, but have generally been separated; and they are held in the United States to be distinct.

The Nereide, 9 Cranch, 388.

A stipulation in a treaty that neutral bottoms shall make neutral goods, does not by necessary implication introduce the principle that enemies' bottoms shall make enemies' goods.

*Ibid.*

Reciprocating to the subjects of a nation, or retaliating on them its unjust proceedings towards our citizens, is a political, not a legal measure.

*Ibid.*

"The rule that the goods of an enemy, found in the vessel of a friend, are prize of war, and that the goods of a friend, found in the vessel of an enemy, are to be restored, is believed to be a part of the original law of nations, as generally, perhaps universally, acknowledged. Certainly, it has been fully and unequivocally recognized by the United States. This rule is founded on the simple and intelligible principle that war gives a full right to capture the goods of an enemy, but gives no right to capture the goods of a friend. In the practical application of this principle, so as to form the rule, the propositions that the neutral flag constitutes no protection to enemy property, and that the belligerent flag communicates no hostile character to neutral property, are necessarily admitted. The character of the property, taken distinctly and separately from all other considerations, depends in no degree upon the character of the vehicle in which it is found.

"Many nations have believed it to be their interest to vary this simple and natural principle of public law. They have changed it by convention between themselves, as far as they have believed it to be for their advantage to change it. But unless there be something in the nature of the rule which renders its parts unsusceptible of division, nations must be capable of dividing it by express compact; and if they stipulate either that the neutral flag shall cover enemy goods, or that the enemy flag shall infect friendly goods, there would, in reason, seem to be no necessity for implying a distinct stipulation not expressed by the parties. Treaties are formed upon deliberate reflection. Diplomatic men read the public treaties made by other nations, and cannot be supposed either to omit or insert an article, common in public treaties, without being aware of the effect of such omission or insertion. Neither the one nor the other is to be ascribed to inattention. And if an omitted article be not necessarily implied in one which is inserted, the subject to which that article would apply remains under the ancient rule. That the stipulation of immunity to enemy goods, in the bottoms of one of the parties being neutral, does not imply a surrender of the goods of that party being neutral if found in the vessel of an enemy, is the proposition of the counsel for the claimant, and he powerfully sustains that proposition by arguments arising from the nature of the two stipulations. The agreement that neutral bottoms shall make neutral goods, is, he very justly remarks, a concession made by the belligerent to the neutral. It enlarges the sphere of neutral commerce, and gives to the neutral flag a capacity not given to it by the law of nations.

"The stipulation which subjects neutral property found in the bottom of an enemy to condemnation as prize of war, is a concession made by the neutral to the belligerent. It narrows the sphere of neutral commerce, and takes from the neutral a privilege he possessed under the law of nations. The one may be, and often is, exchanged for the other. But it may be the interest and the will of both parties to stipulate the one without the other; and if it be their interest or their will, what shall prevent its accomplishment? A neutral may give some other compensation for the privilege of transporting enemy goods in safety, or both parties may find an interest in stipulating for this privilege, and neither may be disposed to make to, or require from, the other, the surrender of any right as its consideration. What shall restrain independent nations from making such a compact? And how is their intention to be communicated to each other or to the world, so properly as by the compact itself?

"If reason can furnish no evidence of the indissolubility of the two maxims, the supporters of that proposition will certainly derive no aid from the history of their progress, from the first attempts at their introduction to the present moment.

"For a considerable length of time they were the companions of each other, not as one maxim consisting of a single indivisible principle, but

as two stipulations, the one, in the view of the parties, forming a natural and obvious consideration for the other. The celebrated compact termed the armed neutrality attempted to effect by force a great revolution in the law of nations. The attempt failed, but it made a deep and lasting impression on public sentiment. The character of this effort has been accurately stated by the counsel for the claimants. Its object was to enlarge, and not in any thing to diminish, the rights of neutrals. The great powers, parties to this agreement, contended for the principle that free ships should make free goods, but not for the converse maxim; so far were they from supposing the one to follow as a corollary from the other, that the contrary opinion was openly and distinctly avowed. The King of Prussia declared his expectation that in future neutral bottoms would protect the goods of an enemy, and that neutral goods would be safe in an enemy bottom. There is no reason to believe that this opinion was not common to those powers who acceded to the principles of the armed neutrality.

"From that epoch to the present [1815], in the various treaties which have been formed, some contain no article on the subject, and consequently leave the ancient rule in full force. Some stipulate that the character of the cargo shall depend upon the flag, some that the neutral flag shall protect the goods of an enemy, some that the goods of a neutral in the vessel of a friend (!) shall be prize of war, and some that the goods of an enemy in a neutral bottom shall be safe, and that friendly goods in the bottom of an enemy shall also be safe.

"This review, which was taken with minute accuracy at the bar, certainly demonstrates that in public opinion no two principles are more distinct and independent of each other than the two which have been contended to be inseparable."

Marshall, C. J.; The Nereide, 9 Cranch., 418. See The Julia, 8 Cranch, 181.

Goods, the property of merchants actually domiciled in the enemy's country at the breaking out of the war, are subject to capture and confiscation as prize.

The Mary and Susan, 1 Wheat., 46.

Property in transit from a belligerent to a neutral is subject to capture and condemnation, if it has not vested at the time of the capture in the neutral consignees.

The St. Jose Indiano, *ibid.*, 208.

Covering belligerent property by neutral papers is not contrary to the law of nations, and, in neutral courts, does not invalidate contracts made in relation to such property.

De Valengin *v.* Duffy, 14 Pet., 282.

An enemy's commerce under neutral disguises has no claim to neutral immunity.

The Bermuda, 3 Wall., 514.

Presumptions of ownership in a neutral, arising from registry or other documents, may be rebutted by circumstances.

*Ibid.*

The liability of property, the product of an enemy country, and coming from it during war, to capture, being irrespective of the *status domicilii*, guilt or innocence, of the owner, such property is as much liable to capture, when belonging to a loyal citizen of the country of the captors, as if owned by a citizen or subject of the hostile country or by the hostile Government itself. The only qualification of this rule is that, where, upon the breaking out of hostilities or as soon after as possible, the owner escapes with such property as he can take with him, or in good faith thus early removes his property, with the view of putting it beyond the dominion of the hostile power, the property in such cases is exempt from the liability which would otherwise attend it.

The Gray Jacket, 5 Wall., 342.

Where the war (a civil war) broke out in April, 1861, a removal on the 30th of December, 1863, was held to be too late.

*Ibid.*

An order for further proof in prize cases is always made with extreme caution, and only when the ends of justice clearly require it. A claimant forfeits the right to ask it, by any guilty concealments in the case.

*Ibid.*

The statute of July 13, 1861, giving the Secretary of the Treasury power to remit penalties, etc., in certain cases did not extend to captures *jure belli*.

*Ibid.;* The Hampton, 5 Wall., 372.

Under the principles of international law, mortgages on vessels captured *jure belli* are to be treated only as liens subject to being overridden by the capture.

The Hampton, *ibid.*, 372.

The law of nations does not prohibit the carrying of enemies' goods in neutral vessels; so far from so doing, upon the condemnation of the goods, the vessel is entitled to freight. But if a neutral endeavors, by false appearances, to cover the property of a belligerent from the lawful seizure of his enemy, such conduct identifies the neutral with the belligerent whom he thus endeavors to protect, and is a fraud on the neutrality of his own Government and upon the rights of the belligerent.

Schwartz *v.* Insurance Company of North America, 3 Wash. C. C., 117.

A shipment made by an enemy shipper to his correspondent in America, to belong to the latter at his election, in twenty-four hours after the arrival thereof, is liable to condemnation as hostile property,

it being held that an election made during the transit will not merge the hostile character of the property.

The ship Francis and Cargo, 1 Gallison, 445.

As will be seen by a survey of the above cases, the right to seize enemy's goods sailing under neutral flag has been sustained in the Julia, 8 Cranch, 181; the Nereide, 9 Cranch, 388; the Ariadne, 2 Wheat., 143. See the Caledonian, 4 Wheat., 100; the Hart, 3 Wall., 559; S. C., Bl. Pr. Ca., 379. That shipping goods in an enemy's ship gives presumption that goods belong to enemy, see the London Packet, 1 Mason, 14; the Amy Warwick, 2 Blatch., 635. On the other hand, the executive department of the Government, to use Mr. Marcy's language (Mr. Marcy to Mr. Mason, Aug. 7, 1850, above quoted), "has strenuously contended that free ships made free goods, articles contraband of war excepted," and that this was then regarded by the Executive as the generally accepted rule is evidenced by Mr. Marcy's statement in the next sentence, that "Great Britain is believed to be almost the only maritime power which has constantly refused to regard this as a rule of international law." Even in the strain of the late civil war, Mr. Seward, when proposing to accede to the declaration of Paris on this point, did so on the ground that the declaration did not make a new rule, but established an old one, which the United States has maintained as a part of international law. This difference of opinion between the judicial and executive departments of the Government may be attributed, in the main, to the distinct political training of the two departments. The executive, from the time of the administration of Mr. Jefferson, inclined to the liberal view of international law which became then prevalent among political economists; and though Mr. Jefferson, when Secretary of State, at first thought the weight of authority was the other way, he changed his mind as to this, and took the lead, as President, in recommending as the best rule, that free ships should make free goods. The same doctrine was vindicated with great elaboration by Mr. Madison, and has been accepted, more or less conspicuously, whenever occasion arose, by succeeding Presidents. While, however, the executive department continued to accept these distinctive views of international law, of which Mr. Jefferson and Mr. Madison were the exponents, it was otherwise with the judiciary. In part this may be attributed to the strong antagonism of Chief-Justice Marshall to Mr. Jefferson, and to the scheme of public law of which Mr. Jefferson was the leading exponent. But aside from this, and aside from the strong bias towards English law and English precedent, which arose from the prior political bias of that great judge, and of his earlier associates, it is impossible not to forget the effect produced, even on professional minds entirely impartial, by the reverence and affection all American lawyers must feel for English judicial literature. If this be the case now—if such literature charm us now, often influencing our judgment, amid the great mass which we possess of legal literature of our own—how much greater must have been the influence when the sole text book at hand was Blackstone, and when Sir William Scott's attractive and lucid judgments were the only sources from which prize law could be studied in the English tongue. Yet, as is elsewhere shown (*supra*, §§ 238, 329*a*), the highest English authorities on international law, while admitting the fascination of Sir W. Scott's style, now regard his later prize decsions as no longer binding law.

If, during the late civil war, views of Sir W. Scott which had gradually ceased to be authoritative in England were reaffirmed by our Supreme Court, three explanatory conditions must be remembered: (1) The judges of that court were not themselves, with one or two exceptions, familiar with prize law, and from the most startling judgments of that court (*e. g.*, that in the Springbok, *infra*, § 362), Judge Nelson and Judge Clifford, who were the judges most familiar with this branch of law, dissented. (2) It could hardly be expected, at a time when the whole atmosphere was charged with a sense of the necessity of vigorous war measures, at least as strongly as was the atmosphere of England in the time of Sir W. Scott, that precedents established by prior decisions of the court, in favor of high belligerent rights, should have been overruled. Yet, at this very period, it is greatly to the credit of Mr. Seward that he maintained unbroken the doctrine as to belligerent rights in this relation pronounced by his predecessors. Co-ordinate as are the executive and the judiciary in matters of international law (*supra*, § 238), it was right that he should have taken this course, not regarding himself as bound by the rulings of the courts, and it is right, also, that to the different positions assumed in this relation by the executive and the judiciary, attention should be called in this work.

"It has been the singular honor of the late Lord Kingsdown, who presided over the English high court of appeal in prize cases during the Crimean war, to have applied the law of blockade to neutral vessels with an equity unknown to the prize court in the days of Lord Stowell, and which a veteran judge of the English high court of admiralty (the Right Hon. Dr. Lushington), who had practiced in prize cases before Lord Stowell, considered to be too favorable to neutrals. It was also in former days the pride of the Supreme Court of the United States to have framed its practice in prize causes after the rules of the British courts of prize, which, as observed by one of the most eminent jurists of the United States, Mr. Justice Story, are conformable with the prize practice of France and other European countries. It would be deeply to be regretted that upon the law of blockade the prize courts of the two countries should proceed henceforth on divergent lines, and that whilst the British high court of appeal has been striving to render the law of blockade less onerous to neutrals by tempering its administration with greater equity, the Supreme Court of the United States of America should have risked to make it intolerable by throwing upon the neutral owners of cargo a burden of proof which it is contrary to natural equity to impose upon them, and by sanctioning the novel principle that a cargo may be condemned for a breach of blockade, whilst the ship itself, in which it is laden, is acquitted of any design of proceeding to a blockaded port."

Sir T. Twiss, Belligerency, &c., London, 1884.

(6) LIABILITY OF NEUTRAL PROPERTY UNDER ENEMY'S FLAG.

§ 343.

A neutral may lawfully ship his goods on board an armed belligerent vessel, and if her force be used in a combat in which he gives no aid his goods are not affected.

The Nereide, 9 Cranch, 388; the Atalanta, 3 Wheat., 409.

The mere depositing by a neutral of his goods in an armed belligerent merchantman does not impress his goods with a belligerent character at the time of their seizure by the enemy, even though he were himself on board, if he took no part in and in no way directed the defense of the merchantman.

The Nereide, 9 Cranch, 388. See, however, dissenting opinion of Story, J.

"That a neutral may lawfully place his goods on board a belligerent ship for conveyance on the ocean is universally recognized as the original rule of the law of nations." "The rule is universally laid down in terms which comprehend an armed as well as an unarmed vessel."

Marshall, C. J.; the Nereide, 9 Cranch, 425.

Where enemy's property is fraudulently blended in the same claim with neutral property, the latter is liable to share the fate of the former, and must be condemned.

The St. Nicholas, 1 Wheat., 417.

Neutral muniments, however regular and formal, if only colorable, do not affect belligerent rights.

The Rugen, *ibid.*, 61.

It is a principle of the law of nations that a neutral cargo found on board an armed enemy's vessel is not liable to condemnation as prize of war.

The Atalanta, 3 Wheat., 409.

In general the circumstance of goods being found on board an enemy's ship raises a presumption that they are enemy's property.

The London Packet, 5 Wheat., 132.

Neutrals who place their vessels under belligerent control and engage them in belligerent trade, or permit them to be sent with contraband cargoes under cover of false destination to neutral ports, while the real destination is to belligerent ports, impress upon them the character of the belligerent in whose service they are employed, and cannot complain if they are seized and condemned as enemy property.

The Hart, 3 Wall., 559.

As to leaving property at enemy's disposal, see *infra*, § 353.

"The Supreme Court of the United States has held that there is no valid distinction of right between the act of a neutral merchant who loads his goods on board an enemy's merchant ship and the act of a neutral merchant who ships his goods in an armed vessel belonging to the enemy. The opinion of Chief-Justice Marshall, who with the majority of the court decided, in the case of the Nereide, 'that a neutral merchant had a right to charter and lade his goods on board a belligerent armed vessel without forfeiting his neutral character,' is entitled to great weight, not merely from the authority which attaches to the opinions of that eminent judge, but also from the solidity of the reasoning upon which his judgment in that case proceeded. But the opinion

of Mr. Justice Story was the other way, and coincided with the view of Lord Stowell. The Supreme Court of the United States, in February term, 1818, maintained the same view in the case of the Atalanta (3 Wheat., 409; 5 Wheat., 433) as it had previously maintained in the Nereide; so that the decisions of the highest tribunal of the United States is on this point in direct conflict with the judgment of the English high court of admiralty."

Twiss, Law of Nations in War (2d ed.), 188.

By an order in council of 1854, it was declared not to be "Her Majesty's intention to claim the confiscation of neutral property, not being contraband of war, found on board enemy's ships." The French Government took the same position. (See Lawrence's Wheaton, 770–1, note 228.)

(7) Exceptions as to rule of seizure of enemy's property at sea.

§ 344.

Even by those who hold that enemy's property may be seized on neutral ships, it is agreed that such seizure cannot be made on neutral waters (*supra*, § 27) or on public ships. (*Supra*, § 36.)

(8) What is a lawful capture of an enemy's merchant ship.

§ 345.

In 1799 there was a limited state of hostilities between this country and France, and the capture of a private armed vessel, officered and manned by Frenchmen, and sailing under the French flag, was lawful, though the vessel was the property of a neutral, from whom the French possessors had captured her.

Talbot *v.* Seeman, 1 Cranch, 1.

A vessel of the United States, which carries a cargo for freight from a neutral to an enemy's port, after the war is known, is liable to capture and condemnation, though such passage is a part of her home voyage from the neutral port to the United States, and the capture is made after she has sailed from the enemy's port.

The Joseph, 8 Cranch, 451.

In cases of recapture the rule of reciprocity is applied. If France would restore in a like case, then we are bound to restore; if otherwise, then the whole property must be condemned to the recaptors. It appears that by the law of France in cases of recapture, after the property has been twenty-four hours in possession of the enemy, the whole property is adjudged good prize to the recaptors, whether it belonged to her subjects, to her allies, or to neutrals. We are bound, therefore, in this case to apply the same rule; and as the property in this case was recaptured after it had been in possession of the enemy more than

twenty-four hours, it must, so far as it belonged to persons domiciled in France, be condemned to the captors.

Schooner Adeline, 9 Cranch, 244.

If a capture be made by a privateer, which had been illegally equipped in a neutral country, the prize courts of such neutral country have power and it is their duty to restore the captured property, if brought within their jurisdiction to its owner.

Brig Alerta *v.* Moran; *ibid.*, 359.
As to privateers, see further *infra*, § § 384, 385.

Navigating under a license from the enemy is closely connected in principle with the offense of trading with the enemy, and is cause of confiscation. In both cases the knowledge of the agent will affect the principal, although he may, in reality, be ignorant of the fact.

The Hiram, 1 Wheat., 440.

The capture of a neutral ship having enemy's property on board is a strictly justifiable exercise of the rights of war. It is no wrong done to the neutral, even though the voyage be thereby defeated. The captors are not therefore answerable *in pœnam* to the neutral for the losses which he may sustain by a lawful exercise of belligerent rights. It is the misfortune of the neutral and not the fault of the belligerent.

By the capture the captors are substituted in lieu of the original owners, and they take the property *cum onere*. They are, therefore, responsible for the freight which then attached upon the property, of which the sentence of condemnation ascertains them to be the rightful owners, succeeding to the former proprietors. So far the rule seems perfectly equitable, but to press it further and charge them with the freight of goods which they have never received, or with the burden of a charter party into which they have never entered, would be unreasonable in itself and inconsistent with the admitted principles of prize law. It might, in case of a justifiable capture by the condemnation of a single bale of goods, lead the captors to their ruin with the stipulated freight of a whole cargo.

The Antonia Johanna, 1 Wheat., 159. See *infra*, § 353.

The rules of prize courts as to the vesting of property are the same with those of the common law by which the thing sold, after the completion of the contract, is properly at the risk of the purchaser. But the question still recurs, when is the contract executed? It is certainly competent for an agent abroad, who purchases in pursuance of orders, to vest the property in his principal immediately on the purchase. This is the case when he purchases exclusively on the credit of his principal, or makes an absolute appropriation and designation of the property for his principal. But where a merchant abroad, in pursuance of orders, either sells his own goods or purchases goods on his own credit (and thereby, in reality, becomes the owner), no property in the goods vests

in his correspondent until he has done some notorious act to divest himself of his title or has parted with the possession by an actual and unconditional delivery for the use of such correspondent.

The St. Jose Indiano, 1 Wheat., 208.

Whatever might be the right of the Swedish sovereign, acting under his own authority, we are of opinion that if a Swedish vessel be engaged in the actual service of Great Britain, or in carrying stores for the exclusive use of the British armies, she must, to all intents and purposes, be deemed a British transport. It is perfectly immaterial in what particular enterprise those armies might, at the time, be engaged; for the same important benefits are conferred upon an enemy, who thereby acquires a greater disposable force to bring into action against us.

Story J; The Commercen, 1 Wheat., 382. Chief-Justice Marshall dissenting.

The mere sailing under an enemy's license, without regard to the object of the voyage, or the port of destination, constitutes in itself an act of illegality which subjects the property to confiscation.

The Ariadne, 2 Wheat., 143.

Where a neutral ship owner lends his name to cover a fraud with regard to the cargo, his conduct will subject the ship to condemnation.

The Fortuna, 3 Wheat., 236.

A vessel and cargo liable to capture as enemy's property, or for sailing under the pass or license of the enemy, or for trading with the enemy, may be seized after arrival in a port of the United States and condemned as prize of war. The *delictum* is not purged by the termination of the voyage.

The Caledonian, 4 Wheat., 100.

A capture of Spanish property, in violation of our neutrality, by a vessel built, armed, equipped, and owned in the United States, is illegal, and the property, if brought within our territorial limits, will be restored to the original owner.

La Concepcion, 6 Wheat., 235.

It is settled that if captures are made by vessels which have violated our neutrality acts, the property may be restored, if brought within our territory. Hence a vessel armed and manned in one of our ports, and sailing thence to a belligerent port, with the intent thence to depart on a cruise with the crew and armament obtained here, and so departing and capturing belligerent property, violates our neutrality laws, and her prizes coming within our jurisdiction will be restored.

The Gran Para, 7 Wheat., 471.

The seizure of a vessel by the naval force of the United States in waters belonging to a friendly power, though an offense against that power, is a matter to be adjusted between the two Governments and

not within the cognizance of the court, and does not render unlawful judicial proceedings against the vessel, instituted after her arrival within the jurisdiction of the United States.

Ship Richmond *v.* U. S., 9 Cranch, 102; The Merino, 9 Wheat., 391.

Spoliation of papers at the time of capture warrants unfavorable inferences as to the employment, destination, and ownership of the captured vessel.

The Bermuda, 3 Wall., 514.

The act of March 3, 1863, "to protect the liens upon vessels in certain cases," etc., does not refer to captures *jure belli*, or modify the law of prize in any respect.

The Hampton, 5 Wall., 372.

In the Hart, 3 Wall., 559, it was said by Chase, C. J., "that neutrals who place their vessels under belligerent control, and engage them in belligerent trade, or permit them to be sent with contraband cargoes under cover of false destination to neutral ports, impress upon them the character of the belligerent in whose service they are employed, and cannot complain if they are seized and condemned as enemy's property."

Ships in time of war are bound by the character impressed upon them by the Government from which their documents issue and under whose flag and pass they sail.

The share of a citizen in a ship sailing under an enemy's flag and papers, there having been ample time and opportunity to dispose of the same, but no attempt made to do so, is subject to capture and condemnation equally with the shares of enemies in the same ship. And where the cargo and ship are owned by the same person, the cargo follows the fate of the ship.

The William Bagaley, 5 Wall., 377.

If a ship or cargo is enemy property, or if either be otherwise liable to condemnation, the circumstance that the vessel at the time of the capture was in neutral waters would not, by itself, avail the claimants in a prize court. It might constitute a ground of claim by the neutral power, whose territories had suffered trespass, for apology or indemnity. (See *infra*, §§ 3, 40, 96.) But neither a hostile belligerent nor a neutral acting the part of such belligerent, can demand restitution of captured property on the sole ground of capture in neutral waters.

The Sir William Peel, *ibid.*, 517; The Adela, 6 *ibid.*, 266.

A *bona fide* purchase for a commercial purpose by a neutral in his own home port, of a ship-of-war of a belligerent that had fled to such port in order to escape from enemy vessels in pursuit, but which was *bona fide* dismantled prior to the sale, and afterward fitted up for the

merchant service, does not pass a title above the right of capture by the other belligerent.

The Georgia, 7 Wall., 32.

A merchant vessel of one country visiting, for the purpose of trade, a port of another where martial law has been established, under belligerent right, subjects herself to that law while she is in such port.

U. S. *v.* Diekelman, 92 U. S., 520. *Supra*, § 35.

As to seizures for blockade-running, see *infra*, § 362; for carrying contraband, § 375; action of prize court as to, *supra*, § 330; as to sales to belligerent, *infra*, § 392.

The benefit of the registry of an American vessel is lost to the owner during his residence in a foreign country, but upon his return to this country the disability ceases; nor does the fact that during the foreign residence of the owner the vessel carried a foreign flag work any divestiture of title, nor render the disability perpetual.

1 Op., 523, Wirt, 1821.

"In 1854, at the commencement of the Crimean war, it was proclaimed by an order in council that all Russian vessels in British ports should be allowed six weeks for loading their cargoes and for departing therefrom, and, further, that if met with at sea by any British ships-of-war they were to be permitted to continue their voyage, if from their papers it was evident that their cargoes had been taken aboard before the expiration of the above term. The French Government also issued a similar order. The British Government, on the same occasion ordered all Her Majesty's subjects who might be resident in Russia to return to their own country within the term of six weeks."

2 Halleck's Int. Law (Baker's ed.), 126.

A similar course was taken by the German and French Governments in the war of 1870.

*Ibid.*, 127.

"Fishing boats have also, as a general rule, been exempted from the effects of hostilities. As early as 1521, while war was raging between Charles V and Francis, embassadors from these two sovereigns met at Calais, then English, and agreed that whereas the herring fishery was about to commence, the subjects of both belligerents engaged in this pursuit should be safe and unmolested by the other party, and should have leave to fish as in time of peace. In the war of 1800, the British and French Governments issued formal instructions exempting the fishing boats of each other's subjects from seizure. This order was subsequently rescinded by the British Government, on the alleged ground that some French fishing-boats were equipped as gunboats, and that some French fishermen, who had been prisoners in England, had violated their parole not to serve, and had gone to join the French fleet at Brest. Such excuses were evidently mere pretexts; and after some angry discussions had taken place on the subject, the British restriction was withdrawn, and the freedom of fishermen was again allowed on both sides. French writers consider this exemption as an established

principle of the modern law of war, and it has been so recognized in the French courts, which have restored such vessels when captured by French cruisers."

*Ibid.*, 151.

(9) WHEN CONVOYS PROTECT.

§ 346.

"'Although' (says Dr. Nicoll) 'a neutral ship may legally carry enemies' property, yet the belligerent has on the other hand a right to seize that property, paying the neutral his freight and expenses. If the neutral, in order to prevent the belligerent from exercising his legal right, puts himself under the enemies' convoy, the claim of freight and expenses is thereby forfeited. It is a departure from that impartiality which the neutral is bound to observe. The only question in this case would be, whether the ship itself was not, under the circumstances, liable to confiscation.'

"In another case, where the American vessel had been condemned with her cargo, Dr. Nicoll gave his opinion not to prosecute an appeal, because the circumstance of going under convoy was, in his judgment, a just cause of forfeiture. This latter opinion I have not in writing, but Mr. Wagner (the clerk charged with this business) well remembers it. But here the cause of forfeiture is not the simple fact of going under convoy, but the attempting, in a *neutral* vessel, to shelter the goods of an *enemy* by means of the convoy; and, therefore, if this distinction be correct, an American vessel with an American cargo may innocently go under convoy. But why do this with neutral property? Because a belligerent power, without regarding treaties or the law of nations, makes prize of such property. If, however, such unwarrantable captures are not made (and this, I suppose, you judged to be the fact in respect to our vessels trading with Great Britain and Ireland) there can be no reason for seeking convoys; and the doing it might give offense to the Government against which it was requested. But whenever that Government has no scruple to interrupt and injure our lawful commerce, by means of her armed vessels, we can have no scruple to accept protection from the convoys of her enemies. The only question then will be whether the Government shall formally request the convoy? This is a question of some delicacy, as it regards the foreign power to whom the request shall be made, on the score of *obligation*. But if for the sake of preserving a lucrative or necessary trade that power voluntarily offers, or, on the request of *individuals*, grants the requisite convoys, are we then to refuse them? Clearly not, and such is the sense of the President."

Mr. Pickering, Sec. of State, to Mr. King, May 9, 1797. MSS. Inst., Ministers.

"It is an ordinary duty of the naval force of a neutral, during either civil or foreign wars, to convoy merchant vessels of the nation to which

it belongs to the ports of the belligerents. This, however, should not be done in contravention of belligerent rights as defined by the law of nations or by treaty. The only limitations of the rights to convoy recognized by the treaty between the United States and Mexico are those contained in the 24th article, which declares that when vessels are under convoy, the verbal declaration of the commander of the convoy, on his word of honor, that the vessels under his protection belong to the nation whose flag he carries, and, when they are bound to an enemy's port, that they have no contraband goods on board shall be sufficient. With these conditions the United States have at all times been willing to comply."

Mr. Forsyth, Sec. of State, to Mr. Monasterio, May 18, 1837. MSS. Notes, Mex.

"Calhoun asked (at a Cabinet meeting on October 26, 1822), if we could authorize the merchant vessel itself to resist the belligerent right of search. I said no; and that the British claimed the right of searching convoyed vessels, but that we never admitted that right, and that the opposite principle was that of the armed neutrality. They maintained that a convoy was a pledge on the part of the convoying nation that the convoyed vessel has no articles of contraband on board, and is not going to a blockaded port, and the word of honor of the commander of the convoy to that effect must be given. But, I added, if we could instruct our officer to give convoy at all, we cannot allow him to submit to the search by foreigners of a vessel under his charge, for it is placing our officer and the nation itself in an attitude of inferiority and humiliation. The President agreed with this opinion, and Mr. Calhoun declared his acquiescence in it, and it was determined that the instructions to Biddle should be drawn accordingly."

5 J. Q. Adams's Mem., 86.

"The act of sailing under belligerent or neutral convoy is of itself a violation of neutrality, and the ship and cargo if caught *in delicto* are justly confiscable; and further, if resistance be necessary, as in my opinion it is not, to perfect the offense, still, that the resistance of the convoy is to all purposes the resistance of the associated fleet. * * * I am unable to perceive any solid foundation on which to rest a distinction between the resistance of a neutral and of an enemy master.

"I cannot bring my mind to believe that a neutral can charter an armed enemy ship, and victual and man her with an enemy crew * * * with the avowed purpose and necessary intent that she should resist every enemy; that he should take on board hostile shipments or freight, commissions, and profits; * * * that he can be the entire projector and conductor of the voyage, and co-operate in all the plans of the owner to render resistance to search secure and effectual; and that yet, notwithstanding all this conduct, by the law of nations he may shelter his property from confiscation, and claim the privileges of an inoffensive neutral."

Story, J.; The Nereide, 9 Cranch, 445, 453, 454; dissenting opinion. See opinion of court by Marshall, C. J., *supra*, § 343.

## IV. *RULES OF CIVILIZED WARFARE TO BE OBSERVED.*

### (1) Spies and their treatment.

### § 347.

"A spy is a person sent by one belligerent to gain secret information of the forces and defenses of the other, to be used for hostile purposes. According to practice he may use deception under the penalty of being lawfully hanged if detected. To give this odious name and character to a confidential agent of a neutral power, bearing the commission of his country, and sent for a purpose fully warranted by the law of nations, is not only to abuse language but also to confound all just ideas, and to announce the wildest and most extravagant notions, such as certainly were not to have been expected in a grave diplomatic paper; and the President directs the undersigned to say to Mr. Hülsemann that the American Government would regard such an imputation on it by the Cabinet of Austria, as that it employed spies, and that in a quarrel none of its own, as distinctly offensive, if it did not presume, as it is willing to presume, that the word used in the original German was not of equivalent meaning with 'spy' in the English language, or that in some other way the employment of such an opprobrious term may be explained. Had the Imperial Government of Austria subjected Mr. Mann to the treatment of a spy it would have placed itself without the pale of civilized nations, and the Cabinet of Vienna may be assured that if it had carried, or attempted to carry, any such lawless purpose into effect in the case of an authorized agent of this Government, the spirit of the people of this country would have demanded immediate hostilities to be waged by the utmost exertion of the power of the Republic, military and naval."

Mr. Webster, Sec. of State, to Mr. Hülsemann, Dec. 21, 1850. MSS. Notes, Germ. States. See further as to Mr. Mann's case, *supra*, §§ 49, 70.

As to André's case, see 3 Phill. Int. Law (3d ed.), 168. See also *supra*, §§ 225, 226.

### (2) Prisoners and their treatment.

#### (*a*) general rules.

### § 348.

"An American citizen, being a pilot, may lawfully exercise his usual functions as pilot on board of any vessel-of-war; and if during his employment on board an engagement takes place, his being on board is not to be considered as criminal, but accidental and innocent."

Mr. Randolph, Sec. of State, to Mr. Fauchet, Sept. 17, 1794. MSS. Notes, For. Leg.

A French decree "that every foreigner found on board the vessels of war or of commerce of the enemy is to be treated as a prisoner of

war, and can have no right to the protection of the diplomatic and commercial agents of his nation," is in contravention of the law of nations.

Mr. Madison, Sec. of State, report, Jan. 25, 1806.
As to treatment of British prisoners during Revolutionary War, see 3 John Adams' Works, 63, 163.

A subject of a foreign power, acting under a commission from the hostile Government, should be treated as an enemy, and confined as a prisoner of war.

1 Op., 84. See *supra*, § 21.

"By the law of war either party to it may receive and list among his troops such as quit the other, unless there has been a previous stipulation to the contrary. But when they (such refugees) have been received, a high moral faith and irrevocable honor, sanctioned by the usages of all nations, gives to them protection personally and security for all that they have or may possess. They are exempt also from all reproach from the sovereignty to which their services have been rendered. Nothing that they claim as their own can be taken from them upon the imputation that they had forfeited or meant to relinquish it by the abandonment of their allegiance to the sovereignty which they have left."

Wayne, J.; U. S. *v.* Reading, 18 How., 10.

"I have the honor to acknowledge the receipt of a letter, dated 25th March, from the Acting Secretary of War, inclosing a paper compiled by Lieutenant-Colonel Poland, which contains the English text of the Geneva (Red Cross) convention (1864), of the additional articles (1868), and of the declaration of St. Petersburg (1868) in regard to explosive bullets. Your Department asks for any further information in respects mentioned in said paper.

"I inclose a copy of the President's proclamation (July 26, 1882) by which it will be seen that while this Governmont has acceded to the Geneva convention, its accession to the additional articles has been reserved until it shall be notified of their ratification by the signatory powers.

"This notification has never been given, and these articles therefore have not the binding force of a convention.

"The only additional ratification of the Geneva convention notified to this Government since July, 1882, is that of Bulgaria, March 1, 1884.

"The United States not being a party to the declaration of St. Petersburg, this Department has issued no official copy thereof. Lieutenant-Colonel Poland's version is an essentially correct translation of the French copy on our files, and the signatory powers are correctly enumerated.

"The United States has made no conventional agreements with other powers in regard to the subjects of these conventions and this declaration."

Mr. Bayard, Sec. of State, to Mr. Endicott, Sec. of War, April 2, 1886. MSS. Dom. Let.

"PROCLAMATION OF THE PRESIDENT OF THE UNITED STATES ANNOUNCING ACCESSION TO THE AFORESAID ARTICLES.

"Concluded August 22, 1864; acceded to by the President March 1, 1882; accession concurred in by the Senate March 16, 1882; proclaimed as to the original convention (1864), but with reserve as to the additional articles July 26, 1882.

"The President's ratification of the act of accession, as transmitted to Bern, and exchanged for the ratification of the other signatory and adhesory powers, embraces the French text of the convention of August 22, 1864, and the additional articles of October 20, 1868. The French text is therefore for all international purposes the standard one.

"*By the President of the United States of America—A proclamation.*

"Whereas on the 22d day of August, 1864, a convention was concluded at Geneva, Switzerland, between the states enumerated, etc., the tenor of which convention is hereinafter subjoined:"

(Here follows the text of the original articles.)

"And whereas the several contracting parties to the said convention exchanged the ratifications thereof at Geneva, on the 22d day of June, 1865.

"And whereas the several states hereinafter named have adhered to the said convention in virtue of Article IX thereof, to wit: Sweden, December 13, 1864; Greece, January 5-7, 1865; Great Britain, February 18, 1865; Mecklenburg-Schwerin, March 9, 1865; Turkey, July 5, 1865; Würtemberg, June 2, 1866; Hesse, June 22, 1866; Bavaria, June 30, 1866; Austria, July 21, 1866; Russia, May 10-22, 1867; Persia, December 5, 1874; Roumania, November 18-30, 1874; Salvador, December 30, 1874; Montenegro, November 17-29, 1875; Servia, March 24, 1876; Bolivia, October 16, 1879; Chili, November 15, 1879; Argentine Republic, November 25, 1879; Peru, April 22, 1880; Bulgaria, March 1, 1884.

"And whereas the Swiss Confederation, in virtue of the said Article IX of said convention, has invited the United States of America to accede thereto.

And whereas on the 20th October, 1868, certain additional articles were proposed and signed at Geneva on behalf of Great Britain, Austria, Baden, Bavaria, Belgium, Denmark, France, Italy, Netherlands, North Germany, Sweden and Norway, Switzerland, Turkey, and Würtemberg, the tenor of which additional articles is hereinafter subjoined."

(Here the text of additional articles follows:)

"And whereas the President of the United State of America, by and with the advice and consent of the Senate, did, on the first day of March, one thousand eight hundred and eighty-two, declare that the United States accede to the said convention of the 22d of August, 1864, and also accede to the said convention of October 20, 1868.

"And whereas on the ninth day of June, one thousand eight hundred and eighty-two, the Federal Council of the Swiss Confederation, in virtue of the final provision of a certain minute of the exchange of ratifications of the said convention at Bern, December 22, 1864, did, by a formal declaration, accept the said adhesion of the United States of America, as well in the name of the Swiss Confederation as in that of the contracting states.

"And whereas, furthermore, the Government of the Swiss Confederation has informed the Government of the United States, that the exchange of the ratifications

of the aforesaid additional articles of October, 20, 1868, to which the United States of America have in like manner adhered as aforesaid, has not yet taken place between the contracting parties, and that these articles cannot be regarded as a treaty in full force and effect.

"Now, therefore, be it known that I, Chester A. Arthur, President of the United States of America, have caused the said convention of August 22, 1864, *to be made public, to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof*, reserving, however, the *promulgation* of the hereinbefore mentioned *additional articles* of *October* 20, 1868, notwithstanding the accession of the United States of America thereto, *until* the exchange of the ratifications thereof between the several contracting *states* shall have been effected, and the said additional articles shall have acquired full force and effect as an *international treaty*.

"In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

"Done at the city of Washington this twenty-sixth day of July, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States, the one hundred and seventh.

"CHESTER A. ARTHUR. [L. S.]

"By the President:

"FREDERICK T. FRELINGHUYSEN,

"*Secretary of State.*"

The following is the convention referred to in the above proclamation:

CONVENTION FOR THE AMELIORATION OF THE CONDITION OF SOLDIERS WOUNDED IN ARMIES IN THE FIELD.

The Swiss Confederation, Baden, Belgium, Denmark, Spain, France, Hesse, Italy, Netherlands, Portugal, Prussia, Würtemberg, being equally animated by the desire to mitigate, as far as depends upon them, the evils inseparable from war, to suppress their useless severities, and to ameliorate the condition of soldiers wounded on the field of battle, have resolved to conclude a convention for that purpose, and have named their plenipotentiaries. * * *

Who, after having exchanged their powers, found in good and due form, have agreed upon the following articles:

ARTICLE I. Ambulances and military hospitals shall be acknowledged to be neuter, and, as such, shall be protected and respected by belligerents so long as any sick or wounded may be therein.

Such neutrality shall cease if the ambulances or hospitals should be held by military force.

ART. II. Persons employed in hospitals and ambulances, comprising the staff for superintendence, medical service, administration, transport of wounded, as well as chaplains, shall participate in the benefit of neutrality whilst so employed, and so long as there remain any wounded to bring in or to succor.

ADDITIONAL ARTICLE I.* The persons designed (designated) in Article II of the convention shall continue after occupation by the enemy to give their services, according to the measure of the necessities, to the sick and the wounded of the ambulance or hospital which they serve.

* The Government of the United States acceded to the original articles of the "Red Cross" convention of 1864, but its *accession* to the *additional* articles has been reserved until it shall be notified of their ratification by the signatory powers. This notification has never been given, and these additional articles therefore have not the binding force of a convention.

When they shall make a demand to withdraw, the commander of the occupying forces shall fix the moment of their departure, which he cannot under any circumstances delay, except for a short period in case of military necessity.

ART. III. The persons designated in the preceding article (II) may, even after occupation by the enemy, continue to fulfill their duties in the hospital or ambulance which they serve, or may withdraw in order to rejoin the corps to which they belong. Under such circumstances, when those persons shall cease from their functions, they shall be delivered by the occupying army to the outposts of the enemy.

ART. IV. As the equipment of military hospitals remains subject to the laws of war, persons attached to such hospitals cannot, in withdrawing, carry away any articles but such as are their private property. Under the same circumstances an ambulance shall, on the contrary, retain its equipment.

ADDITIONAL ARTICLE II.* Dispositions ought to be made by the belligerent powers to assure to the persons neutralized, who may fall into the hands of the enemy army, the complete enjoyment of their appointments. (See Additional Article VII.)

ADDITIONAL ARTICLE III. * In the conditions provided for by Articles I and IV of the convention (of 1864), the denomination of ambulance applies to country hospitals and other temporary establishments, which follow the troops on the field of battle to receive there the sick and wounded.

ART. V. Inhabitants of the country who may bring help to the wounded shall be respected, and shall remain free. The generals of the belligerent powers shall make it their care to inform the inhabitants of the appeal addressed to their humanity, and of the neutrality which will be the consequence of it.

Any wounded man entertained and taken care of in a house shall be considered as a protection thereto. Any inhabitant who shall have entertained wounded men in his house shall be exempted from the quartering of troops, as well as from a part of the contributions of war which may be imposed.

ADDITIONAL ARTICLE IV.* Conformably to the spirit of Article V, of the convention (of 1864), and under the reserves mentioned in the protocol of 1864, it is explained that, as regards the division of the charges relative to the lodgment of troops and the contributions of war, account will only be taken in an equitable degree of the charitable zeal exhibited by the inhabitants.

ART. VI. Wounded or sick soldiers shall be entertained and taken care of, to whatever nation they may belong.

Commanders-in-chief shall have the power to deliver immediately to the outposts of the enemy soldiers who have been wounded in an engagement, when circumstances permit this to be done, and with the consent of both parties.

Those who are recognized after their wounds are healed as incapable of serving shall be sent back to their country.

The others may also be sent back, on condition of not again bearing arms during the continuance of the war.

Evacuations, together with the persons under whose directions they take place, shall be protected by an absolute neutrality.

ADDITIONAL ARTICLE V.* In extension of Article VI of the convention (of 1864), it is stipulated that, with the reservation of officers, the detention of whom may be of importance to the success of the war, and within the limits fixed by the second paragraph of this article, the wounded who have fallen into the hands of the enemy, although they may not have been recognized as incapable of service, ought to be sent back to their country after their wounds are healed, or sooner if it be possible, on condition always of not resuming their arms during the continuance of the war.

ART. VII. A distinctive and uniform flag shall be adopted for hospitals, ambulances, and evacuations.† It must, on every occasion, be accompanied by the national flag.

* See note to Additional Article I.

† See note under Article X for definition of evacuations.

An arm badge shall also be allowed for individuals neutralized, but the delivery thereof shall be left to military authority.

The flag and the arm badge shall bear a red cross on a white ground.

ART. VIII. The details of execution of the present convention shall be regulated by the commanders-in-chief of belligerent armies, according to the instructions of their respective Governments, and in conformity with the general principles laid down in this convention.

ART. IX. The high contracting powers have agreed to communicate the present convention to those Governments which have not found it convenient to send plenipotentiaries to the international conference at Geneva, with an invitation to accede thereto. The protocol is for that purpose left open.

ART. X. The present convention shall be ratified, and the ratification shall be exchanged at Berne in four months, or sooner if possible.

In witness whereof the respective plenipotentiaries have signed the same, and have affixed thereto the seal of their arms.

Done at Geneva, the twenty-second day of August, one thousand eight hundred and sixty-four.

(*Signatures.*)

(The remaining articles of the convention of 1868, not published above are:)

*Concerning the marine.*

ADDITIONAL ARTICLE VI. The boats, which are at their risk and peril, during and after the combat, pick up, or which having picked up the shipwrecked or the wounded, convey them on board of a neutral or hospital ship, shall enjoy, until the completion of their mission, such a degree of neutrality as the circumstances of the combat and the situation of the vessels in conflict will allow to be applied to them.

The appreciation of the circumstances is confided to the humanity of all the combatants.

The shipwrecked and the wounded persons so picked up and saved cannot serve during the continuance of the war.

ADDITIONAL ARTICLE VII. Every person employed in the religious, medical, or hospital service of any captured vessel is declared neutral. In quitting the vessel, he carries away the articles and the instruments of surgery, which are his private property. (See following article.)

ADDITIONAL ARTICLE VIII. Every person designated in the preceding article (VII) ought to continue to fulfill his functions on board of the captured vessel, to assist in the evacuations of the wounded made by the victorious party, after which he ought to be free to rejoin his country, conformably to the second paragraph of the first additional article above mentioned.

The stipulations of the second additional article above mentioned are applicable to the treatment of these persons. (See Additional Article II.)

ADDITIONAL ARTICLE IX. Military hospital vessels remain subject to the laws of war, in what regards their equipment, they become the property of the captor; but the latter cannot divert them from their special occupation during the continuance of the war.

Additional articles proposed to the above, together with discussions thereon by the French and British Governments, are given in a pamphlet by Colonel Poland, published in 1886, on the convention of Geneva. With this are given the results of the Brussels conference of 1874, Dr. Lieber's instructions for the government of the armies of the United States, and other illustrative documents.

The laws of war, in reference to the persons of belligerents, are discussed in 3 Fiore's droit int. (2d ed., 1885, trans. by Antoine), chap. vii.

"A prisoner of war who escapes may be shot, or otherwise killed in his flight; but neither death nor any other punishment shall be inflicted upon him simply for his attempt to escape, which the law of war does not consider a crime. Stricter means of security shall be used after an unsuccessful attempt at escape.

"If, however, a conspiracy is discovered, the purpose of which is a united or general escape, the conspirators may be rigorously punished, even with death; and capital punishment may also be inflicted upon prisoners of war discovered to have plotted rebellion against the authorities of the captors, whether in union with the fellow prisoners or other persons."

Instructions for the government of armies of the United States in the field, quoted in 2 Halleck's Int. Law (Baker's ed.), 44.

"Prisoners of war may be released from captivity by exchange, and, under certain circumstances, by parole.

"The term parole designates the pledge of individual good faith and honor to do, or to omit doing, certain acts after he who gives his parole shall have been dismissed wholly or partially, from the power of the captor.

"The pledge of the parole is always an individual, but not a private act.

"The parole applies chiefly to prisoners of war whom the captor allows to return to their country, or to live in greater freedom within the captor's country or territory, on conditions stated in the parole.

"Release of prisoners of war by exchange is the general rule, release by parole is the exception.

"Breaking the parole is punished with death when the person breaking the parole is captured again.

"Accurate lists, therefore, of the paroled persons must be kept by the belligerents."

*Ibid.*

"In April, 1865, General Grant wrote to General Lee that he proposed to receive the surrender of the Army of Northern Virginia on the following terms, viz:

"1. That rolls of all the officers and men were to be made in duplicate, one copy to be given to an officer of the selection of the former, the other to be retained by whomsoever the latter might appoint.

"2. That the officers give their individual paroles not to take arms against the Government of the United States until properly exchanged, and each commander of a company or regiment to sign a like parole for his men. The arms, artillery, and public property to be parked and stacked, and turned over to the officers appointed by the former to receive them. That this do not include the side-arms of the officers, nor their private horses or baggage.

"3. That, this being done, each officer and man shall be allowed to return to his home, and shall not be disturbed by the United States authority so long as they observe their paroles and the laws in force where they reside.

"General Lee accepted these terms on the same day, and the other rebel armies subsequently surrendered on substantially the same terms.

"By an agreement made the same month between General Johnston, commanding the Confederate army, and Major-General Sherman, commanding the Army of the United States, the Confederate armies then in existence were to be disbanded and conducted to their several State capitals, therein to deposit their arms and public property in the State arsenal; and each officer and man to agree to cease from acts of war, and to abide the action of both State and Federal authorities. The number of arms and munitions of war to be reported to the Chief of Ordnance at Washington, subject to the future action of the Congress of the United States, and in the mean time to be used solely to maintain peace and order within the borders of the different States. The Executive of the United States to recognize the several State governments, on their officers and legislatures taking the oaths prescribed by the Constitu-

tion of the United States. The Federal courts in the several States to be re-established; the people and inhabitants of those States to be guaranteed their political rights and franchise so far as the Executive could do so. The executive authority of the Government of the United States not to disturb any of the people by reason of the war, so long as they lived in peace and quiet. In fact, a general amnesty to be established."

2 Halleck's Int. Law (Baker's ed.), 349.

As to exchange of prisoners, see 3 John Adams' Works, 63, 163; 7 *ibid.*, 13, 41.

(*b*) ARBUTHNOT AND AMBRISTER.

§ 348*a*.

"'When at war' (says Vattel) 'with a ferocious nation, which observes no rules and grants no quarter, they may be chastised in the persons of those of them who may be taken; they are of the number of the guilty, and by this rigor the attempt may be made of bringing them to a sense of the laws of humanity.' And again: 'As a general has the right of sacrificing the lives of his enemies to his own safety or that of his people, if he has to contend with an inhuman enemy, often guilty of such excesses, he may take the lives of some of his prisoners, and treat them as his own people have been treated.' The justification of these principles is found in their salutary efficacy, for terror and for example.

"It is thus only that the barbarities of Indians can be successfully encountered. It is thus only that the worse than Indian barbarities of European impostors, pretending authority from their Governments, but always disavowed, can be punished and arrested. * * *

"The two Englishmen, executed by order of General Jackson were not only identified with the savages with whom they were carrying on war against the United States, but one of them was the mover and promoter of the war, which, without his interference and false promises to the Indians of support from the British Government, never would have happened. The other was the instrument of war against Spain as well as the United States, commissioned by McGregor and expedited by Woodbine, upon their project of conquering Florida with these Indians and negroes. Accomplices of the savages, and, sinning against their better knowledge, worse than savages, General Jackson, possessed of their persons and of the proofs of their guilt, might, by the lawful and ordinary usages of war, have hung them both without the formality of a trial. To allow them every possible opportunity of refuting the proofs, or of showing any circumstance in extenuation of their crimes, he gave them the benefit of trial by a court-martial of highly respectable officers. The defense of one consisted solely and exclusively of technical cavils at the nature of part of the evidence; the other confessed his guilt.

Mr. Adams, Sec. of State, to Mr. Erving, Nov. 28, 1818. MSS. Inst., Ministers. 4 Am. St. Pap. (For. Rel.), 544; adopted and approved in Lawrence's Wheaton, 588. See *supra*, §§ 190, 243.

The court-martial in the case of Arbuthnot and Ambrister consisted of Maj. Gen. E. P. Gaines, president; members, Colonel King, Colonel

Williams, Lieutenant Colonel Gibson, Major Muhlenberg, Major Montgomery, Captain Vashan, Colonel Dyer, Lieutenant-Colonel Lindsay, Lieutenant-Colonel Elliott, Major Fanning, Major Minton, Captain Crittenden, Lieutenant Glassel.

The court met and was sworn on April 26, 1818. The trial occupied more than two days, and a great mass of testimony was taken. The first charge against Arbuthnot was for "exciting the Creek Indians to war against the United States;" the second was for "acting as a spy, aiding and comforting the enemy, and supplying them with the means of war." Both charges were sustained by specifications. A third charge followed, of exciting the Indians to murder Hambly and Doyle; but this charge was withdrawn, as not within the jurisdiction of the court. Two-thirds of the court agreed to a finding that "the court, after mature deliberation, on the evidence adduced, find the prisoner, A. Arbuthnot, guilty of the first charge, and guilty of the second charge, leaving out the words 'acting as a spy;' and after mature reflection sentence him, A. Arbuthnot, to be suspended by the neck until he is dead."

Ambrister was charged with "levying war against the United States," by taking command of hostile Indians and ordering a party of them "to give battle to an army of the United States." He was found guilty, and was sentenced to be shot; but this was afterwards reconsidered, and commuted to fifty stripes and a year's imprisonment. The next morning General Jackson issued the following order:

"The commanding general approves the finding and sentence of the court in the case of A. Arbuthnot, and approves the finding and first sentence of the court in the case of Robert C. Ambrister, and disapproves the reconsideration of the sentence of the honorable court in this case.

"It appears from the evidence and pleading of the prisoner that he did lead and command, within the territory of Spain (being a subject of Great Britain), the Indians at war against the United States, these nations being at peace. It is an established principle of the law of nations, that any individual of a nation making war against the citizens of any other nation, they being at peace, forfeits his allegiance and becomes an outlaw and pirate. This is the case with Robert C. Ambrister, clearly shown by the evidence adduced."

If the ruling of the court-martial rests upon the reason given by General Jackson when affirming it, it cannot be sustained. It is not a violation of the law of nations for a subject of a peaceful neutral power to volunteer his services to a belligerent; nor does such a volunteer, by taking part in belligerent warfare, "forfeit his allegiance or become" an outlaw and pirate. There has been no war in which a part of the combatants on both sides have not been drawn from states at peace with both of the belligerents. This was eminently the case with the American Revolution; the British army being largely manned by foreign auxiliaries, the army of the United States taking some of its most eminent officers from France and Germany.

It does not follow, however, that the action of General Jackson may not be sustained when applied to savage warfare. Such a warfare had been waging between the United States and the Indians whom the defendants were charged with inciting to war. On November 30, 1817, not five months before the court-martial, a boat, containing forty soldiers of the United States, under the command of Lieutenant Scott, seven soldiers' wives, and five little children, while on its way up the Appalachicola

River, not far from Fort Scott, reached a point where a large body of Seminoles were in ambush. A volley of shot was fired on the boat, by which Lieutenant Scott was killed and all his command either killed or wounded. The assailants, who had previously been not only unseen but unsuspected, plunged into the water and boarded the boat, which was close to the shore. Those on board who were still living were massacred, with the exception of one woman, who was carried away by the Indians, and of four men, who escaped by swimming to the opposite shore, two of them only, however, succeeding in reaching Fort Scott. All the others were scalped, and the children were snatched by the heels and their heads crushed by being dashed against the boat. Nor was this all. In the course of the following week an attack was made, in the same way, on other boats which were ascending the river, and it was not till after two men were killed and thirteen wounded, that the survivors succeeded in making their way to Fort Scott. This was the kind of "war" which Arbuthnot and Ambrister were charged with inciting. It was, therefore, an organized system of assassination and rapine, not war, and those who incited it might well be regarded, not prisoners of war, but accessories before the fact to such assassination and rapine, and justly condemned to death. Whether these two defendants were guilty of this offense is a question of fact, dependent, not merely on the evidence as reported to us, but upon conditions which were notorious at the time, and which, therefore, did not require proof. It was established that the savages not only received the arms by which their massacres were effected from foreign aid, but were under the belief that they were supported by Englishmen in their uprising; and in the evidence that is reported to us, there is much to show that Arbuthnot and Ambrister dexterously fanned the flames as well as supplied the fuel. Two important circumstances, also, are to be considered in forming our estimate of the finding of the court. First, the members of the court were men of high character, who, from their participation in this very campaign, were cognizant of the kind of warfare which the accused were charged with instigating; secondly, the British Government, after a careful investigation of the facts, if not acquiescing in the rightfulness of the action of the court-martial, at least made no complaint of it as involving a violation of international law.

*Supra*, § 243.

As to forfeiture of right to governmental protection by abandonment of allegiance, see *supra*, § 190.

"The necessity of my reviewing with particularity the proofs against each of these unhappy sufferers (Arbuthnot and Ambrister) had been superseded, I observed, by what had passed at our interview (Mr. Rush and Lord Castlereagh) on the seventh. This Government itself had acquiesced in the reality of their offenses. I would content myself with superadding that the President believes that these two individuals, in connection with Nicholls and Woodbine, had been the prime movers in the recent Indian war. That without their instigation it never would have taken place, any more than the butcheries which preceded and provoked it; the butchery of Mrs. Garrett and her children; the butchery of a boat's crew, with a midshipman at their head, deputed from a national vessel, and ascending in time of peace the Appalachicola on a lawful errand; the butchery in time of peace at one stroke, upon another occasion, of a party of more than thirty Americans, amongst which

were both women and children, with many other butcheries alike authentic and shocking."

Mr. Rush, minister at London, to Mr. J. Q. Adams, Sec. of State, Jan. 12, 1819. MSS. Dispatches, Gr. Brit. See *supra*, § 216.

"*As matters now stand*, we shall have no difficulty whatever with the *British Cabinet* respecting these executions. * * * I perceive, from some proceedings in Congress as well as in our newspapers, what might be considered as a little curious, had not analogous things occurred before in the history of parties with us. I mean a strenuous denunciation of these executions by some of our own people, at a time when the British Government itself is refusing to stretch out its hand in behalf of the offenders."

Mr. Rush, minister at London, to Mr. Monroe, President, Jan. 17, 1819 (unofficial). MSS. Monroe Pap., Dept. of State.

"The execution of Arbuthnot and Ambrister is also making much noise, I mean only out of doors; for I am happy to add, as yet, this Government has taken no part whatever, so far as is known to me, in these senseless and premature clamors."

Same to same, Aug. 13, 1818; *ibid.*

"Out of doors the excitement seemed to rise higher and higher. Stocks experienced a slight fall. The newspapers kept up their fire. Little acquainted with the true character of the transaction, they gave vent to angry declamation. They fiercely denounced the Government of the United States. Tyrant, ruffian, murderer, were among the epithets applied to their commanding general. He was exhibited in placards through the streets. The journals, without distinction of party, united in these attacks. The Whig, and others in opposition, took the lead. Those in the Tory interest, although more restrained, gave them countenance. In the midst of all this passion, the ministry stood firm. Better informed, more just, they had made up their minds not to risk the peace of the two countries on grounds so untenable. It forms an instance of the intelligence and strength of a Government, disregarding the first clamors of a powerful press, and first erroneous impulses of an almost universal public feeling. At a later day of my mission, Lord Castlereagh said to me that a war might have been produced on this occasion, 'if the ministry had but held up a finger.'"

Rush's Residence at Court of London, etc., 304 *ff*, 338.

The most favorable view of Arbuthnot's character and conduct, in connection with the offenses for which he was tried, is that which is given by Mr. Parton, in the second volume of his Life of Jackson, ch. 34 *ff*. (See also 6 Hildreth's United States, 643.) For a whole generation the trial of Arbuthnot and Ambrister was a party issue; and the opponents of General Jackson and of his administration made the alleged atrocity of the proceedings one of the chief grounds of opposition to General Jackson's election, and to his subsequent administration. In times of such great bitterness of political feeling as then existed, it was difficult for the opponents of General Jackson, who embraced most of the men of cultivation and literary power in the land, to take an unbiased view of the procedure. But now, when these events have receded into history, it may be safely said that, while General Jackson's reason for affirming the action of the court is badly expressed, the action of the

court was in itself right, and the execution sustainable under the law of nations.

Arbuthnot's forfeiture of British protection is considered *supra*, § 190; his loss of title to protection by misconduct, *supra*, § 243.

As to atrocities to prisoners by Indians in the British service in the war of 1812, see 6 Hildreth's United States, 394.

"The only question for the British Government was, if the case was one which called for retribution, and whether they should interfere for the protection of British subjects who engage, without the consent of their Government, in the service of states at war with each other but at peace with their Government. Any British subject who engages in such foreign service, without permission, forfeits the protection of his country and becomes liable to military punishment if the party by whom he is taken chooses to carry the rights of war to that cruel severity. This is a principle admitted by the law of nations, and which, in the policy of the law of nations, has been frequently adopted. It is obvious that if it were to be maintained that a country should hold out protection to every adventurer who enters into foreign service, the assertion of such a principle would lead it into interminable warfare. The case of Ambrister stands on the ground that he was taken aiding the enemy, and although General Jackson's conduct was most atrocious in inflicting upon him a capital punishment, and contrary to the sentence of the court-martial, that was a question between the general and his Government. Arbuthnot's case stands on a different ground. He was not taken in arms, but he was proved—as a political servant rather than as a military agent—to have afforded equal aid and assistance to the enemy, and could not be held to be exempt from punishment; he had placed himself in the same position as if he bore arms. And it was on these considerations that the above-mentioned motion was negatived."

2 Halleck's Int. Law (Baker's ed.), 70. The above is part of a note by Sir S. Baker. See, also, *supra*, §§ 190, 243.

For a full vindication of General Jackson's action, see Mr. J. Q. Adams' instruction to Mr. Erving, of Nov. 28, 1818, quoted in part at the beginning of this section.

In the Brit. and For. St. Pap. for 1818–'19 (vol. 6), 326, will be found the correspondence with Great Britain relative to the war with the Seminole Indians, in which the proceedings against Arbuthnot and Ambrister are reviewed. The extracts include (*inter alia*) the instructions of Mr. Adams, Sec. of State, to Mr. Erving, Nov. 18 and Dec. 2, 1818, General Jackson's letter to the governor of Pensacola, together with full notes of the trial of Arbuthnot and Ambrister, letters from Arbuthnot, and subsequent correspondence with General Jackson and General Gaines.

### (c) Reprisals in war of 1812.

### § 348b.

Retorsion and reprisal, in their general relations, are considered in a prior section, *supra*, § 318.

The British Government, having sent to England, early in 1813, to be tried for treason, twenty-three Irishmen, naturalized in the United States, who had been captured in vessels of the United States, Congress authorized the President to retaliate. Under this act, General Dearborn placed in close confinement twenty-three prisoners taken at

Fort George. General Prevost, under the express directions of Lord Bathurst, thereupon ordered the close imprisonment of double the number of commissioned or uncommissioned United States officers. This was followed by a threat of "unmitigated severity against the American citizens and villages" in case the system of retaliation was pursued. Mr. Madison having retorted by putting in confinement a similar number of British officers taken by the United States, General Prevost immediately retorted by subjecting to the same discipline all his prisoners whatsoever. The difficulty was aggravated by the denunciation by leading New England Federalists of "this policy of exposing our own citizens to imprisonment and death for the sake of a set of foreign renegades, as they were bitterly described," "and the escape of some of the imprisoned British officers from Worcester jail gave very general satisfaction." (6 Hildreth's Hist., U. S., 446.) (Mr. Hildreth's attachment to the Federalists, it must be remembered, gives to statements such as this peculiar weight.) In Massachusetts this sentiment took effect in a statute forbidding the use of the State jails to the United States for prisoners of war; and the jailers were directed to discharge all prisoners of war after thirty days' confinement. An act of Congress was at once passed authorizing the United States marshals, when the State jails were refused, to provide other places of confinement, and the legislature of Pennsylvania at once granted its prisons for this purpose. A better temper, however, soon came over the British Government, by whom this system had been instituted. A party of United States officers, who were prisoners of war in England, were released on parole, with instructions to state to the President that the twenty-three prisoners who had been charged with treason in England had not been tried, but remained on the usual basis of prisoners of war. This led to the dismissal on parole of all the officers of both sides.

As to treatment of prisoners of war in the war of 1812, see 3 Am. St. Pap. (For. Rel.), 630. See Lawrence com. sur Wheat., 3, 229.

The correspondence between Vice-Admiral Cochrane and Mr. Monroe, in 1814, as to reprisals, is given *supra*, § 318.

(*d*) DARTMOOR PRISONERS.

§ 348*c*.

On the announcement of the ratification of the treaty of Ghent there was naturally some disorder among the American prisoners of war confined at Dartmoor, near Plymouth, who were not as yet released. On April 6, 1815, there was some slight disturbance, and indications of an attempt, at least of one or two, to break loose. The captain on guard directed the alarm bell to be sounded, which caused a rush of prisoners, most of whom had no part whatever in the disorder, to the place of alarm. He then ordered the prisoners to their yards, and directed a squad of soldiers to charge them. The crowd of prisoners was great; they would not, and indeed, in the crush of the narrow passage in which they were, could not, immediately retreat; and it was said by some of the witnesses that stones were thrown from among them at the soldiers, though this last fact was negatived by a great preponderance of testimony. An order to fire was given, though by whom it was not clearly shown, and this firing, on a perfectly defenseless crowd, was continued until seven persons were killed, thirty dangerously and thirty slightly wounded. A commission consisting of Mr. F. S. Larpent, representing the British Government, and Mr. Charles King, deputed by the Amer-

can mission in London, having visited the scene of action and examined into the facts, reported that "this firing (at the outset) was justifiable in a military point of view," but that "it is very difficult to find any justification for the further renewal and continuance of the firing," which is attributed to "the state of individual irritation and exasperation on the part of the soldiers who followed the prisoners into their yards." Lord Castlereagh, on receiving this report, expressed, on May 22, 1815, the "disapprobation" of the Prince Regent at the conduct of the troops, and his desire "to make a compensation to the widows and families of the sufferers." Mr. Monroe, Secretary of State, on being informed of this action, sent on December 11, 1885, to Mr. Baker, British chargé d'affaires at Washington, a note in which he said: "It is painful to touch on this unfortunate event, from the deep distress it has caused the whole American people. This repugnance is increased by the consideration that our Governments, though penetrated with regret, do not agree in sentiment respecting the conduct of the parties engaged in it. Whilst the President declines accepting the provision contemplated by His Royal Highness the Prince Regent, he nevertheless does full justice to the motives which dictated it."

The evidence taken in the case is given in 4 Am. St. Pap. (For. Rel.), 24 *ff.*

In a prior section the case of the Dartmoor prisoners is discussed in connection with the question of apology and satisfaction. *Supra*, § 315*c*.

(*e*) CASES IN MEXICAN WAR.

§ 348*d*.

"Prisoners of war are to be considered as unfortunate and not as criminal, and are to be treated accordingly, although the question of detention or liberation is one affecting the interest of the captor alone, and therefore one with which no other Government ought to interfere in any way; yet the right to detain by no means implies the right to dispose of the prisoners at the pleasure of the captor. That right involves certain duties, among them that of providing the prisoners with the necessaries of life and abstaining from the infliction of any punishment upon them which they may not have merited by an offense against the laws of the country since they were taken."

Mr. Webster, Sec. of State, to Mr. Ellis, Feb. 26, 1842. MSS. Inst., Mex.

The Government of the United States having acknowledged the independence of Texas, and Texas being at war with Mexico, if a citizen of the United States captured when with a Texas army by Mexican forces should be treated in Mexico as a rebel and not as a prisoner of war, on the ground that Mexico had not acknowledged Texas as a belligerent, "after his release had been demanded by this Government, consequences of the most serious character would certainly arise."

Mr. Webster, Sec. of State, to Mr. Thompson, Apr. 5, 1842. MSS. Inst., Mex.

For acknowledgment of liberation of such prisoners, see same to same, Sept. 5, 1842.

As protesting against the Mexican doctrine that all "foreigners" invading Mexico with the Texan armies should be granted no quarter, see Mr. Upshur, Sec. of State, to Mr. Thompson, July 27, 1842.

"By the law and practice of civilized nations, enemies' subjects taken in arms may be made prisoners of war, but every person found in the train of an army is not to be considered as therefore a belligerent or an enemy. In all wars and in all countries multitudes of persons follow the march of armies for the purposes of traffic or from motives of curiosity or the influence of other causes who neither expect to be nor reasonably can be considered belligerents. Whoever in the Texan expedition to Santa Fé was commissioned or enrolled for the military service of Texas, or, being armed, was in the pay of that Government and engaged in an expedition hostile to Mexico, may be considered as her enemy, and might lawfully, therefore, be detained as a prisoner of war. This is not to be doubted, and by the general progress of modern nations it is true that the fact of having been found in arms with others admitted to be armed for belligerent purposes raises a presumption of hostile character. In many cases, and especially in regard to European wars in modern times, it might be difficult to repel the force of this presumption. It is still, however, but a presumption, because it is nevertheless true that a man may be found in arms with no hostile intentions. He may have assumed arms for other purposes, and may assert a pacific character with which the fact of his being more or less armed would be entirely consistent. In former and less civilized ages cases of this sort existed without number in European society. When the peace of communities was less firmly established by efficient laws, and when, therefore, men often traveled armed for their own defense, or when individuals being armed according to the fashion of the age, yet often journeyed under the protection of military escorts or bodies of soldiers, the possession of arms was no evidence of hostile character, circumstances of the times sufficiently explaining such appearances consistently with pacific intentions; and circumstances of the country may repel the presumption of hostility as well as circumstances of the times or the manners of a particular age. * * *

"There would be no meaning in that well-settled principle of the law of nations which exempts men of letters and other classes of non-combatants from the liability of being made prisoners of war if it were an answer to any claim for such exemption that the person making it was united with a military force, or journeying under its protection. As to the assertion that it is against the law of Mexico for foreigners to pass into it across the line of Texas, it is with no little surprise that the Mexican secretary of state is found to assert this reason for making Mr. Kendall a prisoner."

Mr. Webster, Sec. of State, to Mr. Thompson, Apr. 5, 1842. MSS. Inst., Mex. 6 Webster's Works, 427, 432.

Prisoners taken from a Texan hostile expedition in Mexico in 1840 (Mexico not having at the time acknowledged Texan independence) are to be regarded as prisoners of war, and cannot be treated as subject to

the municipal laws of Mexico. "Any proceeding founded on this idea would undoubtedly be attended with the most serious consequences. It is now several years since the independence of Texas as a separate Government has been acknowledged by the United States, and she has since been recognized in that character by several of the most considerable powers of Europe. The war between her and Mexico, which has continued so long and with such success that for a long time there has been no hostile foot in Texas, is a public war, and as such it has been and will be regarded by this Government. It is not now an outbreak of rebellion—a fresh insurrection—the parties to which may be treated as rebels. The contest, supposed, indeed, to have been substantially ended, has at least advanced far beyond that point. It is a public war, and persons captured in the course of it, who are detained at all, are to be detained as prisoners of war, and not otherwise. It is true that the independence of Texas has not been recognized by Mexico. It is equally true that the independence of Mexico has only been recently recognized by Spain. But the United States, having acknowledged both the independence of Mexico before Spain acknowledged it and the independence of Texas, although Mexico has not yet acknowledged it, stands in the same relation toward both these Governments, and is as much bound to protect its citizens in a proper intercourse with Texas against injuries by the Government of Mexico as it would have been to protect such citizens in a like intercourse with Mexico against injuries by Spain."

*Ibid.*, 434.

(3) WANTON DESTRUCTION PROHIBITED.

§ 349.

See App., Vol. III, § 349.

The burning in 1814 by the British of the President's residence, of the Capitol, and of other buildings in Washington, was an outrage and an indignity unexampled in modern times; and was remarkable from the fact that the injury it produced to Great Britain was immeasurably greater than that it produced to the United States. It is true that buildings associated with the settlement of the Government at Washington were destroyed; but these could be readily, with scarce a consciousness of the loss, be replaced. It is true, also, that valuable records of the Government were burned or carried off, and that this loss is one which cannot be fully made up. But to Great Britain the penalty inflicted was summary and effective. The invaders were almost immediately ignominiously driven back to their ships, with the humiliating stigma attached to a horde of baffled marauders. Whatever party divisions existed in the United States as to the policy of the war ceased when it was found in what way this war was to be conducted by Great Britain. Throughout the continent of Europe there was not a publicist who spoke on the subject who did not condemn the outrage as a disgrace to those who inflicted it and as a gross violation of the laws of war. Napoleon, it was said, had been spoken of as reckless, and yet, though he had occupied almost every capital of Europe, so far from burning public buildings, he sheltered them from injury by putting them under

special guards. It is true that when fortified towns had been taken after defenses unnecessarily protracted there had been sometimes hard measure shown to the defenders, but Washington was not a fortified town, nor were the assailants a besieging army wearied by long service in the trenches. They were simply a cohort of incendiaries, so it was argued, not organized for battle, who, landing on an unprotected coast, darted on a capital which was but a village, burned its public buildings, and then, when they met an armed force after the burning was done, hurried back to their ships. It is no wonder, so it was further said, that the military power of the United States should have derived an immense stimulus from such an outrage, nor that the battle of New Orleans should have been the response to the burning of Washington.

"They wantonly destroyed the public edifices having no relation in their structure to operations of war, nor used at the time for military annoyance; some of these edifices being costly monuments of taste and of the arts, and others depositories of the public archives, not only precious to the nation as the memorials of its origin and its early transactions, but interesting to all nations as contributions to the general stock of historical instruction and political science."

President Madison's proclamation of Sept. 1, 1814.

The British Government, immediately after being advised of the conflagration, publicly thanked the officers concerned in it; and on being subsequently informed of the death of General Ross, who was killed, the day after the conflagration, in the abortive march to Baltimore, erected a monument in Westminster Abbey to his memory. But before long it was discovered that the burning of Washington was as impolitic as it was in violation of the law of nations. The sentiment of condemnation that then sprung up is exhibited in a speech of Sir James Mackintosh in the House of Commons on April 11, 1815, in an address to the Prince Regent on the treaty of peace. It was argued by him that "the culpable delay of the ministry in opening the negotiations of peace could be explained only on the miserable policy of protracting the war for the sake of striking a blow against America. The disgrace of the naval war, of balanced success between the British navy and the new-born marine of America, was to be redeemed by protracted warfare, and by pouring our victorious armies upon the American continent. That opportunity, fatally for us, arose. If the congress had opened in June, it was impossible that we should have sent out orders for the attack on Washington. We should have been saved from that success, which he considered a thousand times more disgraceful and disastrous than the worst defeat. * * * It was a success which had made our naval power hateful and alarming to all Europe. It was a success which gave the hearts of the American people to every enemy who might rise against England. It was an enterprise which most exasperated a people and least weakened a government of any recorded in the annals of war. For every justifiable purpose of present warfare, it was almost impotent. To every wise object of retrospective policy, it was hostile. It was an attack, not against the strength or resources of a state, but against the national honor and public affections of a people. After twenty-five years of the fiercest warfare, in which every great capital of the European continent had been spared, he had almost said respected, by enemies, it was reserved for England to violate all that decent courtesy towards the seats of national dignity which, in the midst of enmity, manifest the respect of nations for each other,

by an expedition deliberately and principally directed against palaces of government, halls of legislation, tribunals of justice, repositories of the muniments of property, and of the records of history; objects, among civilized nations, exempted from the ravages of war, and secured, as far as possible, even from its accidental operation, because they contribute nothing to the means of hostility, but are consecrated to purposes of peace, and minister to the common and perpetual interest of all human society. It seemed to him an aggravation of this atrocious measure that ministers had attempted to justify the destruction of a distinguished capital as a retaliation for some violences of inferior American officers, unauthorized and disavowed by their Government, against he knew not what village in Upper Canada. To make such retaliation just, there must always be clear proof of the outrage; in general, also, sufficient evidence that the adverse Government had refused to make due reparation for it; and, at least, some proportion of the punishment to the offense. Here there was very imperfect evidence of the outrage—no proof of refusal to repair—and demonstration of the excessive and monstrous iniquity of what was falsely called retaliation. The value of a capital is not to be estimated by its houses and warehouses and shops. It consisted chiefly in what could be neither numbered nor weighed. It was not even by the elegance or grandeur of its monuments that it was most dear to a generous people. They looked upon it with affection and pride as the seat of legislation, as the sanctuary of public justice, often as linked with the memory of past times, sometimes still more as connected with their fondest and proudest hopes of greatness to come. To put all these respectable feelings of a great people, sanctified by the illustrious name of Washington, on a level with half a dozen wooden sheds in the temporary seat of a provincial government, was an act of intolerable insolence, and implied as much contempt for the feelings of America as for the common sense of mankind."

30 Hansard Parl. Deb. 526 *ff.* See Dana's Wheaton, § 351. 2 Ingersoll's Hist. Late War, ser. 1, ch. viii.

"Nothing could be so unwise, to say nothing more," so said the Edinburgh Review, in the year of the event, "as our unmeaning marauding expedition to Washington and Baltimore, which exasperated without weakening, and irritated all the passions of the nation, without even a tendency to diminish its resources—nay, which added directly to their force, both by the indignation and unanimity which they excited and by teaching them to feel their own strength, and to despise an enemy that, with all his preparation and animosity could do them so little substantial mischief."

24 Edinb. Rev., 254, Nov., 1814.

Sir A. Alison, after showing his Tory proclivities by declaring that the "battle" of Bladensburg has done "service to the cause of historic truth by demonstrating in a decisive manner the extreme feebleness of the means for national protection which democratic institutions afford," goes on to say that "it is to be regretted that the luster of the victory has been much tarnished to the British arms by the unusual and, under the circumstances, unwarrantable extension which they made of the ravages of war to the *pacific* or ornamental edifices of the capital."

10 Alis. Hist. of Europe, 725.

"The following propositions, drawn from the instructions issued for the government of the Army of the United States in the field, commend themselves to approval so much by their moderation and by their sound reason, that they are given here as rules that all enlightened powers recognize, accept, and act upon: Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern laws and usages of war. Military necessity admits of all direct destruction of life or limb of *armed* enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war. It allows of all destruction of property and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy, of the appropriation of whatever an enemy's country affords necessary for the safety and subsistence of the army, and of such deception as does not involve the breaking of good faith, either pointedly pledged regarding agreements entered into during the war, or supposed by the modern law of war to exist. Military necessity does not admit of cruelty or torture to extract confession, nor of poison, nor of wanton devastation of a district. It admits of deception, but disdains acts of perfidy; and, in general, it does not include any act of hostility that makes the return to peace unnecessarily difficult."

Abdy's Kent (1878), 223. See 2 Halleck's, Int. Law (Baker's ed.), 37.

"Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the non-combatants, and especially the women and children, may be removed before the bombardment commences. But it is no infraction of the common law of war to omit thus to inform the enemy. Surprise may be a necessity."

Instructions for the government of armies of the United States in the field. 2 Halleck's Int. Law (Baker's ed.), 38.

"31. A victorious army appropriates all public money, seizes all public movable property until further direction by its Government, and sequesters for its own benefit or that of its Government all the revenues of real property belonging to the hostile Government or nation. The title to such real property remains in abeyance during military occupation, and until the conquest is made complete. * * *

"34. As a general rule, the property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning, or observatories, museums of the fine arts, or of a scientific character—such property is not to be considered public property in the sense of paragraph 31; but it may be taxed or used when the public service may require it.

"35. Classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.

"36. If such works of art, libraries, collections, or instruments belonging to a hostile nation or Government, can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace.

"In no case shall they be sold and given away, if captured by the armies of the United States, nor shall they ever be privately appropriated, or wantonly destroyed or injured."

Instructions for the government of armies of the United States in the field. 2 2 Halleck's Int. Law (Baker's ed.), 39 *ff.*

The bombardment of unfortified towns is not permitted by the law of nations. (See Calvo, 3d ed., vol. ii, 137.) An exception to this rule is recognized in cases where the inhabitants of an unfortified city oppose, by barricades and other hostile works, the entrance of the enemy's army, or wantonly proceed in the destruction of his property and refuse redress.

As to Greytown, see §§ 224, 315.

"In the case of a collection of Italian paintings and prints captured by a British vessel during the war of 1812, on their passage from Italy to the United States, the learned judge (Sir Alexander Croke) of the vice-admiralty court at Halifax, directed them to be restored to the Academy of Arts in Philadelphia, on the ground that the arts and sciences are admitted amongst all civilized nations to form an exception to the severe rights of war, and to be entitled to favor and protection. They are considered not as the *peculium* of this or that nation, but as the property of mankind at large, and as belonging to the common interests of the whole species; and that the restitution of such property to the claimants would be in conformity with the law of nations, as practiced by all civilized countries."

Twiss, Law of Nations at War (2d ed.), 132.

### V. *WHO ARE ENTITLED TO BELLIGERENT RIGHTS.*

#### (1) In foreign war authorization from sovereign generally necessary.

### § 350.

"If one citizen has a right to go to war of his own authority, every citizen has the same. If every citizen has that right, then the nation (which is composed of all its citizens) has a right to go to war by the authority of its individual citizens. But this is not true, either on the general principles of society or by our Constitution, which gives that power to Congress alone, and not to the citizen individually. Then the first position is not true, and no citizen has a right to go to war on his own authority, and for what he does without right he ought to be punished."

Mr. Jefferson, Sec. of State, to Mr. Morris, Aug. 16, 1793. MSS. Inst., Ministers. 4 Jeff. Works, 37. Adopted by Mr. Webster, Sec. of State, report to President (Thrasher's case), Dec. 23, 1851. 6 Webster's Works, 527. (This report is not on record in the Department of State.) See *supra*, §§ 190, 203, 229, 230, 244, 257.

"While noticing the irregularities committed on the ocean by others, those on our own part should not be omitted nor left unprovided for.

Complaints have been received that persons residing within the United States have taken on themselves to arm merchant vessels, and to force a commerce into certain ports and countries in defiance of the laws of those countries. That individuals should undertake to wage private war, independently of the authority of their country, cannot be permitted in a well ordered society. Its tendency to produce aggression on the laws and rights of other nations and to endanger the peace of our own is so obvious that I doubt not you will adopt measures for restraining it effectually in future."

President Jefferson, Fourth Annual Message, 1804.

"That an individual forming part of a public force, and acting under the authority of his Government, is not to be answerable as a private trespasser or malefactor, is a principle of public law sanctioned by the usages of all civilized nations, and which the Government of the United States has no inclination to dispute. * * * All that is intended to be said at present is, that since the attack on the Caroline is avowed as a national act, which may justify reprisals, or even general war, if the Government of the United States, in the judgment which it shall form of the transaction and of its own duty, should see fit so to decide, yet that it raises a question purely public and political, a question between independent nations, and that individuals concerned in it cannot be arrested and tried before the ordinary tribunals, as for the violation of municipal law."

Mr. Webster, Sec. of State, to the Attorney-General (Mr. Crittenden), Mar. 15, 1841. 2 Curtis' Webster, 65. In § 21, *supra*, Mr. Calhoun's reply to Mr. Webster, in this relation, is given.

As to Caroline case, see *supra*, § 50.

As to McLeod's case, Mr. Webster, in his speech in the Senate on the treaty of Washington (Apr. 6, 1846) said: "McLeod's case went on in the court of New York, and I was utterly surprised at the decision of that court on the *habeas corpus*. On the peril and risk of my professional reputation, I now say that the opinion of the court of New York in that case is not a respectable opinion, either on account of the result at which it arrives, or the reasoning on which it proceeds." In a note it is added that the opinion had been reviewed by Judge Tallmadge, of New York City, and that of this review Chief-Justice Spencer said that "it refutes and overthrows the opinion most amply," and that Chancellor Kent said, "It is conclusive at every point."

5 Webster's Works, 129.

For a full discussion of McLeod's case, see *supra*, § 21.

No hostilities of any kind, except in necessary self-defense, can lawfully be practiced by one individual of a nation against an individual of any other nation at enmity with it, but in virtue of some public authority.

Talbot *v.* Janson, 3 Dall., 133.

The fact that the commander of a private armed vessel is an alien enemy does not invalidate a capture made by it.

The Mary and Susan, 1 Wheat., 46.

It is an offense against the law of nations for any persons, whether citizens or foreigners, to go into the territory of Spain with intent to recover their property by their own strength, or in any other manner than that permitted by its laws.

1 Op., 68, Lee, 1797.

"It is necessary, in order to place the members of an army under the protection of the law of nations, that it should be commissioned by a state. If war were to be waged by private parties, operating according to the whims of individual leaders, every place that was seized would be sacked and outraged, and war would be the pretense to satiate private greed and spite. Hence, all civilized nations have agreed in the position that war, to be a defense to an indictment for homicide or other wrong, must be conducted by a belligerent state, and that it cannot avail voluntary combatants not acting under the commission of a belligerent. But freebooters, or detached bodies of volunteers, acting in subordination to a general system, if they wear a distinctive uniform, are to be regarded as soldiers of a belligerent army. Mr. Field, in his proposed code, thus speaks: 'The following persons, and no others, are deemed to be impressed with the military character: (1) Those who constitute a part of the military forces of the nation; and (2), Those who are connected with the operations thereof, by the express authority of the nation.' This was accorded to the partisans of Marion and Sumter in the American Revolution, they being treated as belligerents by Lord Rawdon and Lord Cornwallis, who were in successive command of the British forces in South Carolina; by Napoleon to the German independent volunteers in the later Napoleonic campaigns; and by the Austrians, at the time of the uprising of Italy, to the forces of Garibaldi. (Lawrence's Wheaton's Elem. of Int. Law, 627, pt. iv, chap. ii, § 8; Dana's Wheaton, § 356; Bluntschli, Droit Int. Codifié, § 569, cited by Field, *ut supra*.) There must, however, be a military uniform, and this test was insisted on by the Government of the United States in its articles of war issued in 1863, and by the German Government in its occupation of France in 1871. The privileges of belligerents attach to subsidiary forces, camp followers, etc. But ununiformed predatory guerrilla bands are regarded as outlaws, and may be punished by a belligerent as robbers and murderers. (Halleck's Int. Law and Laws of War, 386, 387; Heffter, Droit Int., § 126; 3 Phill. Int. Law, § 96; Lieber's Instructions for the Government of Armies of the United States, § iv.) But if employed by the nation, they become part of its forces. (Halleck, 386, § 8; adopted by Field, *ut supra*.)"

Whart. Com. Am. Law, § 221.

(2) INSURGENTS ARE BELLIGERENTS WHEN PROCEEDED AGAINST BY OPEN WAR.

§ 351.

The question of recognition of belligerency is discussed, *supra*, § 69; that of insurgency as a preliminary to belligerency, *infra*, § 381.

### VI. *WHEN ENEMY'S CHARACTER IS IMPUTABLE TO NEUTRALS.*

#### (1) When residing in enemy's jurisdiction.

§ 352.

In other sections the liability of neutral or alien property to seizure is considered as follows: Rights of aliens generally, § 201; subjection of, to local seizures, § 203; injury of, from belligerent action, §§ 223 *ff.*; injury of, from mob attacks, § 226; belligerent's spoliation by neutral, § 227; neutral's spoliation by belligerent, § 228; subjection of alien to reprisal, § 318; confiscation of goods of, as a war measure, § 336; contraband goods of, liable to seizure, § 375; cotton belonging to, susceptibility of seizure when in belligerent lines, §§ 203, 224–228, 353, 373.

As to domicil attaching to aliens, see *supra*, § 198; *infra*, § 353.

"An answer to these notes has been delayed with the view of obtaining the opinion of the Supreme Court in the case entitled 'The United States *v.* Guillem,' which it was supposed might contribute to a better understanding of the case first named. That decision having been recently given, I have now the honor to transmit to you a copy of it for your consideration, and to state, in reply to your application, that the legality of the capture in the case of the Jeune Nelly has been incidentally tried and decided, both by the district court of Louisiana and by the Supreme Court of the United States."

Mr. Webster, Sec. of State, to M Boislecombe, Feb. 14, 1851. MSS. Notes, France.

A neutral who places his personal property in a country occupied in turn by each of two belligerent armies takes the risks, and cannot afterwards proceed against the conqueror for injuries resulting from the course of war.

Mr. Bayard, Sec. of State, to Mr. Muruaga, June 28, 1886. MSS. Notes, Spain.

A neutral, who has resided in an enemy's country, resumes his neutral rights as soon as he puts himself and his family *in itinere* to return home to reside, and has a right to take with him money he has earned, as the means of support for himself and his family. Such property, it was further held, is not forfeited by a breach of blockade by the vessel on board of which he has taken passage if he personally is in no fault.

U. S. *v.* Guillem, 11 How., 47. See this case considered in dispatch from Mr. Hoffman, Apr. 14, 1879. For. Rel., 1879. Whart. Com. Am. Law, § 219.

The question how far a temporary residence of a neutral merchant in an enemy's country imposes on such merchant the enemy's liability to capture at sea, is discussed at large by Mr. Pinkney, as commissioner under the treaty of 1794. See Wheaton's Life of Pinkney, 245 *ff.*

An American citizen, residing in a foreign country, may acquire the commercial privileges attached to his domicil; and, by making him-

self the subject of a foreign power, he places himself out of the protection of the United States while within the territory of the sovereign to whom he has sworn allegiance.

Murray *v.* The Charming Betsey, 2 Cranch, 64.

A Spanish subject, who comes to the United States in time of peace to carry on trade, and remains here engaged in trade after a war has been begun between Spain and Great Britain, is to be deemed an American merchant by the law of domicil, although by the law of Spain the trade in which he was engaged could be carried on only by a Spanish subject; his neutral character depending, not on the kind of trade in which he was engaged, but on his domicil.

Livingston *v.* Maryland Ins. Co., 7 Cranch, 506.

The acceptance and use of an enemy's license on a voyage to a neutral port, prosecuted in furtherance of the enemy's avowed objects, is illegal, and subjects vessel and cargo to confiscation. It is not necessary, in order to subject the property to condemnation, that the person granting the license should be duly authorized to grant it, provided the person receiving it takes it with the expectation that it will protect his property from the enemy.

The Aurora, 8 Cranch, 203. As to license, see *infra*, § 388.

If a person who has acquired a domicil in an enemy's country cause property to be shipped before the war be declared, or before its declaration be known, it is, like other enemies' property, liable to capture. But national character which a man acquires by residence may be thrown off at pleasure by a return to his native country, or even by leaving the country in which he has resided for another.

The Venus, *ibid.*, 253.

The domicil of a neutral or citizen in an enemy's country subjects his property embarked in trade to capture on the high seas.

*Ibid.*; The Frances, *ibid.*, 335; S. P., *ibid.*, 363.

If, upon the breaking out of a war with this country, our citizens have a right to withdraw their property from the enemy's country, it must be done within a reasonable time. Eleven months after the declaration of war is too late.

The St. Lawrence, 9 Cranch, 120.

A detention in the enemy's country by perils of the sea, or an act of the enemy, does not render unlawful a voyage lawful in its inception.

The Mary, *ibid.*, 126.

Shipments made by merchants actually domiciled in the enemy's country at the breaking out of a war partake of the nature of enemy trade, and, as such, are subject to capture.

The Mary and Susan, 1 Wheat., 46.

The share of a partner in a neutral house is, *jure belli*, subject to confiscation where his own domicil is in a hostile country.

The Antonia Johanna, *ibid.*, 159.

A native citizen of the United States who emigrated before a declaration of war to a neutral country, and there acquired a domicil, afterward returning to the United States during the war and reacquiring his native domicil, is to be held as recovering his American citizenship, so that he could not afterward, *flagrante bello*, acquire a neutral domicil by again emigrating to his adopted country.

The Dos Hermanos, 2 Wheat., 76.

Mere casual return to his native country of a merchant who is domiciled in a neutral country at the time of capture does not revive his native domicil, it appearing that he left his commercial establishment in the neutral country to be conducted by his clerks in his absence, and that he visited his native country merely on mercantile business, intending to return to his adopted country.

The Friendschaft, 3 Wheat., 14.

The property of a house of trade established in the enemy's country is condemnable as prize, whatever may be the personal domicil of the partners.

*Ibid.*, 4 Wheat., 105.

All persons, whether foreigners or not, residing within the territory occupied by the hostile party in the civil war in the United States, are liable to be treated as enemies.

The Prize Cases, 2 Black, 635; The Venice, 2 Wall., 258.

"It is said, that though remaining in rebel territory, Mrs. Alexander has no personal sympathy with the rebel cause, and that her property therefore cannot be regarded as enemy property; but this court cannot inquire into the personal character and dispositions of individual inhabitants of enemy territory. We must be governed by the principle of public law, so often announced from this bench, as applicable alike to civil and international wars, that all the people of each State or district in insurrection against the United States must be regarded as enemies, until, by the action of the legislature and the executive, or otherwise, that relation is thoroughly and permanently changed."

Chase, C. J.; Mrs. Alexander's Cotton, 2 Wall., 419.

As to cotton as contraband, see §§ 203, 224, 2.8, 373. As to claims for spoliation of neutral, see *supra*, §§ 227 *ff*; *infra*, § 353; App., Vol. III, § 352.

Alien friends who remain in the country of the enemy after the declaration of war have impressed upon them so much the character of enemies that trading with them becomes illegal, and all property so acquired is liable to confiscation.

The William Bagaley, 5 Wall. 377.

Domicil in such cases becomes an important consideration, because every person is to be considered in such proceedings as belonging to that country where he has his domicil, whatever may be his native or adopted country.

*Ibid.*

The court has never gone further in protecting the property of citizens residing during the rebellion in the Confederate States from judicial sale than to declare that where such citizen has been driven from his home by a special military order and forbidden to return, judicial proceedings against him were void.

University *v.* Finch, 18 Wall., 106.

The court reaffirms the ruling in the William Bagaley (5 Wall., 377), that a resident of a section in rebellion should leave it as soon as practicable and adhere to the regular established Government; and furthermore holds that one who, abandoning his home, enters the military lines of the enemy and is in sympathy and co-operation with those who strive by armed force to overthrow the Union, is, during his stay there, an enemy of the Government, and liable to be treated as such, both as to his person and property.

Gates *v.* Goodloe, 101 U. S., 612.
As to abandonment of citizenship, see *supra*, §§ 176–190, 216.
As to seizure in other cases, see *supra*, §§ 201, 203, 223, 226–228, 318, 336.

As we have seen, partnership property sent to sea by a partner domiciled in an enemy's country partakes of the character of such partner (The William Bagaley, 5 Wall., 377), though this taint does not reach to the separate property of a partner having a neutral domicil. (*Ibid.;* The Sally Magee, Blatch. Pr. Ca., 382; The Aigburth, *ibid.*, 635.)

That a neutral's residence in an enemy's country exposes his property to enemy's risks, see The Gray Jacket, 5 Wall., 342; The Pioneer, Blatch. Pr. Ca., 61; The Prince Leopold, *ibid.*, 89; The Lilla, 2 Sprague, 177. And see, more fully, *supra*, §§ 198, 223; App., Vol. III, § 352.

According to Chancellor Kent, the principle that "for all commercial purposes the domicil of the party, without reference to the place of birth, becomes the test of national character, has been repeatedly and explicitly admitted in the courts of the United States." "If he resides" (here "domicil" and "residence" are treated as convertible by Chancellor Kent, which, if the latter term be regarded as defining the rule, would largely extend belligerent rights) "in a belligerent country, his property is liable to capture as enemy's property, and if he resides in a neutral country, he enjoys all the privileges, and is subject to all the inconveniences of the neutral trade." (1 Kent Com., 75; The Chester, 2 Dall., 41; Maley *v.* Shattuck, 3 Cranch, 458; The Venus, 8 *ibid.*, 253. To the same effect, see The William Bagaley, 5 Wall., 377; The Cheshire, 3 Wall., 231.) Sir Robert Phillimore, on the other hand, evidently accepts this position with reluctance (4 Phill., 169), though it is reaffirmed by Mr. Dicey, who states the distinction to be as follows: "A commercial domicil is such a residence in a country for the purpose of trading there as makes a person's trade or business con-

tribute to or form part of the resources of such country, and renders it, therefore, reasonable that his hostile, friendly, or neutral character should be determined by reference to the character of such country. When a person's civil domicil is in question, the matter to be determined is whether he has or has not so settled in a given country as to have made it his home. When a person's commercial domicil is in question, the matter to be determined is whether he is or is not residing in a given country with the intention of continuing to trade there." (Dicey on Domicil, 345; see further Whart. Confl. of Laws, § 70.) This is clearly put; and if we accept the position that an enemy's goods may be seized at sea wherever found, gives us at least a line of demarkation readily understood and easily applied. It is, however, to be regretted that the term "domicil" should be adapted to conditions so different as residence with intention to establish a permanent home, and residence with intention to engage in business. The rejection of this distinction renders still more objectionable the claim of belligerents to seize an enemy's goods at sea. If by an "enemy" is to be considered any one who by his business contributes to the resources of an enemy's country, it would be hard for any goods on the high seas, in any way related to a belligerent country, to escape the meshes of the net of the other belligerent. And even were we to hold that a commercial "domicil" of this kind stamps the party accepting it with the political character of the country in which he does business, the more reasonable view is that if he engage in such business in time of peace, this "domicil," if not adopted as final, ceases when the sovereign of such country enters into a war which could not have been contemplated by the party when he engaged in the business. This is the position taken by Marshall, C. J., in The Venus (8 Cranch, 253), dissenting in this respect from the majority of the court, who held to the English view. Chancellor Kent (Com., i, 79) and Mr. Duer (Ins., i, 498), vindicate the dissenting opinion of the Chief Justice; Chancellor Kent saying "there is no doubt of its superior solidity and justice." And even by the English courts a person doing business in a land in which he is not naturalized is allowed, on the breaking out of war, a reasonable time to leave such land, and dissolve his business relations. The Gerasimo, 11 Moore, P. C., 88; The Ariel, *ibid.*, 119; see, for parallel cases in this country, The William Bagaley, 5 Wall., 377; The Gray Jacket, 5 Wall., 342. But where a merchant elects to put his goods in a country engaged in war, he impresses such goods, according to the English view, with the political character of such country; and this "allows a merchant to act in two characters, so as to protect his property connected with his house in a neutral country, and to subject to seizure and forfeiture his effects belonging to the establishment in the belligerent country."

See 1 Kent Com., 81, citing, among other cases, The San José, 2 Gallison, 268. As to rights and duties of domicil, see *supra*, §§ 198 *ff.*

(2) WHEN LEAVING PROPERTY AT ENEMY'S DISPOSAL.

§ 353.

The principle that personal dispositions of the individual inhabitants of enemy territory cannot, in questions of prize, be inquired into, applies in civil as well as foreign wars. Property captured *on land* by the officers and crews of a naval force of the United States, is not

"maritime prize;" even though, like cotton, it may have been a property subject of *capture* generally, as an element of strength to the enemy.

Mrs. Alexander's Cotton, 2 Wall., 404.

As to principle in this case, see further §§ 203, 224, 228, 352, 373.

NOTE.—By the act of Congress of March 12, 1863, the proceeds of the sale of such property were deposited in the National Treasury, so that loyal owners might obtain restitution, on making satisfactory proof of their loyalty in the Court of Claims.

As to cotton as contraband, see *infra*, § 373.

The property of a commercial house, established in the enemy's country, is subject to seizure and condemnation as prize, though some of the partners may have a neutral domicil.

The Cheshire, 3 Wall., 231.

When a neutral, who places his vessels under belligerent control, and engages them in belligerent trade, or permits them to be sent with contraband cargoes, under cover of false destination, to neutral ports, while the real destination is to belligerent ports, he impresses upon them the character of the belligerents in whose service they are employed, and the vessel may be seized and condemned as enemy property.

The Hart, *ibid.*, 559. See *supra*, §§ 223 *ff*, 227 *ff*.

Property, the product of an enemy country, and coming from it during war, bears the impress of enemy's property. If it belongs to a loyal citizen of the country of the captors, it is nevertheless as much liable to condemnation as if owned by a citizen or subject of the hostile country, or by the hostile Government itself.

The only qualification of these rules is, that where, upon the breaking out of hostilities, or as soon after as possible, the owner escapes with such property as he can take with him, or in good faith thus early removes his property, with the view of putting it beyond the dominion of the hostile power, the property in such cases is exempt from the liability which would otherwise attend it.

The Gray Jacket, 5 Wall., 342.

The presumption of the law of nations is against an owner who suffers his property to continue in the hostile country for a considerable length of time.

If a person, abandoning a hostile country, has had his property in partnership with citizens thereof, it is his duty to withdraw or dispose of his interest in the firm. If he neglects to do so, his property becomes liable as enemy's property.

The William Bagaley, *ibid.*, 377; *supra*, §§ 223 *ff*, 227 *ff*.

Where, after active hostilities had ceased in Georgia, cotton, as private property, was seized there by the military forces of the United States, in obedience to an order of the commanding general, during their occupation and actual government of that State, it was held to have been taken from hostile possession within the meaning of that term, and was, without regard to the *status* of the owner, a legitimate subject of capture.

Lamar *v.* Browne, 92 U. S., 187. See as to cotton, *supra*, §§ 203, 224, 228; *infra*, § 373.

What shall be the subject of capture, as against an enemy, is always within the control of every belligerent. It is the duty of his military forces in the field to seize and hold that which is apparently so subject, leaving the owner to make good his claim as against the captor, in the appropriate tribunal established for that purpose. In that regard they occupy on land the same position that naval forces do at sea.

A person residing in an enemy's country long enough to acquire a domicil there, is subject to the disabilities of an enemy, so far as his property is concerned.

U. S. *v.* Cargo of the El Telegrafo, 1 Newb. Adm., 383.

A Frenchman who had resided thirteen years in Mexico, was held to have acquired a domicil in the enemy's country, subjecting him, so far as his property was concerned, to all the disabilities of an alien enemy.

Rogers *v.* The Amado, *ibid*, 400.

That the question of enemy or friend depends upon the domicil, see The Ann Green, 1 Gallison, 274; The Joseph, *ibid.*, 545; The Francis, *ibid.*, 614. And see as to domicil, *supra*, § 198.

If there be a house of trade established in the enemy's country, the property of all the partners in the house is condemnable as prize, notwithstanding some of them have a neutral residence. But such connection will not affect the other separate property of the partners having a neutral residence.

The San José Indiano, 2 Gallison, 268. *Supra*, §§ 198, 352.

The rule of international law is well established that a foreigner who resides in the country of a belligerent can claim no indemnity for losses of property occasioned by acts of war of the other belligerent. Hence American merchants domiciled for commercial purposes at Valparaiso cannot sustain a claim for indemnity against Spain or Chili for losses of merchandise in the conflagration caused by the bombardment of Valparaiso by the Spanish fleet in March, 1866.

12 Op., 21, Stanbery, 1866. *Supra*, § 198.

As to neutral property under enemy's flag, see *supra*, § 343.

As to seizures of enemy's goods under neutral flags, see *supra*, § 342; and see further, as to alien neutral's liability to seizure of goods, §§ 201, 203, 223, 227, 228, 318.

## VII. *ADMINISTRATION BY CONQUEROR.*

### (1) As to courts.

### § 354.

Conquered territory, while subject to temporary military control, retains its municipal institutions.

*Supra*, §§ 3, 4.

A portion of the territory of the United States under the military occupation of a public enemy, is deemed a foreign country with respect to our revenue laws, and goods imported during such occupation do not become liable to the payment of duties on the evacuation of the territory by the enemy.

U. S. *v.* Rice, 4 Wheat., 246.

Neither the President nor any military officer can establish a court in a conquered country and authorize it to decide upon the rights of the United States or of individuals in prize cases, nor to administer the law of nations. Hence the courts established or sanctioned in Mexico during the war by the commanders of the American forces, were to be regarded as nothing more than the agents of the military power, to assist it in preserving order in the conquered territory, and to protect the inhabitants in their persons and property while it was occupied by the American arms. They were subject to the military power, and their decisions under its control, whenever the commanding officer thought proper to interfere. They were not courts of the United States, and had no right to adjudicate upon a question of prize or no prize; and the sentence of condemnation of such courts is a nullity, and can have no effect upon the rights of any party.

Jecker *v.* Montgomery, 13 How., 515. See Snell *v.* Faussatt, 1 Wash. C. C., 271; and see *supra*, §§ 3 *ff.*

It was within the authority of the President, as commander-in-chief, to establish courts during the rebellion in portions of the insurgent territory which were occupied by the national forces.

The Grapeshot, 9 Wall., 129.

The Constitution did not prohibit the creation by military authority of courts for the trial of civil causes during the civil war in conquered portions of the insurgent States. The establishment of such courts was the exercise of the ordinary rights of conquest.

Mechanics' and Traders' Bank *v.* Union Bank, 22 Wall., 276.

It will be presumed, until the contrary is proven, that a court established by proclamation of the commanding general in New Orleans on the 1st of May, 1862, on the occupation of the city by the Government forces, was established with the authorization of the President.

*Ibid.*

Whether a court established during the rebellion by the proclamation of a general commanding the Army of the United States, in a department and State then lately in rebellion, and now held only by military occupation—the jurisdiction of the court being nowhere clearly defined in the order constituting it—acted, in fact, within its jurisdiction in a case adjudged by it, where one bank of the State was claiming from another bank of the same State a large sum of money, is not a question for the Federal courts to determine, but is exclusively for the proper State court.

*Ibid.* See also §§ 3 *ff.*

Martial law is the law of military necessity in the actual presence of war. It is administered by the General of the Army, and is under his supreme control.

U. S. *v.* Diekelman, 92 U. S., 520.

When any portion of the insurgent States was in the occupation of the forces of the United States during the rebellion, the municipal laws, if not suspended or superseded, were generally administered there by the ordinary tribunals for the protection and benefit of persons not in the military service. Their continued enforcement was not for the protection or the control of officers or soldiers of the Army.

Dow *v.* Johnson, 100 U. S., 158.

An officer of the Army of the United States, whilst serving in the enemy's country during the rebellion, was not liable to an action in the courts of that country for injuries resulting from his military orders or acts; nor could he be required by a civil tribunal to justify or explain them upon any allegation of the injured party that they were not justified by military necessity. He was subject to the laws of war, and amenable only to his own Government.

*Ibid.*

As to limits of courts-martial, see 1 John Adams' Works, 562; 8 *ibid.*, 567; 2 Halleck's Int. Law (Baker's ed.), 455; Whart. Cr. Pl. and Pr., § 979, note.

As to martial law, see 3 John Adams' Works, 440.

As to relations of civil to military authority, see 10 John Adams' Works, 17, 203.

As to effect of war on titles and municipal law, see *supra*, § 4.

As to distinctions in respect to martial law, see Whart. Cr. Pl. and Pr., § 979, note.

(2) As to executive.

§ 355.

If a nation be not entirely subdued, its territory, when in the invader's lines, is regarded as a mere military occupation, until its fate shall be determined by final treaty. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of ces-

sion or on such as its new master shall impose. On such transfer of territory, it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the Government which has acquired their territory. The same act which transfers their country transfers the allegiance of those who remain in it, and while the law which may be denominated political is necessarily changed, that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly-created power of the state.

American Ins. Co. *v.* 356 Bales of Cotton, 1 Pet., 511, 542. See *supra*, §§ 3, 4.

By the modern usage of nations, private property is not confiscated, nor private rights annulled by a conquest; and the same rule should apply to an amicable cession. The people change their allegiance, their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property remain undisturbed. A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The sovereign cedes that only which belongs to him.

U. S. *v.* Percheman, 7 Pet., 51; and see Strother *v.* Lucas, 12 *ibid.*, 410. See *supra*, §§ 3, 4, 338.

"The President, as constitutional Commander-in-Chief of the Army and Navy, authorized (in 1847) the military and naval commander of our forces in California to exercise the belligerent rights of a conqueror, and to form a civil government for the conquered territory, and to impose duties on imports and tonnage as military contributions for the support of the government and of the army which had the conquest in possession. * * * No one can doubt that these orders of the President, and the action of our Army and Navy commander in California, in conformity with them, were according to the law of arms and the right of conquest, or that they were operative until the ratification and exchange of a treaty of peace. Such would be the case upon general principles in respect to war and peace between nations."

Wayne, J.; Cross *v.* Harrison, 16 How., 190.

The authority and jurisdiction of Mexican officers in California are held to terminate on the 7th of July, 1846. The political department of the Government has designated that day as the period when the conquest of California was completed and the Mexican officers were displaced, and in this respect the judiciary follows the action of the political department.

U. S. *v.* Yorba, 1 Wall., 412.

The territory of Castine, by the conquest and occupation by Great Britain, passed under the temporary allegiance and sovereignty of the British sovereign. The sovereignty of the United States over the terri-

tory was suspended during such occupation, so that the laws of the United States could not be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. But a territory conquered by an enemy is not to be considered as incorporated into the dominions of that enemy without a renunciation in a treaty of peace, or a long and permanent possession. Until such incorporation it is still entitled to the full benefit of the law of postliminy.

U. S. *v.* Hayward, 2 Gallison, 485.

### VIII. *ENDING OF WAR.*

#### (1) By cessation of hostilities.

§ 356.

"Conquest gives only an inchoate treaty of peace, which does not become perfect till confirmed by the treaty of peace, and by a renunciation or abandonment by the former proprietor."

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

The late civil war began and terminated at different times in different States. Its commencement may be referred to the proclamation of blockade of the 19th of April, 1861, in those States to which it applied; and to the proclamation of blockade of the 27th of April, 1861, in the States to which it applied. Its termination may be referred, in various States, to the proclamations declaring it closed in those States.

The Protector, 12 Wall., 700; Brown *v.* Hiatts, 15 *ibid.*, 177; Adger *v.* Alston, *ibid.*, 355; Batesville Institute *v* Kauffman, 18 *ibid.*, 151.

Citizens of the loyal States were not, however, prevented from suing citizens of the Confederate States in the Federal courts in those States as soon as such courts were opened. Before any official proclamation of the end of the civil war was made courts of the United States were held in the several States which had been engaged in rebellion, and their jurisdiction to hear and determine the cases brought before them as well before as after such proclamation is not open to controversy.

Masterson *v.* Howard, 18 Wall., 99.

[These were all cases of the application of the rule that, as between citizens of the loyal and rebellious States, the statutes of limitation did not run during the rebellion, and in determining what period should be deducted for the pendency of the war from the limitation prescribed, it was held that the war continued until proclamation was officially made of its close. See also App., Vol. III, § 356.]

#### (2) By treaty of peace.

§ 357.

The topic of treaties of peace is examined at large in a prior chapter.

*Supra*, §§ 130 *ff.*

# CHAPTER XVIII.

## BLOCKADE.


I. WHAT ESSENTIAL TO.
  (1) Must be duly instituted, § 359.
  (2) Must be notified to neutrals, § 360.
  (3) Must be effective, § 361.
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II. ENFORCEMENT OF.
  (1) Vessels seeking evasion of, may be seized, § 362.
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### I. *WHAT ESSENTIAL TO.*

#### (1) MUST BE DULY INSTITUTED.

#### § 359.

"On principle it might well be questioned whether this rule (the right to confiscate vessels bound to a blockaded port) can be applied to a place not completely invested by land as well as by sea. If we examine the reasoning on which is founded the right to intercept and confiscate supplies designed for a blockaded town, it will be difficult to resist the conviction that its extension to towns invested by sea only is an unjustifiable encroachment on the rights of neutrals. But it is not of this departure from principle, a departure which has received some sanction from practice, that we mean to complain. It is that ports not effectually blockaded by a force capable of completely investing them have yet been declared in a state of blockade, and vessels attempting to enter therein have been seized and on that account confiscated."

Mr. Marshall, Sec. of State, to Mr. King, Sept. 20, 1800. MSS. Inst. Ministers 2 Am. St. Pap. (For. Rel.), 488.

For following portion of this paper, see *infra*, § 361.

"If the subject of blockade, so simple in its original application, now involves the most complicated questions of maritime law among nations, it is to be ascribed to abuses of power on one side, to too much condescension on the other, and to the multitude of incidental cases which have arisen as precedents, establishing arbitrary and ephemeral doctrines, since the breaking down of the original bounds and landmarks of mutual and universal rights.

"Although the commerce of the United States has been to a greater extent than any other the victim of those gigantic abuses of power, it

has never suffered without just complaints in individual cases, and constant and strong remonstrance on the part of the Government of the said States against the principle and practice of everything like an imaginary blockade, the hydra of lawless oppression.

"Thus it has ever been maintained by the United States that a proclamation or ideal blockade of an extensive coast, not supported by the actual presence of a naval power competent to enforce its simultaneous, constant, and effective operation on every point of such coast, is illegal throughout its whole extent, even for the ports which may be in actual blockade; otherwise every capture under a notified blockade would be legal, because the capture itself would be proof of the blockading force. This is, in general terms, one of the fundamental rules of the law of blockade as professed and practiced by the Government of the United States.

"And if this principle is to derive strength from the enormity of consequences resulting from a contrary practice, it could not be better sustained than by the terms of the original declaration of the existing Brazilian blockade, combined with its subsequent practical application."

Mr. Forbes, minister of the United States to Buenos Ayres, to Admiral Lobo, commanding the Brazilian squadron blockading Buenos Ayres, Feb. 13, 1826. Brit. and For. St. Pap. (1825–'26), vol. 13, 822.

The orders and decrees of the belligerent powers of Europe affecting the commerce of the United States are given in 3 Am. St. Pap. (For. Rel.), 263.

Count Romanzoff's circular of May 14, 1809, as to the blockade of the Baltic, is in 3 Am. St. Pap. (For. Rel.), 327.

President Madison's message of Jan. 12, 1810, with the accompanying papers, relative to French blockade of ports in the Baltic, is given in 7 Wait's St. Pap., 342.

Mr. Pinkney's exposition of the law of blockade, in this relation, in his note of Jan. 14, 1811, to Lord Wellesley, is given in 3 Am. St. Pap. (For. Rel.), 419.

The position maintained by Great Britain in 1811 is exhibited in the notes of Mr. Foster, British minister at Washington, to Mr. Monroe, Sec. of State, as given in 3 Am. St. Pap. (For. Rel.), 439.

As to blockade by Spain of the ports of Santa Fé, see 4 Am. St. Pap. (For. Rel.), 156.

President Monroe's message of Feb. 12, 1818, as to blockade of Santa Fé, is in 11 Wait's St. Pap., 473.

An elaborate and extended discussion, carried on in 1825–'28, between Commodore Biddle, commanding the United States Navy in Brazilian waters, and Mr. Raguet, United States minister at Brazil, in reference to the Brazilian blockades of Pernambuco and the River Plate, will be found in the Brit. and For. St. Pap. for 1828–'29, vol. 16, 1099 *ff.*

The message of President J. Q. Adams, of May 23, 1828, containing a mass of correspondence in reference to the Brazilian blockade then recently existing, as well as to certain alleged outrages of the Brazilian Government, is contained in House Doc. 499, 20th Cong., 1st sess.; 6 Am. St. Pap. (For. Rel.), 1021. See also same volume, 277 *ff.*, Brit. and For. St. Pap. (1826–'27), vol. xiv, 1165, for further correspondence.

The blockade of Buenos Ayres by Brazil, and Mr. Raguet's demand for his passport, are given in House Ex. Doc. 281, 20th Cong., 1st sess. 6 Am. St. Pap. (For. Rel.), 1021.

As to blockades on Mexican coast and the Rio de la Plata, see Mr. Van Buren's message of Feb. 22, 1839, House Ex. Doc. 211, 25th Cong., 3d sess.

As to the practice of the United States as to blockade, see 3 Phill. Int. Law (3d ed.), 478.

The correspondence with Great Britain respecting the blockade of the west coast of Mexico in 1846, is found in the Brit. and For. St. Pap. for 1848–'49, vol. 37, 565. The documents include a note from Mr. Buchanan, Secretary, to Mr. Pakenham, of December 29, 1846, in which it is said: "It is sufficiently apparent from the whole proclamation (of Commodore Stockton) that he did not intend to establish a paper blockade. This would have been equally unwarranted by his instructions and by the principles which the United States have maintained in regard to blockades ever since we became an independent nation." In a circular from Mr. Mason, Secretary of the Navy, of December 24, to the commanding officers of the United States Navy in the Pacific, it is said that "a lawful maritime blockade requires the actual presence of a sufficient force stationed at the entrance of the ports, sufficiently near to prevent communication. The only exception to this rule which requires the actual presence of an adequate force to constitute a lawful blockade, arises out of the occasional temporary absence of the blockading squadron produced by accident, as in the case of a storm, which does not suspend the legal operation of a blockade. The law considers an attempt to take advantage of such an accidental removal a fraudulent attempt to break the blockade. The United States have at all times maintained these principles on the subject of blockade; and you will take care not to attempt the application of penalties for a breach of blockade, except in cases where your right is justified by these rules. You should give general notice that under Commodore Stockton's general notification no part on the west side of Mexico is regarded as blockaded unless there is a sufficient American force to maintain it actually present, or temporarily driven from such actual presence by storms of weather, intending to return."

"Your dispatch of June 28, No. 10, has been received.

"I have already, in a previous communication, informed you that this Government has not been disturbed by the action of the British authorities in sending three regiments into Canada, nor by the announcement of the coming of British armed vessels into American waters. These movements are certainly not very formidable in their proportions; and we willingly accept the explanation that they proceed from merely prudential motives.

"Doubtless it had been better if they had not been made. But what Government can say that it never acts precipitately, or even capriciously? On our part the possibility of foreign intervention, sooner or later, in this domestic disturbance is never absent from the thoughts of this Government. We are, therefore, not likely to exaggerate indications of an emergency for which we hold ourselves bound to be in a measure always prepared.

"Another subject which, according to your report, was discussed in your late interview with Lord John Russell demands more extended remarks. I refer to the portion of your dispatch which is in these words: 'His lordship then said something about difficulties in New Granada, and the intelligence that the insurgents there had passed a law to close their ports. But the law officers here told him that this could not be done as against foreign nations, except by the regular form of a block-

ade. He did not know what we thought about it; but he had observed that some such plan was said to be likely to be adopted at the coming meeting of Congress in regard to the ports of those whom we considered as insurgents.'

"Much as I deprecate a reference in official communications of this kind to explanations made by ministers in Parliament, not always fully or accurately reported, and always liable to be perverted when applied to cases not considered when the explanations are given, I nevertheless find it necessary, by way of elucidating the subject, to bring into this connection the substance of a debate which is said to have taken place in the House of Commons on the 27th of June last, and which is as follows:

"Mr. H. Berkly asked the secretary of state for foreign affairs whether Her Majesty's Government recognized a notification given by Señor Martin, minister plenipotentiary to this court from the Granadian Confederation, better known as the Republic of New Granada, which announces a blockade of the ports of Rio Hacha, Santa Marta, Savanilla, Carthagena, and Zaporte, and which Government did Her Majesty's Government recognize in the so-called Granadian Confederation.

"Lord John Russell said the question is one of considerable importance. The Government of New Granada has announced, not a blockade, but that certain ports of New Granada are to be closed. The opinion of Her Majesty's Government, after taking legal advice, is that it is perfectly competent for the Government of a country in a state of tranquillity to say which ports shall be open to trade and which shall be closed; but in the event of insurrection or civil war in that country, it is not competent for its Government to close the ports that are *de facto* in the hands of the insurgents, as that would be an invasion of international law with regard to blockade. Admiral Milne, acting on instructions from Her Majesty's Government, has ordered the commanders of Her Majesty's ships not to recognize the closing of their ports.

"Since your conversation with Lord John Russell, and also since the debate which I have extracted occurred, the Congress of the United States has by law asserted the right of this Government to close the ports in this country which have been seized by the insurgents.

"I send you herewith a copy of the enactment. The connecting by Lord John Russell of that measure when it was in prospect with what had taken place in regard to a law of New Granada, gives to the remarks which he made to you a significance that requires no especial illustration. If the Government of the United States should close their insurrectionary ports under the new statute, and Great Britain should, in pursuance of the intimation made, disregard the act, no one can suppose for a moment that the United States would acquiesce. When a conflict on such a question shall arrive between the United States and Great Britain, it is not easily to be seen what maritime nation could

keep aloof from it. It must be confessed, therefore, that a new incident has occurred increasing the danger that what has hitherto been, and, as we think, ought to be, a merely domestic controversy of our own, may be enlarged into a general war among the great maritime nations. Hence the necessity for endeavoring to bring about a more perfect understanding between the United States and Great Britain for the regulation of their mutual relations than has yet been attained.

"In attempting that important object I may be allowed to begin by affirming that the President deprecates, as much as any citizen of either country or any friend of humanity throughout the world can deprecate, the evil of foreign wars, to be superinduced, as he thinks unnecessarily, upon the painful civil conflict in which we are engaged for the purpose of defending and maintaining our national authority over our own disloyal citizens.

"I may add, also, for myself, that however otherwise I may at any time have been understood, it has been an earnest and profound solicitude to avert foreign war that alone has prompted the emphatic and sometimes, perhaps, impassioned remonstrances I have hitherto made against any form or measure of recognition of the insurgents by the Government of Great Britain. I write in the same spirit now; and I invoke on the part of the British Government, as I propose to exercise on my own, the calmness which all counselors ought to practice in debates which involve the peace and happiness of mankind.

"The United States and Great Britain have assumed incompatible, and thus far irreconcilable, positions on the subject of the existing insurrection.

"The United States claim and insist that the integrity of the Republic is unbroken, and that their Government is supreme so far as foreign nations are concerned, as well for war as for peace, over all the States, all sections, and all citizens, the loyal not more than the disloyal, the patriots and the insurgents alike. Consequently they insist that the British Government shall in no way intervene in the insurrection, or hold commercial or other intercourse with the insurgents in derogation of the Federal authority.

"The British Government, without having first deliberately heard the claims of the United States, announced, through a proclamation of the Queen, that it took notice of the insurrection as a civil war so flagrant as to divide this country into two belligerent parties, of which the Federal Government constitutes one and the disloyal citizens the other; and consequently it inferred a right of Great Britain to stand in an attitude of neutrality between them.

"It is not my purpose at this time to vindicate the position of the United States, nor is it my purpose to attempt to show to the Government of Great Britain that its position is indefensible.

"The question at issue concerns the United States primarily, and Great Britain only secondarily and incidentally. It is, as I have before

said, a question of integrity, which is nothing less than the life of the Republic itself.

"The position which the Government has taken has been dictated, therefore, by the law of self-preservation. No nation animated by loyal sentiments and inspired by a generous ambition can even suffer itself to debate with parties within or without a policy of self-preservation. In assuming this position and the policy resulting from it, we have done, as I think, just what Great Britain herself must, and therefore would, do if a domestic insurrection should attempt to detach Ireland, or Scotland, or England from the United Kingdom, while she would hear no argument nor enter into any debate upon the subject. Neither adverse opinions of theoretical writers nor precedents drawn from the practice of other nations, or, even if they could be, from her own, would modify her course, which would be all the more vigorously followed, if internal resistance should fortify itself with alliances throughout the world. This is exactly the case now with the United States.

"So, for obvious reasons, I refrain from argument to prove to the Government of Great Britain the assumed error of the position it has avowed.

"First, argument from a party that maintains itself to be absolutely right, and resolved in no case to change its convictions, becomes merely controversial. Secondly, such argument would be only an indirect way of defending our own position, which is unchangeable. Thirdly, the position of Great Britain has been taken upon the assumption of a certain degree of probability of success by the insurgents in arms; and it must be sooner or later abandoned, as that probability shall diminish and ultimately cease, while in any case that circumstance does not affect our position or the policy which we have adopted. It must, therefore, be left to Great Britain to do what we have done, namely, survey the entire field, with the consequences of her course deemed by us to be erroneous, and determine as those consequences develop themselves how long that course shall be pursued.

"While, however, thus waiving controversy on the main point, I am tempted by a sincere conviction that Great Britain really must desire, as we do, that the peace of the world may not be unnecessarily broken, to consider the attitude of the two powers, with a view to mutual forbearance, until reconciliation of conflicting systems shall have become in every event impossible.

"The British Government will, I think, admit that so soon as its unexpected, and, as we regard it, injurious, position assumed in the Queen's proclamation became known to us, we took some pains to avert premature or unnecessary collision, if it could be done without sacrificing any part of the sovereignty which we had determined in every event to defend. We promptly renewed the proposition which, fortunately for both parties, we had tendered before that proclamation was

issued, to concede as one whole undivided sovereignty to Great Britain, as a friend, all the guarantees for her commerce that she might claim as a neutral from this Government as one of her two imagined belligerents. It seemed to us that these two great and kindred nations might decline to be dogmatic, and act practically with a view to immediate peace and ultimate good understanding.

"So, on the other hand, it is my duty to admit, as I most frankly do, that the directions given by the British Government that our blockade shall be respected, and that favor or shelter shall be denied to insurgent privateers, together with the disallowance of the application of the insurgent commissioners, have given us good reason to expect that our complete sovereignty, though theoretically questioned in the Queen's proclamation, would be practically respected. Lord Lyons, as you are aware, proposed to read to me a dispatch which he had received from his Government, affirming the position assumed in the Queen's proclamation, and deducing from that position claims as a neutral to guarantees of safety to British commerce less than those we had, as I have already stated, offered to her as a friend. I declined, as you have been advised, to hear the communication, but nevertheless renewed through you, as I consistently could, the offer of the greater guarantees before tendered.

"The case then seemed to me to stand thus: The two nations had, indeed, failed to find a common ground or principle on which they could stand together; but they had succeeded in reaching a perfect understanding of the nature and extent of their disagreement, and in finding a line of mutual, practical forbearance. It was under this aspect of the positions of the two Governments that the President thought himself authorized to inform Congress on its coming together on the 4th of July instant, in extra session, that the sovereignty of the United States was practically respected by all nations.

"Nothing has occurred to change this condition of affairs, unless it be the attitude which Lord John Russell has indicated for the British Government in regard to an apprehended closing of the insurrectionary ports, and the passage of the law of Congress which authorizes that measure in the discretion of the President.

"It is my purpose not to anticipate or even indicate the decision which will be made, but simply to suggest to you what you may properly and advantageously say while the subject is under consideration. First. You will, of course, prevent misconception of the measure by stating that the law only authorizes the President to close the ports in his discretion, accordingly as he shall regard exigencies now existing or hereafter to arise.

"Secondly. The passage of the law, taken in connection with attendant circumstances, does not necessarily indicate a legislative conviction that the ports ought to be closed, but only shows the purpose of Congress that the closing of the ports, if it is now or shall become neces-

sary, shall not fail for want of power explicitly conferred by law. When, on the 13th of April last, disloyal citizens defiantly inaugurated an armed insurrection by the bombardment of Fort Sumter, the President's constitutional obligation to suppress the insurrection became imperative.

"But the case was new, and had not been adequately provided for by express law. The President called military and naval forces into activity, instituted a blockade, and incurred great expense, for all which no direct legal provisions existed. He convened Congress at the earliest possible day to confirm these measures if they should see fit.

"Congress, when it came together, confronted these facts. It has employed itself less in directing how and in what way the Union shall be maintained, than in confirming what the President had already done, and in putting into his hands more ample means and greater power than he has exercised or asked.

"The law in question was passed in this generous and patriotic spirit. Whether it shall be put into execution to-day or to-morrow, or at what time, will depend on the condition of things at home and abroad, and a careful weighing of the advantages of so stringent a measure against those which are derived from the existing blockade.

"Thirdly. You may assure the British Government that no change of policy now pursued, injuriously affecting foreign commerce, will be made from motives of aggression against nations which practically respect the sovereignty of the United States or without due consideration of all the circumstances, foreign as well as domestic, bearing upon the question. The same spirit of forbearance towards foreign nations, arising from a desire to confine the calamities of the unhappy contest as much as possible, and to bring it to a close by the complete restoration of the authority of the Government as speedily as possible, that have hitherto regulated the action of the Government, will continue to control its counsels.

"On the other hand, you will not leave it at all doubtful that the President fully adheres to the position that this Government so early adopted, and which I have so continually throughout this controversy maintained; consequently he fully agrees with Congress in the principle of law which authorizes him to close the ports which have been seized by the insurgents, and he will put into execution and maintain it with all the means at his command, at the hazard of whatever consequences, whenever it shall appear that the safety of the nation requires it.

"I cannot leave the subject without endeavoring once more, as I have so often done before, to induce the British Government to realize the conviction which I have more than once expressed in this correspondence, that the policy of the Government is one that is based on interests of the greatest importance and sentiments of the highest virtue, and therefore is in no case likely to be changed, whatever may be the varying fortunes of the war at home or the action of foreign nations

on this subject, while the policy of foreign states rests on ephemeral interests of commerce or of ambition merely. The policy of these United States is not a creature of the Government but an inspiration of the people, while the policies of foreign states are at the choice mainly of the Governments presiding over them. If, through error, on whatever side this civil contention shall transcend the national bounds and involve foreign states, the energies of all commercial nations, including our own, will necessarily be turned to war, and a general carnival of the adventurous and the reckless of all countries, at the cost of the existing commerce of the world, must ensue. Beyond that painful scene upon the seas there lie, but dimly concealed from our vision, scenes of devastation and desolation which will leave no roots remaining out of which trade between the United States and Great Britain, as it has hitherto flourished, can ever again spring up."

Mr. Seward, Sec. of State, to Mr. Adams, July 21, 1861. MSS. Inst., Gr. Brit.; Dip. Corr., 1861.

"At the close of my dispatch, No. 17, on the subject of my last conference with Lord John Russell, I mentioned my intention to write to Mr. Dayton, at Paris, to know whether he felt authorized to proceed in a simultaneous negotiation on the subject of the declaration of the congress at Paris. I have now to report that I executed my purpose on the 19th instant.

"On the evening of the 24th I received a note from Mr. Dayton announcing his arrival in town and his wish to confer with me upon this matter.

"Yesterday morning I had the pleasure of a full and free conversation with him, in the course of which we carefully compared our respective instructions and the action taken under them.

"I am very glad he has taken the trouble to come over to see me, for I confess that I was a little embarrassed by not knowing the precise nature of his proposal to the French Government at the time when I heard of it from Lord John Russell. Had I been informed of it I should perhaps have shaped my own course a little differently. So I doubt not that he would have been pleased to know more exactly my own proceedings as well as the more specific character of my instructions. An hour's interview has had the effect to correct our impressions better than could have been accomplished by an elaborate correspondence.

"I can now perfectly understand as well as enter into the reasons which prompted his proposal of the declaration of Paris, connected as it was with the modification first suggested by Mr. Marcy. There can be no doubt that the attempt to secure such an extension of the application of the principle contained in the first point of that declaration was worth making, on the part of the new Administration, particularly at a place where there was no reason to presume any disinclination to adopt it. Neither did the reply of Mr. Thouvenel entirely preclude the hope of ultimate success, so far as the disposition of France may be presumed.

"The obstacles, if any there are, must be inferred to have been thought to exist elsewhere. And an advance could be expected only when the efforts to remove them had been applied with effect in the

proper quarter. It was, therefore, both natural and proper for Mr. Dayton, after having made his offer, and received such an answer, to wait patiently until it should become apparent that such efforts had been made, and made without success.

"There can be no doubt that the opposition to this modification centers here. Independently of the formal announcement of Lord John Russell to me that the proposition was declined, I have, from other sources of information, some reason to believe that it springs from the tenacity of a class of influential persons, by their age and general affinities adverse to all sudden variations from established ideas. Such people are not to be carried away by novel reasoning, however forcible. We have cause to feel the presence of a similar power at home, though in a vastly reduced degree.

"All modifications of the public law, however beneficent, naturally meet with honest resistance in these quarters for a time. It is to be feared that this may have the effect of defeating, at this moment, the application of the noble doctrines of the declaration of Paris, in the full expansion of which they are susceptible. But to my mind the failure to reach that extreme point will not justify the United States in declining to accept the good which is actually within their grasp. The declaration of the leading powers of civilized Europe, made at Paris in 1856, engrafted upon the law of nations for the first time great principles for which the Government of the United States had always contended against some of those powers, and down to that time had contended in vain.

"That great act was the virtual triumph of their policy all over the globe. It was the sacrifice, on the part of Great Britain, of notions she had ever before held to with the most unrelenting rigidity. It would therefore seem as if any reluctance to acknowledge this practical amount of benefit, obtained on the mere ground that something remained to require, was calculated only to wither the laurels gained by our victory.

"It would almost seem like a retrograde tendency to the barbarism of former ages. Surely it is not in the spirit of the reformed Government in America to give countenance to any such impression. Whatever may have been the character of the policy in later years, the advent of another and a better power should be marked by a recurrence to the best doctrines ever proclaimed in the national history. And if it so happen that they are not now adopted by others to the exact extent that we would prefer, the obvious course of wisdom would seem to be to accept the good which can be obtained, and patiently to await another opportunity when a continuance of exertions in the same direction may enable us to secure everything that is left to be desired."

Mr. Adams to Mr. Seward, July 6, 1861. MSS. Dispatches, Gr. Brit.; Dip. Corr., 1861.

The blockade (in 1861–'62) "is a legitimate war measure intended to exhaust the insurrection. As I have already intimated, we are willing to conform to the law of nations as it is, or to consent to modifications of it, upon sufficient guarantees that what we concede to other nations shall be equally conceded by them. It is not the blockade that distresses European commerce; it is the insurrection that renders the blockade necessary. Let the European powers discourage the insur-

rection, it will perish. The blockade has not been unreasonably protracted."

Mr. Seward, Sec. of State, to Mr. Dayton, Feb. 19, 1862. MSS. Inst., France; Dip. Corr., 1862.

As to blockade of Confederate ports, see Brit. and For. St. Pap., 1860–'61, vol. 51; *ibid.*, 1864–'65, vol. 55.

"The rule adopted by the French Government in 1861, in respect to the civil war then existing in the United States, was as follows: 'The Southern States exhibit to foreign eyes the appearance of a Government *de facto*, and are hence to be recognized as belligerents, and can employ against their adversaries such measures as are usual in war. * * * France recognizes in them (the United States) the right to establish blockades, without at the same time recognizing the Confederacy as a new state, never having entered into an official relation with it. The United States followed the same course in reference to French interposition in Mexico, never having recognized Maximilian as Emperor, but never having contested his right to establish a blockade. It is true that on August 17, 1866, President Johnson refused to recognize the imperial decree of July 9 declaring the blockade of Matamoras, but this was only because the blockade was ineffective.' (Archiv. Dip., 1866, iv, 276.)"

Fauchille, du Blocus Maritime, Paris, 1882.

"Blockades are divided by English and American publicists into two kinds: (1) a simple or *de facto* blockade and (2) a public or governmental blockade. This is by no means a mere nominal distinction, but one that leads to practical consequences of much importance. In cases of capture, the rules of evidence which are applicable to one kind of blockade, are entirely inapplicable to the other; and what a neutral vessel might lawfully do in case of a simple blockade, would be sufficient cause for condemnation in case of a governmental blockade. A simple or *de facto* blockade is constituted merely by the fact of an investment, and without any necessity of a public notification. As it arises solely from facts, it ceases when they terminate; its existence must, therefore, in all cases, be established by clear and decisive evidence. The burden of proof is thrown upon the captors, and they are bound to show that there was an actual blockade at the time of the capture. If the blockading ships were absent from their stations at the time the alleged breach occurred, the captors must prove that it was accidental, and not such an absence as would dissolve the blockade. A *public*, or governmental blockade, is one where the investment is not only actually established, but where, also, a public notification of the fact is made to neutral powers by the Government, or officers of state, declaring the blockade. Such notice to a neutral state is presumed to extend to all its subjects; and a blockade established by a public edict is presumed to continue till a public notification of its expiration. Hence the burden of proof is changed, and the captured party is now bound to repel the legal presumptions against him by unequivocal evidence. It would, probably, not be sufficient for the neutral claimant to prove that the blockading squadron was absent, and there was no actual investment at the time the alleged breach took place; he must also prove that it was not an accidental and temporary absence, occasioned by storms, but that it arose from causes which, by their necessary and

legal operation, raised the blockade. (Wheat. Elem. Int. Law, pt. iv, ch. iii, § 28; the Neptunus, K., 1 Rob., 170; the Betsey, 1 Rob., 331; the Christina Margaretha, 6 Rob., 62; the Vrow Johanna, 2 Rob., 109; Duer on Insurance, vol. i, pp. 649, 659; Phillimore on Int. Law, vol. iii, § 290; the Mercurius, 1 Rob., 82; the Neptunus, H., 2 Rob., 110; the Welvaart van Pillau, 2 Rob., 130; Ortolan, Diplomatie de la Mer, tome ii, ch. ix; Hautefeuille, Des Nations Neutres, tit. ix, ch. v, § 2.)"

2 Halleck's Int. Law (Baker's ed.), 219.

Notice from the British Government that a blockade will not be considered as existing without an actual investment, and that vessels bound to an invested port will not be captured, unless previously warned off, justifies the master of an American vessel, who has been warned off, but has, subsequently, reasonable ground to believe the blockade has ceased, in returning to make inquiry off the port, intending to proceed elsewhere if the blockade still continues.

Maryland Ins. Co. *v.* Wood, 7 Cranch, 402.

The right to blockade an enemy's port with a competent force, is a right secured to every belligerent by the law of nations.

McCall *v.* Marine Ins. Co., 8 Cranch, 59.

A belligerent may blockade the port of his enemy; but this blockade does not, according to modern usage, extend to a neutral vessel found in port, nor prevent her from coming out with the cargo which was on board when the blockade was instituted.

Olivera *v.* Union Ins. Co., 3 Wheat., 183.

Neutrals may question the existence of a blockade, and challenge the legal authority of the party which has undertaken to establish it. One belligerent, engaged in actual war, has a right to blockade the ports of the other, and neutrals are bound to respect that right. The blockade of the ports of the Confederacy under the proclamation of the President of the 19th of April 1861, was valid.

The Prize Cases, 2 Black, 635; The Circassian, 2 Wall., 135; The Admiral, 3 *ibid.*, 603.

To justify the exercise of the right of blockade, and legalize the capture of a neutral vessel for violating it, a state of actual war must exist, and the neutral must have knowledge or notice that it is the intention of one belligerent to blockade the ports of the other.

To create the right of blockade, and other belligerent rights, as of capture, as against neutrals, it is not necessary that the party claiming them should be at war with a separate and independent power; the parties to a civil war are in the same predicament as two nations who engage in a contest and have recourse to arms. A state of actual war may exist without any formal declaration of it by either party; and this is true of both a civil and a foreign war.

The Prize Cases, 2 Black. 635.

The proclamation of blockade having allowed fifteen days for neutrals to leave, a vessel which overstays the time is liable to capture, even if her delay was partly due to difficulty in procuring a tug, this being one of the accidents which must have been foreseen and should have been provided for while the vessel was remaining in port and loading a cargo with the proclamation in view.

*Ibid.*

A public blockade of a city is not terminated by the occupation of the city by the blockading belligerent; the city itself being hostile, the opposing enemy in the neighborhood, and the occupation limited, recent, and subject to the vicissitudes of war. Still less does such occupation terminate such a blockade proclaimed and maintained not only against the city, but against the fort and district commercially dependent upon it and blockaded by its blockade.

The Circassian, 2 Wall., 135.

This ruling conflicts with Thirty Hogsheads *v.* Boyle, 9 Cranch, 191. Damages were afterwards given by the Mixed Commission to the owners of the Circassian. See Hall Int. Law., 656. Of the decision in the Circassian Professor Lorimer thus speaks:

"A British ship, the Circassian, was actually seized and confiscated by the American prize court for attempting to run the blockade at New Orleans *after* New Orleans had been retaken and was in possession of the North, and she was restored only under the Mixed Commission appointed by the Treaty of Washington at the close of the war. The commission held that as the blockade was terminated by the recapture, the right of a belligerent to exercise the privileges which it conferred against a neutral vessel was at an end."

Lorimer's Law of Nations, 145.

A public blockade, that is to say, a blockade regularly notified to neutral Governments, and as such distinguished from a simple blockade or such as may be established by a naval officer acting on his own discretion or under direction of his superiors, must, in the absence of clear proof to the contrary, be presumed to continue until notification is given by the blockading Government of its discontinuance.

The Circassian, 2 Wall., 135; The Baigorry, *ibid.*, 474.

Evidence of intent to violate blockade may be collected from bills of lading, from letters and papers found on board the captured vessel, from acts and words of the owners or hirers of the vessel and the shippers of the cargo and their agents, and from the spoliation of papers in apprehension of capture.

The Circassian, *ibid.*, 135.

The blockade of the *coast of Louisiana*, as established on the coast of the Southern States generally, by the President's proclamation of April 19, 1861, was not terminated by the capture of the forts below New Orleans by Commodore Farragut and the occupation of the city by

General Butler, and the proclamation of the President of the 12th of May, 1862, declaring that after June 1 the blockade of the port of New Orleans should cease. It therefore remained in force at Calcasieu, on the western extremity of the coast of Louisiana.

The Baigorry, *ibid.*, 474. The Josephine, 3 *ibid.*, 83.

A blockade is not to be extended by construction.

The Peterhoff, 5 Wall., 28.

A blockade which was "intended to blockade the whole coast, from the Chesapeake Bay to the Rio Grande," did not include the mouth of the Rio Grande, the middle of that stream forming the boundary line between the United States and Mexico, and the free navigation of the river being guaranteed by treaty. The presumption from these facts could be overcome only by an express declaration to that end.

*Ibid.*

Hence trade, during the rebellion, between London and Matamoras, two neutral places, the latter an inland port of Mexico, and close to the Mexican boundary line, even with intent to supply, from Matamoras, goods to Texas, then an enemy of the United States, was not unlawful on the ground of such violation.

*Ibid.*

(2) MUST BE NOTIFIED TO NEUTRALS.

§ 360.

When a blockade has been abandoned and then renewed, there should be either a new proclamation by the blockading sovereign, or vessels making for the blockaded port (after notice of the withdrawal) ought to be "premonished of their danger and permitted to change their course as they might think proper."

Mr. Madison, Sec. of State, to Mr. C. Pinckney, Oct. 25, 1801. MSS. Inst. Ministers.

"The British principle which makes a notification to foreign Governments of an intended blockade equivalent to the notice required by the law of nations before the penalty can be incurred, cannot be conceded."

Mr. Madison, Sec. of State, report Jan. 25, 1806. MSS. Dom. Let.

"In addition to what is proposed on the subject of blockades in VI and VII articles, the perseverance of Great Britain in considering a notification of a blockade, and even of an intended blockade, to a foreign Government, or its ministers at London, as a notice to its citizens, and as rendering a vessel, whenever found in a destination to the notified port, liable to capture, calls for a special remedy. The palpable injustice of the practice is aggravated by the auxiliary rule prevailing in the British courts, that the blockade is to be held in legal force until the Governmental notification be expressly rescinded, however certain the fact may be that the blockade was never formed or had ceased.

You will be at no loss for topics to enforce the inconsistency of these innovations with the law of nations, with the nature of blockades, with the safety of neutral commerce, and particularly with the communication made to this Government by order of the British Government in the year 1804, according to which the British commanders and vice-admiralty courts were instructed 'not to consider any blockade of the islands of Martinique and Guadaloupe as existing unless in respect of particular ports which may be actually invested, and then not to capture vessels bound to such ports unless they shall previously have been warned not to enter them.'"

Mr. Madison, Sec. of State, to Messrs. Monroe and Pinkney, May 17, 1806. MSS. Inst., Ministers.

"On this subject it is fortunate that Great Britain has already in a formal communication admitted the principle for which we contend. It will be only necessary therefore to hold her to the true sense of her own act. The words of the communication are 'that vessels must be *warned* not to enter.' The term *warn* technically imports a distinction between an individual notice to vessels and a general notice by proclamation or diplomatic communication; and the terms *not to enter* equally distinguishes a notice at or very near the blockaded port from a notice directed against the original destination, or the apparent intention of a vessel nowise approaching such a port."

Same to same, Feb. 3, 1807; *ibid.*

Notification of blockade must be made directly to the Governments of neutral powers.

Mr. Rush, Sec. of State, to Mr. Correa, May 28, 1817. MSS. Notes, For. Leg.

"It will be your duty, however, to bear in mind the true principles of blockade contended for and insisted upon by the United States. They are well known to the world. We deny that general and diplomatic notifications of blockade are of binding force; though they may be regarded as friendly notices. Blockade must be confined to particular and specified places, with a sufficient force near to intercept the entry of vessels, and no vessel is subject to capture without previous notice or due warning."

Mr. Clayton, Sec. of State, to Mr. Flenniken, May 12, 1849. MSS. Inst., Denmark.

The rule requiring notice of a blockade applies, at the utmost, only to vessels about entering a blockaded port in ignorance of the existence of the blockade.

Mr. Hunter, Acting Sec. of State, to Mr. Sartiges, July 29, 1852. MSS. Notes, France.

"The safest rule, in regard to the rights of both belligerents and neutrals involved in blockade, is believed to be contained in the 18th

article of the treaty between the United States and Great Britain of the 19th of November, 1794, in the following words:

"'And whereas it frequently happens that vessels sail for a port or place belonging to an enemy, without knowing that the same is either besieged, blockaded, or invested, it is agreed that every vessel so circumstanced may be turned away from such port or place, but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless after the notice, she shall again attempt to enter, *but she shall be permitted to go to any other port or place she may think proper.*'

"A similar article is contained in many other treaties between the United States and foreign powers."

Mr. Seward, Sec. of State, to Lord Lyons, Mar. 24, 1862. MSS. Notes, Gr. Brit.

As to notification by Texas in 1842 of blockade of Mexico, see Brit. and For. St. Pap., 1845-'46, vol. 34, 1261, 1262. This blockade, not being "real," was, on Sept. 21, 1842, declared by the British foreign office to be of no effect.

In numerous treaties negotiated by the United States, it is provided that, notwithstanding a diplomatic general notice of blockade, a neutral vessel cannot be condemned for blockade-running unless she had notice en route that the place in question was blockaded. (Treaty with Sweden, September 4, 1816; July 14, 1827; with Prussia, May 1, 1828; with Greece, December 10, 1837; with Sardinia, November 26, 1837.) In other treaties special notification is made dependent on the question of the knowledge or ignorance of the party seized. (Treaty of the United States with Great Britain, November 28, 1795; with France, September 30, 1800; with Hayti, November 3, 1864; with Italy, February 27, 1871.) "But notwithstanding these treaties, the Government of the United States seems to look upon the diplomatic notice as superfluous, and to exact in all cases a special notification. The instructions of May 14, 1846, relating to the blockade of Mexican ports prescribe that no neutral vessel entering into a blockaded port can be captured or detained unless it has received from one of the blockading squadron special notice of the existence." (Martens Nouv. rec. IX, 167.) The proclamation of President Lincoln of April 19, 1861, declares that if, with the intention to violate the blockade, a ship attempts to leave or to enter one of the blockaded ports, there must be an examination by the commander of one of the blockading vessels, who shall take due note of the fact and date of the notice. Lord Lyons to Lord Russell, May 2, 1861; Mr. Seward to the minister of Spain, Archiv. Dip., 1861, ii, 265; iii, 438, 443. But the American prize courts have not accepted this opinion of the Executive, and have fallen back on the limitations of the treaties above mentioned; and the Federal courts have declared that a vessel could be taken prize without special notice, if the officers of the vessel had knowledge of the blockade, and were consequently chargeable with bad faith. (The Circassian, 2 Wall., 135.)"

Fauchille's Blocus Maritime (Paris, 1882), 203, 204.

As to notification by the United States, in 1846, of the blockade of Mexican ports in the Pacific, see Brit. and For. St. Pap., 1845-'46, 1139.

Notice may be express, to a particular Government, or to a ship, or it may be inferred from all the facts, among which notoriety is to be

especially considered. To proceed to the mouth of the blockaded port on the plea of there seeking information, exposes the vessel to serious suspicion of knowledge of blockade, and the mere hovering around a blockaded port, as if to seize some unguarded point to enter, is ground for seizure.

See the Cornelius, 3 Wall., 214.

The treaty between the United States and Great Britain provides that every vessel may be turned away from every blockaded or besieged port or place, which shall have sailed for the same without knowledge of the blockade or siege; but she shall not be detained, nor her cargo, if not contraband, be confiscated unless, after notice, she shall again attempt to enter; but she shall be permitted to go to any other port or place she may think proper. And this treaty is conceived to be a correct exposition of the present law of nations upon this point. The intention must be manifested in such manner as to be equivalent to an attempt.

Fitzsimmons *v.* Newport Ins. Co., 4 Cranch, 185.

In the absence of such a treaty, the courts do not require notice; Field's Code Int. Law, § 892, citing 1 Kent Com., 150; The Circassian, 2 Wall., 135; Wheat. on Capture, 193-207; The Hallie Jackson, Blatch. Prize Cases, 2, 41; The Empress, *ibid.*, 175; except where the vessel sails without a knowledge of the blockade; The Nayade, 1 Newb. Adm., 366.

It is a settled rule that a vessel in a blockaded port is presumed to have notice of a blockade as soon as it commences.

The Prize Cases, 2 Black, 635.

The provision in the President's proclamation of the 19th of April, 1861, for *warning* vessels which approached the blockaded ports with a view to entering, did not protect a vessel that sailed for a blockaded port with knowledge of the blockade.

The Hiawatha, *ibid.*, 677; The Admiral, 3 Wall., 603.

Where a vessel, knowing of a blockade when she sails, has no just reason to suppose it has been discontinued, her approach to the mouth of a blockaded port for inquiry is itself a breach of the blockade, and subjects both vessel and cargo to seizure and condemnation.

The Cheshire, 3 Wall., 231.

Knowledge of a recently established blockade may be inferred from facts.

The Herald, *ibid.*, 768.

Under the proclamation of the President of April 19, 1861, only those who are ignorant of the blockade are entitled to the warning and indorsement mentioned in the proclamation.

The Revere, 2 Sprague, 107.

(3) MUST BE EFFECTIVE.

§ 361.

"Ports not effectually blockaded by a force capable of completely investing them have not yet been declared (by the law of nations) in a state of blockade. * * * If the effectiveness of the blockade is dispensed with, then every port of all the belligerent powers may at all times be declared in that state (of blockade) and the commerce of neutrals is thereby subjected to universal capture. But if this principle is strictly adhered to, the capacity to blockade will be limited to the naval force of the belligerent, and of consequence the mischief to neutral commerce cannot be very extensive. I observe that you have pressed this reasoning on the British minister, who replies that an occasional absence of a fleet from a blockaded port ought not to change the state of the place. Whatever force this observation may be entitled to where that occasional absence has been produced by an accident, as a storm which for a moment blows off the fleet and forces it from its station, which station it immediately resumes, I am persuaded that when a part of the fleet is applied, though only for a time, to other objects, or comes into port, the very principle requiring an effective blockade—which is that the mischief can only be coextensive with the naval force of the belligerent—requires that during such temporary absence the commerce of neutrals to the place should be free."

Mr. Marshall, Sec. of State, to Mr. King, Sept. 20, 1800. MSS. Inst., Ministers. 2 Am. St. Pap. (For. Rel.), 1800.

Mere liability by neutral vessels, to capture, by belligerent cruisers hovering around a coast, cannot constitute a blockade of a port on such coast.

Mr. Madison, Sec. of State, to Mr. C. Pinckney, Oct. 25, 1801. MSS. Inst., Ministers.

The law of nations requires, to constitute a blockade, that there should be the "presence and position of a force rendering access to the prohibited place manifestly difficult and dangerous. Every jurist of reputation, who treats with precision on this branch of the laws of nations, refers to an actual or particular blockade."

Mr. Madison, Sec. of State, to Mr. Thornton, Oct. 27, 1803. MSS. Dom. Let. See also letter of Mr. Madison to Mr. Merry, Dec. 24, 1803; *ibid.*

"The fictitious blockades proclaimed by Great Britain and made the pretext for violating the commerce of neutral nations have been one of the greatest abuses ever committed on the high seas. During the late war they were carried to an extravagance which would have been ridiculous, if in their effects they had not inflicted such serious and extensive injuries on neutral nations. Ports were proclaimed in a state of blockade previous to the arrival of any force at them, were considered

in that state without regard to intermissions in the presence of the blockading force, and the proclamations left in operation after its final departure; the British cruisers during the whole time seizing every vessel bound to such ports, at whatever distance from them, and the British prize courts pronouncing condemnations wherever a knowledge of the proclamation at the time of sailing could be presumed, although it might afterwards be known that no real blockade existed. The whole scene was a perfect mockery in which fact was sacrificed to form and right to power and plunder. The United States were among the greatest sufferers; and would have been still more so, if redress for some of the spoliations proceeding from this source had not fallen within the provisions of an article in the treaty of 1794."

Mr. Madison, Sec. of State, to Mr. Monroe, Jan. 5, 1804. MSS. Inst., Ministers.

"The British Government having repealed the order in council and the blockade of May, 1806, and all other illegal blockades, and having declared that it would institute no blockade which should not be supported by an adequate force, it was thought better to leave that question on that ground than to continue the war to obtain a more precise definition of blockade, after the other essential cause of the war, that of impressment, should be removed."

Mr. Monroe, Sec. of State, to the envoys at Ghent, June 23, 1814. MSS. Inst. Ministers.

Although the commissioners of the United States, during the conference at Ghent, were unable to obtain from Great Britain any definition which would limit blockade, the British Government from that time ceased to claim that blockades were effective unless supported by a naval force adequate to substantially seal the port.

See 4 Am. St. Pap. (For. Rel.), 9.

"No maxim of the law of nations is better established than that a blockade shall be confined to particular ports, and that an adequate force shall be stationed at each to support it. The force should be stationary, and not a cruising squadron, and placed so near the entrance of the harbor, or mouth of the river, as to make it evidently dangerous for a vessel to enter. I have to add that a vessel entering the port ought not to be seized, except in returning to it after being warned off by the blockading squadron stationed near it."

Mr. Monroe, Sec. of State, to Mr. de Onis, Mar. 20, 1816. MSS. Notes, For. Leg.

"This consideration ought to operate with still greater force in leading the British Cabinet to an adjustment of the principal objects of collision between neutral and belligerent interests. The unexampled outrages upon all neutral rights which were sanctioned during the late wars both by Great Britain and France, were admitted by both to be unwarranted by the ordinary laws of nations. They were, on both sides, professed to be retaliations, and each party pleaded the excesses of the other as the justification of its own. Yet so irresistible is the tend-

ency of precedent to become principle in that part of the law of nations which has its foundations in usage, that Great Britain, in her late war with the United States, applied against neutral maritime nations almost all the most exceptionable doctrines and practices which she had introduced during her war against France. The maritime nations were then so subservient to her domination that in the Kingdom of the Netherlands a clearance was actually refused to vessels from thence to a port in the United States on the avowed ground that their whole coast had been declared by Great Britain to be in a state of blockade. The whole coast in a state of blockade, while the British commerce, upon every sea, was writhing under the torture inflicted by our armed vessels and privateers issuing from the ports thus pretended to be in blockade! The dereliction of the rights of maritime neutrality by *all* the allied powers at the congress of Vienna, and at the subsequent negotiations for settling the affairs of Europe at Paris, have so far given a tacit sanction to all the British practices in the late wars that none of them would have a right to complain if the United States, on the contingency of a maritime war in which they should be engaged, should apply to the neutral commerce of all those allies the doctrines which they thus suffered Great Britain, without remonstrance, to apply against it in her late contest with the United States."

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

"The renewal of the war in Venezuela has been signalized on the part of the Spanish commanders by proclamations of blockade unwarranted by the law of nations, and by decrees regardless of that of humanity. With no other naval force than a single frigate, a brig, and a schooner, employed in transporting supplies from Curacoa to Porto Cabello, they have presumed to declare a blockade of more than twelve hundred miles of coast. To this outrage upon all the rights of neutrality, they have added the absurd pretension of interdicting the peaceable commerce of other nations with *all* the ports of the Spanish Main, upon the pretense that it had heretofore been forbidden by the Spanish colonial laws; and on the strength of these two inadmissible principles, they have issued commissions at Porto Cabello and in the island of Porto Rico to a swarm of privateers, which have committed extensive and ruinous depredations upon the lawful commerce of the United States, as well as upon that of other nations, and particularly of Great Britain. It was impossible that neutral nations should submit to such a system; the execution has been as strongly marked with violence and cruelty as was its origin with injustice. * * * The naval officers of the United States who have been instructed to protect our commerce in that quarter have been brought in conflict with two descriptions of *unlawful* captors, the acknowledged and the disavowed pirates from Porto Rico and Porto Cabello, and in both cases the actual depreda-

tors have been of the same class of Spanish subjects, and often probably the same persons."

Mr. Adams, Sec. of State, to Mr. Nelson, Apr. 8, 1823. MSS. Inst., Ministers, Lawrence's Wheaton (ed. 1863), 846, 847.

In 1827, Brazil, being a belligerent, imposing a blockade on her enemies, undertook to lay down two laws of blockade, maintaining as against United States vessels the strict rules held by the United States and as against British vessels the laxer rules held by Great Britain. This the British Government resisted, holding that it would recognize no blockade that was not effectual. Brazil was forced to give way, and the rule the maritime powers united in imposing on the Brazilian blockade the test of efficacy. On this Mr. J. Q. Adams, then President, thus comments in his Memoirs: "Belligerent, she (Great Britain) tramples on neutral rights; neutral, she maintains them at the cannon's mouth; and the Brazilian courts have been awed into submission."

7 J. Q. Adams' Memoirs, 385.

As to the action of our Government in respect to Key West as a port of refuge for South American belligerent cruisers, see 7 J. Q. Adams' Memoirs, 290.

For correspondence of the United States with Spain in 1822 as to blockade of South America, see Brit. and For. St. Pap., vol. 9, 784.

"The mandate of the Mexican Government was obviously tantamount to a blockade by notification merely, the illegality of which has invariably been asserted by the United States, and has been agreed to by Mexico in the treaty."

Mr. Forsyth, Sec. of State, to Mr. Monasterio, May 18, 1837. MSS. Notes, Mex.

"A blockade, to be valid under the law of nations, must be efficient; that is to say, carried on by a force competent to prevent the entrance of neutrals into the blockaded ports. * * * Neutrals proceeding to such ports cannot lawfully be captured for the mere intent, express or implied, of entering them, but must be warned off by the blockading force; but after having thus been duly warned, if they shall again attempt to enter, they are liable to capture and condemnation as lawful prize."

Mr. Clayton, Sec. of State, to Mr. Bowlin, Jan. 24, 1850. MSS. Dom. Let.

"It may be admitted that neither France nor the United States has acknowledged the legality of the blockade of an extensive coast by proclamation only, and without a force to carry the same into effect. It may also be true that, with a view to protect innocent neutrals, proceeding from a distance to a blockaded port, from capture on account of an honest ignorance on their part of the existence of the blockade, a previous warning thereof, by an entry, or other mode of actual notice, on the papers of the vessel, has been deemed advisable."

Mr. Webster, Sec. of State, to Mr. Sartiges, June 3, 1852. MSS. Notes, France.

"In some respects I think the law of blockade is unreasonably rigorous towards neutrals, and they can fairly claim a relaxation of it. By the decisions of the English courts of admiralty—and ours have gen-

erally followed their footsteps—a neutral vessel which happens to be in a blockaded port is not permitted to depart with a cargo unless that cargo was on board at the time when the blockade commenced or was first made known. Having visited the port in the common freedom of trade, a neutral vessel ought to be permitted to depart with a cargo without regard to the time when it was received on board."

Mr. Marcy, Sec. of State, to Mr. Buchanan, Apr. 13, 1854. MSS. Inst., Gr. Brit. House Ex. Doc. 103, 33rd Cong., 1st Sess.

As condemning paper blockades, see Mr. Marcy, Sec. of State, to Mr. Sartiges, July 28, 1856. MSS. Notes, France.

"The blockade of an enemy's coast, in order to prevent all intercourse with neutral powers, even for the most peaceful purpose, is a claim which gains no additional strength by an investigation into the foundation on which it rests; and the evils which have accompanied its exercise call for an efficient remedy. The investment of a place by sea and land with a view to its reduction, preventing it from receiving supplies of men and material necessary for its defense, is a legitimate mode of prosecuting hostilities which cannot be reasonably objected to, so long as war is recognized as an arbiter of national disputes. But the blockade of a coast or of commercial positions along it, without any regard to ulterior military operations, and with the real design of carrying on a war against trade, and from its very nature against the trade of peaceable and friendly powers, instead of a war against armed men, is a proceeding which it is difficult to reconcile with reason or with the opinions of modern times. To watch every creek and river and harbor upon an ocean frontier, in order to seize and confiscate every vessel with its cargo attempting to enter or go out, without any direct effect upon the true objects of war, is a mode of conducting hostilities which would find few advocates if now first presented for consideration. Unfortunately, however, the right to do this has been long recognized by the law of nations, accompanied indeed with precautionary conditions, intended to prevent abuse, but which experience has shown to be lamentably inoperative. It is very desirable, therefore, that this constant source of irritation in time of war should be guarded against, and the power to interrupt all intercourse with extensive regions be limited and precisely defined, before, by a necessary reaction, its exercise is met by an armed resistance. * * *

"But Lord Stowell has borne yet more direct testimony to the correctness of these suggestions. In a case decided by him, he said a blockade is 'a sort of circumvallation, by which all correspondence and communication is, as far as human force can effect it, effectually cut off,' etc."

Mr. Cass, Sec. of State, to Mr. Mason, June 27, 1859. MSS. Inst., France.

"The undersigned, Secretary of State of the United States, has had the honor of receiving the note of Baron Gerolt of the 30th ultimo, mak-

ing inquiries about the blockade of the ports in several of the States, and would observe in reply—

"1st. That the blockade will be strictly enforced upon the principles recognized by the law of nations.

"2d. That armed vessels of neutral states will have the right to enter and depart from the interdicted ports.

"3d. That merchant vessels in port at the time when the blockade took effect will be allowed a reasonable time for their departure.

"4th. The Government cannot consent that the emigrant vessels shall enter the interdicted ports."

Mr. Seward, Sec. of State, to Baron Gerolt, May 2, 1861. MSS. Notes, Prussia.

Temporary fortuitous absence of a blockading force, by which occasional blockade-runners slip in, does not of itself break up the blockade.

Mr. Seward, Sec. of State, to Lord Lyons, May 27, 1861. MSS. Notes, Gr. Brit.

Lord Russell, in an interview with Mr. Adams, having stated that the British Government, in conformity with a declaration previously made in the House of Commons, would not recognize as internationally binding a decree of a sovereign closing certain of his ports which were in the hands of insurgents, Mr. Seward instructed Mr. Adams that though there was an act of Congress authorizing the President to close such ports of the United States as were held by the Confederates, the President, while not conceding that such action would not be internationally valid, had not determined to enforce the act of Congress, and regarded as satisfactory the position taken by the British Government as to the requisites of blockade.

Mr. Seward, Sec. of State, to Mr. Adams, July 20, 1861. MSS. Inst., Gr. Brit.

"The loan made by European capital is a direct engagement with the armed insurgents, who have assumed to control, supply, and deliver cotton for the reimbursement of the money advanced, with interest. You will give notice to Earl Russell that this transaction necessarily brings to an end all concessions, of whatever form, that have been made by this Government for mitigating or alleviating the rigor of the blockade in regard to the shipment of cotton and tobacco. Nor will any title of any person, whether citizen of the United States or subject of a foreign power, to any cotton or merchandise, which title is derived from or through any pretended insurgent authority or other agency hostile to the United States, be respected by this Government."

Mr. Seward, Sec. of State, to Mr. Adams, Apr. 10, 1863. MSS. Inst., Gr. Brit.
As to blockade-running during the civil war, see Senate Ex. Doc. 11, 41st Cong., 1st sess.

"Only such blockades as shall be duly proclaimed and maintained by adequate force, in conformity to the law of nations, will be observed and respected by the United States."

Mr. Seward, Sec. of State, to Mr. Sullivan, June 13, 1867. MSS. Inst., Colombia.

The United States Government was entitled under the law of nations to send in 1868, without molestation from the Brazilian blockading squadron, an armed cruiser up the river Parana to Paraguay, then at war with Brazil, the object being to bring home the minister of the United States at Paraguay.

Mr. Seward, Sec. of State, to Mr. Webb, Aug. 17, 1868. MSS. Inst., Brazil.

"I am aware of no instance in which the right of blockade has been invoked for the purpose of preventing the Government of a neutral and friendly state from communicating with its diplomatic agent accredited to the Government of the blockaded country. It is believed that safe conducts are rarely, if ever, refused under such circumstances, and when the refusal does take place the aggrieved party has a right to expect sufficient reasons therefor."

Mr. Fish, Sec. of State, to Mr. Kirk, June 17, 1869. MSS. Inst., Arg. Rep. See *supra*, § 97.

"I have had the honor to receive your note of yesterday. It is accompanied by a copy of a circular addressed to you by the chancellor of the Empire, relative to the supposed blockade by Turkey of the ports of the Black Sea by proclamation only, and the indiscriminate placing by order of that power of torpedoes in the bed of the Danube. Although it is true that the United States did not sign and has not since acceded to the declaration of Paris of 1856, our reserve in this respect was and has not been occasioned by any doubt as to the soundness of the rule in regard to blockades which that instrument embodies. That rule has always been regarded by this Government as the wisest, especially in the interests of neutrals, and as founded upon texts of public law generally received. It is probable, however, that as the flag of the United States, even in times of peace, is seldom seen in the Black Sea, there probably will be little or no occasion for the practical assertion of the rule by us at this juncture. The employment of torpedoes is so recent a belligerent device that it is believed the powers as yet have had no opportunity to consider the general regulations, if any, to which they should be subjected. For this reason I now forbear to express any opinion upon the proceeding to which you advert."

Mr. Evarts, Sec. of State, to Mr. Shishkin, June 12, 1877. MSS. Notes, Russia; For. Rel., 1877. See Mr. Evarts, Sec. of State, to Mr. Christiancy, Aug. 8, 1879. MSS. Inst., Peru. Mr. Evarts, Sec. of State, to Mr. Christiancy, Jan. 25, 1881, *ibid;* quoted *infra*, § 361*a*.

"When threatened by civil strife or foreign war, a Government may readily be supposed to have the *right* to interdict traffic with any port.

"This carries with it the right to punish infractions of the proclaimed interdiction; in other words, to enforce the declared blockade. The private citizens of other Governments engaged in commercial pursuits are not bound to obey the proclamation, but they disobey it at their peril. It is, however, no part of the international duties of the Governments

to which such citizen belong to enforce against them the declaration of blockade made by another state.

Mr. Frelinghuysen, Sec. of State, to Mr. Langston, Dec. 15, 1883. MSS. Inst., Hayti.

"This Government, following the received tenets of international law, does not admit that a decree of a sovereign Government closing certain national ports in the possession of foreign enemies or of insurgents has any international effect, unless sustained by a blockading force sufficient to practically close such ports.

"Mr. Lawrence thus states the rule drawn from the positions taken by the administrations of Presidents Jefferson and Madison during the struggles with France and England, which grew out of the attempt to claim the right of closure—as equivalent to blockade—without effective action to that end: 'Nor does the law of blockade differ in civil war from what it is in foreign war. Trade between foreigners and a port in possession of one of the parties to the contest cannot be prevented by a municipal interdict of the other. For this, on principle, the most obvious reason exists. The waters adjacent to the coast of a country are deemed within its jurisdictional limits only because they can be commanded from the shore. It thence follows that whenever the dominion over the land is lost, by its passing under the control of another power, whether in foreign war or civil war, the sovereignty over the waters capable of being controlled from the land likewise ceases.' (Lawrence's note on Wheaton, part ii, ch. iv, § 5 (2d annotated ed.), 846.)

"The situation which the present decree assumes to create is analogous to that caused by the action of the Government of New Granada in 1861. The Granadian chargé d'affaires, Señor Rafael Pombo, on the 31st of March of that year, notified Mr. Seward that certain ports, among them Rio Hacha, Santa Marta, Cartagena, Sabanilla, and Zapote, all on the Caribbean coast, had been declared to be closed to commerce whether of export or of import. There is this difference, however, that the Granadian Government then announced that war vessels of the Confederation were to cruise about the ports closed to commerce for the purpose of seizing vessels which should be found violating the closure which had been decreed. It appears from Mr. Seward's note of acknowledgment to Señor Pombo, dated April 9, 1861, that the announcement then made was interpreted as a declaration that certain named ports were 'in a state of blockade which should be rendered effective by national vessels, and of which due public notice had been given.'

"While the Government of the United States, in 1861, thus confirmed the doctrine it had consistently maintained from the earliest days of the Republic, that non-possessed ports might be effectually closed by a maritime blockade, the British Government then controverted the right of New Granada to resort to such a remedy. Answering an inquiry in

the House of Commons, June 27, 1861, Lord John Russell, the secretary of state for foreign affairs, said: 'The Government of New Granada has announced not a blockade, but that certain ports of New Granada are to be closed. The opinion of Her Majesty's Government, after taking legal advice, is that it is perfectly competent to the Government of a country in a state of tranquillity to say which ports shall be open to trade and which shall be closed; but in the event of insurrection or civil war in that country, it is not competent for its Government to close the ports that are *de facto* in the hands of the insurgents, as that would be a violation of international law with regard to blockades.' His lordship added that orders had been given to the British naval commanders in the Caribbean Sea 'not to recognize the closing of these ports.' (See Parliamentary Debates, cited in Lawrence's Wheaton (2d annotated ed.) notes, 46–48.)

"When in 1861 the civil war in the United States broke out, this Government maintained the position that the municipal closure of domestic ports in the hands of the Confederate forces was a legitimate incident toward the maintenance of an effective blockade by sea. This was opposed by the British Government, and in the correspondence which then took place Lord John Russell repeatedly announced to Mr. Adams the same rule as he had previously announced with regard to the Granadian decree; and he finally appealed to his answer in the New Granada case for the purpose of showing that it was intended to make the rule universal. (U. S. Dip. Corr., 1861, 90, 95, 117, 120, 177.) The British ministry ultimately went to the extreme of declaring that they would consider such a municipal enactment (that of the closure of non-possessed ports) as null and void, and that 'they would not submit to measures taken on the high seas in pursuance of such decree.' (Parliamentary Papers, 1862, North America, No. 1, 72; Lord Lyons to Lord J. Russell, August 12, 1861.)

"In a speech of Mr. Cobden, made on October 25, 1862 (cited in Lawrence's Wheaton, 2d annotated ed., 823, note), he said: 'It has been distinctly intimated to America that we do not recognize their municipal right in the matter; and if they were to proclaim, for example, that Charleston was not to be traded with, and did not keep a sufficient force of ships there, we should go on trading with the town just as if nothing had occurred. It is only upon condition that the blockade shall be effectively maintained as between belligerents that the European powers recognize it at all.

"A recent authority, Professor Perels, judge of the imperial admiralty court in Berlin, in a treatise on international maritime law, published in 1882, writes thus: 'The embargo of domestic ports, no matter by what measures or for what purpose it takes place, as it has not the character of a real blockade, cannot have the same consequences. It can indeed without question be maintained, in case of need, by means of the employment of force against such neutral ships as do not choose

to acquiesce in it; likewise a seizure of such neutral ships as do not find themselves prepared to submit to the measures of embargo must be considered as allowable, and it must be held in the case of active resistance that even the destruction of such ships is allowable in accordance with the rules of war; but it is inadmissible, because not grounded on international law, to condemn as good prizes on account of their cargoes, neutral ships resisting such embargo.' (*Op. cit.*, § 52.) And it is conceded by this eminent authority that there can be, without blockade, no closure of a port not in possession of the sovereign issuing the decree.

"The legislation by the Congress of the United States in 1861 relative to the closing of the ports of the South held by the Confederate armies was really conditioned on a blockade. As Mr. Seward wrote to Mr. Adams, July 21, 1861, 'the law only authorizes the President to close the ports in his discretion, according as he shall regard exigencies now existing or hereafter to arise. * * * The passage of the law, taken in connection with attendant circumstances, does not necessarily indicate a legislative conviction that the ports ought to be closed, but only shows the purpose of Congress that the closing of the ports, if it is now or shall become necessary, shall not fail for want of power explicitly conferred by law.' (U. S. Dip. Corr., 1861, 120.) Under the authority so conferred certain ports were closed by formal proclamation of blockade which it thereupon became incumbent upon the Government of the United States to maintain effectively according to the prescriptions of international maritime law.

"After careful examination of the authorities and precedents bearing upon this important question, I am bound to conclude, as general principle, that a decree by a sovereign power closing to neutral commerce ports held by its enemies, whether foreign or domestic, can have no international validity and no extraterritorial effect in the direction of imposing any obligation upon the Governments of neutral powers to recognize it or to contribute toward its enforcement by any domestic action on their part. Such a degree may indeed be necessary as a municipal enactment of the state which proclaims it, in order to clothe the executive with authority to proceed to the institution of a formal and effective blockade, but when that purpose is attained its power is exhausted. If the sovereign decreeing such closure have a naval force sufficient to maintain a blockade, and if he duly proclaim such a blockade, then he may seize, and subject to the adjudication of a prize court, vessels which may attempt to run the blockade. If he lay an embargo, then vessels attempting to evade such embargo may be forcibly repelled by him if he be in possession of the port so closed. But his decree closing ports which are held adversely to him is, by itself, entitled to no international respect. Were it otherwise, the *de facto* and titular sovereigns of any determinate country or region might between them exclude all merchant ships whatever from their ports, and in this way

not only ruin those engaged in trade with such states, but cause much discomfort to the nations of the world by the exclusion of necessary products found in no other market.

"The decree of closure of certain named ports of Colombia contains no intimation of an ulterior purpose to resort to a proclaimed and effective blockade. It may, therefore, be premature to treat your announcement as importing such ulterior measures; but it gives me pleasure to declare that the Government of the United States will recognize any effective blockade instituted by the United States of Colombia with respect to its domestic ports not actually subject to its authority. This Government will also submit to the forcible repulsion of vessels of the United States by any embargo which Colombia may lay upon ports of which it has possession, when it has power to effect such repulsion. But the Government of the United States must regard as utterly nugatory proclamations closing ports which the United States of Colombia do not possess under cover of a naval force which is not even pretended to be competent to constitute a blockade.

"As early as April 24, 1861, when Mr. Lincoln's administration had only been in office six weeks, but when it was already apparent that the secession movement then begun would speedily have possession of most of the ports of the Southern States, Mr. Seward addressed a circular to the ministers of the United States in Europe, in which he declared the adhesion of the United States Government to the rule that 'blockades, in order to be binding, must be effective; that is to say, maintained by forces sufficient really to prevent access to the coast of the enemy.' (U. S. Dip. Corr., 1861, 34.)

"When President Lincoln proclaimed, as he did on the inception of the civil war, a blockade of the Southern coast, the proclamation was followed by an announcement to France and to England that the blockade would be effective in the above sense; and it is important to observe that, enormous as were the profits to be gained by blockade-running, and doubtful as was at least the friendliness of certain European courts towards the United States, not one of the maritime powers of Europe complained that the blockade was not effective.

"Congress, it is true, adopted a few weeks later a municipal statute, as hereinbefore stated, authorizing the President, at his discretion, to close the Southern ports; but as to this measure the following observations are to be made:

"(*a*) The closure was to be a domestic act, incidental to the blockade, the permanency of which as a general measure during the civil war the President had already announced to foreign sovereigns.

"(*b*) It was to be effected in part by land forces.

"(*c*) Its institution was conditional upon the discretion of the President, which discretion was never exercised.

"It is as thus qualified and explained that Mr. Seward refers, in his correspondence with Mr. Adams and Lord Lyons, to the statutes in

question, but it is impossible not to see, in Mr. Seward's references, a latent appeal of great force against the action of those European powers which, at the beginning of this century, did not hesitate to convulse and devastate the world by decrees and orders in council closing ports they did not possess. They did this in the face of vehement and almost supplicatory remonstrances from the United States, and forced this Government, then young in the family of sovereignties, and naturally desirous of peace with all, most reluctantly and at great cost of blood and treasure to undertake, as at last the sole maritime contestant, wars against Great Britain and France to maintain the freedom of the seas and the invalidity of paper blockades."

Mr. Bayard, Sec. of State, to Mr. Becerra, Apr. 9, 1885. MSS. Notes, Colombia; For. Rel., 1885.

Fauchille (Blocus Maritime, 155), while pushing in this, as in other respects, his vindication of neutral rights to their extreme limit, holds that the United States accept the position of Sir W. Scott that a blockade is not broken by an accidental dispersion of the blockading squadron through stress of weather. "In 1800, the United States held that a blockade was maintained notwithstanding a temporary dispersion of the blockaders by storm (Mr. Marshall to Mr. King, September 20, 1800), and the same view was enforced by Mr. Mason in his instructions to the naval commanders of December 24, 1846." He admits, also, that the same position is taken by Phillimore, iii, § 294; 1 Kent, 365; and other high authorities. But he proceeds to cite the opinion of Ortolan (ii, 314, and also Deane on Blockade, 54) to the effect that while a blockade is not vacated permanently by such a dispersion, it is suspended while the dispersion continues, so that vessels entering during such an interval are not liable to be seized for blockade-running. He proceeds to argue that the preponderance of reason and of authority is with the position that when a blockading force is dispersed by stress of weather or by other causes, the blockade is broken, and cannot be renewed except by notice, as if it were a new blockade.

A blockade may be made effectual by batteries ashore as well as by ships afloat. In the case of an inland fort, the most effective blockade would be maintained by batteries commanding the river or inlet by which it may be approached, supported by a naval force sufficient to warn off innocent and capture offending vessels attempting to enter.

The Circassian, 2 Wall., 135.

The fact that the master and mate saw no blockading ships off the port where their vessel was loaded, and from which she sailed, is not enough to show that a blockade, once established and notified, had been discontinued.

The Baigorry, *ibid.*, 474.

A blockade, once regularly proclaimed and established, will not be held to be ineffective by continual entries in the log-book, supported by testimony of officers of the vessel seized, that, the weather being clear, no blockading vessels were to be seen off the port from which the vessel sailed.

The Andromeda, *ibid.*, 481.

Where, in time of war, a foreign vessel, availing herself of a proclamation of the President of May 12, 1862, entered the port of New Orleans, the blockade of which was not removed, but only relaxed in the interests of commerce, she thereby assented to the conditions imposed by such proclamation that she should not take out goods contraband of war, nor depart until cleared by the collector of customs according to law.

U. S. *v.* Diekelman, 92 U. S., 520.

(4) OBSTRUCTIONS MAY BE TEMPORARILY PLACED IN CHANNEL OF ACCESS.

§ 361*a*.

The obstructing by a blockading squadron of the blockaded port, leaving the main channel open, is not inconsistent with international law.

Mr. Seward, Sec. of State, to Mr. Dayton, Feb. 19, 1862. MSS. Inst., France.

Lord Lyons's protest against the use of stone in the blockading of Charleston, is limited to the element of permanency, no objections being made by him to obstructions which could be removed after the termination of hostilities. (Archiv Dip., 1862, ii, 80.) Fauchille (Blocus Maritime, 144 *ff.*) dissents, not very forcibly, from this view, although it was acquiesced in at the time by the French Government.

"On February 14, 1862, in the House of Lords, Lord Stanhope called the attention of Lord John Russell to the report that a second squadron of ships, laden with stone, was to be sunk by the Government of the United States in the Maffitt's Channel of Charleston Harbor. The sinking of large ships, laden with stone, on banks of mud at the entrance of a harbor, could only end in the permanent destruction of the same, and such was not justified by the laws of war. It was not an act of man against man, but against the bounty of Providence, which had vouchsafed harbors for the advantage and intercourse of one people with another. On this ground we (the British) were well entitled to protest against the act. Lord John Russell approved of the protest, and considered the destruction of commercial harbors a most barbarous act. He stated that the French Government took the same view, and were decided to remonstrate with the United States Government.

"On February 28, Lord John Russell informed the House that he had received a dispatch from Lord Lyons, to the effect that Mr. Seward stated there had not been a complete filling up of Charleston Harbor, and that no more stone ships would be sunk there."

2 Halleck's Int. Law, (Baker's ed.), 23.

"I regret that a report which has been communicated to the Department obliges me to request that you will make a strong representation in the premises to the Peruvian Government, should you find on inquiry that the report is well founded. This report is that the Peruvians have made use, during the present war with Chili, of 'boats containing explosive materials,' which have 'in some instances been sent adrift *on the chance* of their being fallen in with by some of the Chilian

blockading squadrons.' How far the case of the launch to which you refer in your No. 183, which was loaded with concealed dynamite, comes within the description of cases mentioned, the Department has not the requisite data to determine.

"It is sufficiently obvious that this practice must be fraught with danger to neutral vessels entitled to protection under the law of nations, and that in case American vessels are injured thereby, this Government can do no less than hold the Government of Peru responsible for any damage which may be thus occasioned.

"There is no disposition on the part of this Government to act in any wise nor in any spirit which may be construed as unnecessarily critical of the methods whereby Peru seeks to protect her life or territory against any enemy whatsoever; but it will appear, I think, to the high sense of propriety which has in times past distinguished the councils of the Peruvian Government, and which without doubt still abides therein, that in case it is ascertained that means and ways so dangerous to neutrals as those adverted to have been for any reason suffered to be adopted by her forces, or any part of them, they should be at once checked, not only for the benefit of Peru, but in the interest of a wise and chivalrous warfare, which should constantly afford to neutral powers the highest possible consideration."

Mr. Evarts, Sec. of State, to Mr. Christiancy, Jan. 25, 1881. MSS. Inst., Peru. Doc. with President's message of Jan. 26, 1882. See to same effect Mr. Evarts to Mr. Shishkin, June 12, 1877. MSS. Notes, Russia; quoted *supra*, § 361.

"On the 10th of January I was informed by the British minister, Sir Harry Parkes, and the German chargé d'affaires, Count Tattenbach, that dispatches had been received from their consuls at Canton saying that the Chinese authorities were preparing to obstruct the water approaches to Canton, and that the effect of these obstructions would be to imperil, if not to prevent, navigation. The German consul reported that Whampoa would 'be totally blocked.'

"I telegraphed Mr. Consul Seymour for information, and his reply I inclose. Mr. Seymour, as you will observe, said that there would be 'serious obstructions without equivalent benefits.'

"Two questions arose which in the opinion of the legation required immediate attention.

"The first was that by the terms of the treaty of Tien-Tsin, 1858, concluded between China and the United States, in Article XXVI, United States vessels, in the event of war between China and other powers, were to have free access and egress in the open ports. 'It is further agreed,' says the treaty, 'that in case, at any time hereafter, China shall be at war with any foreign nation whatever, and should for that cause exclude such nation from entering her ports, still the vessels of the United States shall not the less continue to pursue their commerce in freedom and security, and to transport goods to and from the ports of the belligerent powers,' etc.

"The second was that the Chinese authorities, in a time of peace, were performing a belligerent act directed against the commerce of friendly powers, an act which if permitted at Canton would stand as a precedent for closing every port in China.

"I was not disposed to lay much stress upon the first of these propositions, or even to make it a matter of serious debate with the Government, without asking for your special instructions. To be sure, the stipulations of the treaty are plain. It was made, however, in 1858. Since then the methods of offensive and defensive warfare have been revolutionized. The United States, during the rebellion, saw fit to obstruct the channels in Charleston Harbor by sinking ships laden with stone, to secure an effective blockade. Germany, during her latest war with France, protected her Baltic ports with torpedoes. I should have felt some embarrassment in seeking to persuade the yamên that what Germany and the United States regarded as honorable warfare could not be permitted to them.

"At all events, I should have deemed it wise, before making any representation to the yamên, to have asked the Department for further instructions as to how far my Government was disposed to assert our rights under the article I have quoted.

"As to the second proposition, I could see no doubt as to my immediate duty. The situation was this: The viceroy of two provinces, a local official, upon his own responsibility, without asking the orders of his Government and without any communication to the foreign powers of such a contemplated act, proposed to do what could only be regarded as an extreme and supreme measure of war, namely, to close a port open to us by the treaties. This was to be done when China was at peace, and before any declaration of war, or even an intention so to declare, had been published. If the obstruction of Canton, under these circumstances, was permitted, without a prompt and decisive protest, there would be no reason why this or a subsequent Government, the Canton viceroy, or the ruler of other provinces, should not obstruct and close every port in China. And while it might be said that motives of self-interest and the natural desire of the Chinese to profit out of foreign commerce would render such apprehensions improbable, yet one can never cease to remember that in China there is a powerful and what some observers regard a dominant anti-foreign sentiment, which would regard such a measure as excluding all foreigners from the Empire as an act of the highest patriotism.

"The question was one which under ordinary circumstances I should have submitted to the diplomatic body. But on account of the relations between China and France, I believed, on reflection, that separate action, and especially in my own capacity as the American representative, would be the most effective in securing the ends of peace. With this view I requested an interview with the ministers of the yamên. The result was a long conversation, a report of which is inclosed.

"It would be superfluous to repeat what is written with so much detail in this report. * * *

"Although we could not induce the yamên to give us a formal withdrawal of their policy, nor to make any promise that what had been done at Canton might not be repeated at Shanghai and Tien-Tsiu, the practical effect of our joint action was to arrest the obstructions proposed in Canton, and to show the Government that we could not permit what had been attempted as a precedent. I did not feel myself at liberty to go beyond an earnest and at the same time a friendly protest.

"The point at issue was so important, and the possible action of the yamên so uncertain, that I felt bound to submit it without delay to the Department. This was also done by the British legation. The dispatch of Sir Harry Parkes to Lord Granville, and his lordship's answer, will be found as inclosures.

"I also requested Admiral Davis, now at Shanghai, to have some skilled officer examine the nature of the proposed obstruction. Such a report would have a technical value, as that of a professional expert, apart from the judgment of the consular gentlemen upon whose information we act.

"The correspondence is herewith submitted to the Department. I am persuaded that you will agree with me that, considering, on the one hand, our rights under the treaties, and, on the other, the practical embarrassments which confronted China, wishing under no circumstances to appear harsh and stern, the position taken by the yamên made our duty clear; that this duty was to protest against a grave violation of treaties and of international law. I endeavored to do so in a way that would show the minister that no nation, under existing fomrs of civilized society, could venture upon deeds of this nature without doing herself in the end a grave injury; that treaties and international law were made for the common welfare of mankind, and that in their sanctity China had no small share.

"To have overlooked the action of the Canton viceroy, to have permitted a precedent which at any time, under the reactionary influences possible in China, would have fatally wounded every foreign interest, would, in my opinion, have been a serious neglect of duty. I trust that the action of the legation will meet with your approval."

Mr. Young, minister to China, to Mr. Frelinghuysen, Feb. 11, 1884. MSS. Dispatches China; For. Rel., 1884.

"Your No. 350, of the 11th of February last, concerning the threatened obstruction of the Canton River by the viceroy of the province, as a defensive war measure, has been received and read with much attention.

"The report of your conference with the yamên on the 14th of January presents very clearly the embarrassments which attend any attempt to make clear to the Chinese Government the relations of the treaty powers to each other in regard to this question.

"In your interview with the yamên you closely anticipated the tenor of my telegraphic instruction of the 22d of January. Had that telegram been before you it might possibly have furnished you with a reply to an argument frequently put forth by the ministers of the yamên, that the neutral powers should show their friendship for China by preventing France from attacking China without proper previous notice of intention to do so. This is, as you will have seen, almost exactly the ground taken by the United States.

"The real issue seems to have been very succinctly put by Chang-ta-jên in the interview of the following day with Sir Harry Parkes. 'If,' said he, 'China could be certain that France would be guided by the laws of war in her future action, and an authoritative assurance could be obtained from any quarter that France would not attack (the open ports) without due notice, Chang-ta-jên would promise, on his own responsibility, that the obstructions at Canton should be removed.'

"The gravity of the question seems to have been removed in a great measure by the assurance given by the yamên that a channel of over

100 feet in width would be left in both channels for the convenience of steamers and sailing vessels, an assurance which Chang-ta-jên seems afterwards to have still further extended to 150 feet, as appears from the telegram from the British consul at Canton to Sir Harry Parkes of January 26.

"Even, however, under this favorable modification, the obstruction to the channel at Canton and Whampoa can only be tolerated as a temporary measure, to be removed as soon as the special occasion therefor shall have passed, and under no circumstances to be admitted as a precedent for setting obstacles to open navigation at the treaty ports in time of peace, under pretext of being intended for ultimate strategic defense in the contingency of future war."

Mr. Frelinghuysen, Sec. of State, to Mr. Young, Apr. 18, 1884; *ibid.*

"Your No. 141 is before me, and brings to the Department, with much clearness, a question of great interest. It is unquestionable that a belligerent may, during war, place obstructions in the channel of a belligerent port, for the purpose of excluding vessels of the other belligerent which seek the port either as hostile cruisers or as blockade-runners. This was done by the Dutch when attacked by Spain, in the time of Philip II; by England when attacked by the Dutch, in the time of Charles II; by the United States when attacked by Great Britain, in the Revolutionary War and in the war of 1812; by the United States during the late civil war; by Russia at the siege of Sebastopol; and by Germany during the Franco-German war of 1870. But while such is the law, it is equally settled by the law of nations that when war ceases, such obstructions, when impeding navigation in channels in which great ships are accustomed to pass, must be removed by the territorial authorities. Such is the rule, apart from treaty; and it was implicitly admitted by Mr. Seward, when, in replying to the remonstrances by the British Government on the placing by the blockading authorities of obstructions in the harbor of Charleston, he stated that these obstructions were placed there merely temporarily. Were there any doubt about this question, which I maintain there is not, it would be settled by the provisions of our treaties with China, which virtually make Canton a free port, to which our merchant ships are entitled to have free access in time of peace. You are therefore instructed to make use of the best efforts in your power to induce the Chinese Government to remove the obstruction in the Canton River, which, as you state, operate to close the port of Canton to the merchant vessels of the United States. In sending to you this instruction, I affirm the instructions of Mr. Frelinghuysen to Mr. Young, No. 267, dated April 18, 1884, printed in the Foreign Relations of that year."

Mr. Bayard, Sec. of State, to Mr. Denby, July 28, 1886. MSS. Inst., China.

II. *ENFORCEMENT OF.*

(1) VESSELS SEEKING EVASION OF, MAY BE SEIZED.

§ 362.

The rule "which subjects to capture vessels arriving at a port in the interval between a removal and a return of the blockading forces," is a deviation from international law.

Mr. Madison, Sec. of State, report of Jan. 25, 1806. MSS. Dept. of State.

For correspondence with Brazilian Government in 1827, respecting the exclusion of neutral ships-of-war from blockaded ports, see Brit. and For. St. Pap., 1827–'28, vol. 15, 1118. In Commodore Biddle's letter of November 11, 1827, to the Brazilian admiral, he states "that blockades have never been deemed to extend to public ships. Great Britain almost perpetually at war, and numerically superior at sea to any other nation, never for a moment pretended that neutral ships-of-war could be affected by blockades. During several years of the war in Europe, the Government of the United States maintained its diplomatic intercourse with France exclusively by means of its public ships entering the blockaded ports. In 1811, in the U. S. S. Hornet, I myself went into Cherbourg, then blockaded by a British squadron; was boarded as I went in by the blockading squadron, but merely for the purpose of ascertaining our national character." The Brazilian admiral in reply stated that by a recent decision of the British Cabinet, "vessels-of-war could not enter blockaded ports, and such has continued to be the practice of the English."

It is not inconsistent with the principles of international law for a neutral sovereign to send an armed cruiser to watch a blockaded coast, so as to see no injustice is done to his own merchant vessels, and that they may be prevented from any irregular proceedings.

Mr. Van Buren, Sec. of State, to Mr. Azambigo, Mar. 8, 1831. MSS. Notes, For. Leg.

"On this point the law of nations cannot admit of doubt. Its principles are announced more clearly than I could express them by Sir William Scott, in delivering the opinion of the court in the case of the Vrouw Judith (1 Robinson's Admiralty Reports, 151), that eminent publicist says: 'Now, with respect to the matter of blockade, I must observe that a blockade is just as much violated by a vessel passing outwards as inwards. A blockade is a sort of circumvallation round a place, by which all foreign connection and correspondence is, as far as human force can effect it, to be entirely cut off. It is intended to suspend the entire commerce of that place; and a neutral is no more at liberty to assist the traffic of exportation than of importation. The utmost that can be allowed to a neutral vessel is that, having already taken on board a cargo before the blockade begins, she may be at liberty to retire with it. But it must be considered as a rule which this court means to apply, that a neutral ship departing, can only take away

a cargo *bona fide* purchased and delivered before the commencement of the blockade; if she afterwards takes on board a cargo, it is a fraudulent act, and a violation of the blockade.'

"But the very question arising in the case of the Jeune Nelly has been judicially decided, after full argument, by the United States district court for Louisiana, a prize court of competent jurisdiction, and I now have the honor to transmit you a copy of the opinion of the learned judge, extracted from the New Orleans Picayune, of the 14th December, 1847."

Mr. Buchanan, Sec. of State, to Mr. Poussin, Jan. 17, 1849. MSS. Notes, France.

See Mr. Marcy, Sec. of State, to Mr. Buchanan, April 13, 1854. MSS. Inst., Gr. Brit. House Ex. Doc. 103, 33d Cong., 1st sess.; quoted *supra*, § 361.

The carrying letters or passengers to blockaded ports by neutral war vessels, entering by courtesy therein, is an infraction of neutrality.

Mr. Seward, Sec. of State, to Lord Lyons, Oct. 4, 1861. MSS. Notes, Gr. Brit. Same to same, Oct. 14, 1861; *ibid.*

As to recapture of blockade-runner Emily St. Pierre, see Brit. and For. St. Pap., 1864-'65, vol. 55.

"The fact of clearing out for a blockaded port is in itself innocent, unless it be accompanied with knowledge of the blockade. The clearance, therefore, is not considered as the offence; the persisting in the intention to enter that port, after warning by the blockading, is the ground of the sentence. * * *

"Vattel, b. 3, s. 117, says, 'All commerce with a besieged town is entirely prohibited. If I lay siege to a place, or even simply blockade it, I have a right to hinder any one from entering, and to treat as an enemy whoever attempts to enter the place, or carry anything to the besieged, without my leave.' The right to treat the vessel as an enemy is declared, by Vattel, to be founded on the attempt to enter, and certainly this attempt must be made by a person knowing the fact."

Marshall. C. J.; Fitzsimmons *v.* Newport Ins. Co., 4 Cranch, 198.

A vessel sailing ignorantly for a blockaded port is not liable to condemnation under the law of nations.

Yeaton *v.* Fry, 5 Cranch, 335.

No neutral can, after knowledge of a blockade, lawfully enter or attempt to enter the blockaded port; and to do so would be a violation of neutral character, which, according to established usages, would subject the property engaged therein to the penalty of confiscation.

McCall *v.* Marine Ins. Co., 8 Cranch, 59.

A vessel sailing from a neutral port with intent to violate a blockade is liable to capture and condemnation as prize from the time of sailing, though she intend to call at another neutral port, not reached at time of capture, before proceeding to her ulterior destination.

The Circassian, 2 Wall., 135.

Intent to run a blockade may be inferred in part from delay of the vessel to sail after being completely laden, and from changing the ship's course in order to escape a ship-of-war cruising for blockade-runners. A vessel and cargo, though owned by neutrals, may be condemned as enemy property, because of the vessel being engaged in enemy trade, and because of an attempt to violate a blockade and to elude visitation and search.

The Baigorry, *ibid.*, 474.

If a vessel is found without a proper license near a blockading squadron, under circumstances indicating intent to run the blockade, and in such a position that, if not prevented, she might pass the blockading force, she cannot thus, *flagrante facto*, set up as an excuse that she was seeking the squadron with a view of getting an authority to proceed on her desired voyage.

The Josephine, 3 Wall., 83.

A cargo taken from a port in violation of a blockade, with the intent to transship it at an intermediate port for its port of ultimate destination, remains liable to capture and condemnation after the transshipment.

The Thompson, *ibid.*, 155.

Presumption of an intent to run a blockade by a vessel bound apparently to a lawful port may be inferred from a combination of circumstances.

The Cornelius, *ibid.*, 214.

Destination alone justifies seizure and condemnation of ship and cargo in voyage to ports under blockade; and such destination justifies equally seizure of contraband in voyage to ports not under blockade; but in the latter case the ship, and cargo, not contraband, are free from seizure, except in cases of fraud or bad faith.

The Bermuda, *ibid.*, 514.
For a criticism of this case see 3 Phill. Int. Law (3d ed.), 446.

The approach of a vessel to the mouth of a blockaded port for inquiry—the blockade having been generally known—is itself a breach of the blockade, and subjects both vessel and cargo to condemnation.

The Cheshire, *ibid.*, 231.

Where a clearance of a vessel expressed a neutral port to be her sole port of destination, but the facts showed that her primary purpose was to get cargoes into and out of a port under blockade, the outward cargo, if obtained, to go to the neutral port named as the one cleared for, the fact that the vessel's letter of instructions directed the master to call off the blockaded port and, if he should find the blockade still in force, to get the officer in command of the blockading ship to indorse on the vessel's register that she had been warned off (in accordance with what

the owners of the vessel asserted to be their understanding of neutral rights under the President's proclamation of the 19th of April, 1861), and *then* to go to the port for which the clearance called, will not save the vessel from condemnation as prize, she having been captured close by the blockaded port, standing in for it, and without ever having made an inquiry anywhere whether the port was blockaded or not.

The Admiral, *ibid.*, 603.

Mere sailing for a blockaded port is not an offense, but where the vessel has knowledge of the blockade, and sails with the intention of violating it, she is liable to capture. A vessel setting sail from England on the 9th of September, 1861, with actual knowledge of a proclamation which the President of the United States made on the 19th of the April preceding, blockading certain Southern ports, had no right, under an allegation of a purpose to see if the blockade existed, to sail to one of the ports actually blockaded.

*Ibid.*

Where the papers of a ship sailing under a charter-party are all genuine and regular, and show a voyage between neutral ports, where there has been no concealment or spoliation of papers; where the stipulations of the charter-party in favor of the owners are apparently in good faith, and the owners are neutrals, have no interest in the cargo, and have not previously in any way violated neutral obligations, and there is no sufficient proof that they have any knowledge of the unlawful destination of the cargo—in such case the vessel will not be condemned, because the neutral port to which it is sailing has been constantly and notoriously used as a port of call and transshipment by persons engaged in systematic violation of blockade and in the conveyance of contraband of war, and was meant by the owners of the cargo to be so used on this occasion. But the mere fact that the master declared himself ignorant as to what a part of his cargo, of which invoices were not on board (having been sent by mail to the port of destination), consisted, such part having been contraband; and also declared himself ignorant of the cause of capture, when his mate, boatswain, and steward all testified that they understood it to be the vessel's having contraband on board, was held not sufficient of itself to infer guilt to the owners of the vessel, who were in no way compromised with the cargo.

The Springbok, 5 Wall., 1.

A neutral vessel sailing under a charter-party from one neutral port to another was captured and libeled for intent to violate a blockade. The port to which she was sailing, though neutral, had been constantly and notoriously used as a port of call and transshipment by persons engaged in systematic violation of certain blockaded ports and in the conveyance of contraband of war. Her cargo consisted of 2,007 packages, of which the contents of 619 packages were disclosed by the bills

of lading, the contents of the remaining 1,388 not being disclosed. Both the bills of lading and the manifest made the cargo deliverable to order, and the master was directed by his letter of instructions to report himself on arrival at his destination to H., who "would give him orders as to the delivery of his cargo." A certain fraction of that portion of the cargo whose contents were undisclosed was specially fitted for the enemy's military use, and a larger part capable of being adapted to it. On invoking the proofs in two other cases it was found that the owners of the cargo in question and the charterer of the vessel were the owners of certain vessels which, while sailing ostensibly for neutral ports, had been captured and shown to have been engaged in blockade-running; and that many packages on one of these vessels, being numbered in a broken series of numbers, had many of their complemental numbers on the vessel now under adjudication. No application was made to take further proof in explanation of these facts, and the claim to the cargo was not sworn to by either of the persons owning it and resident in England, but by an agent at New York, on "information and belief." No guilty intent, or complicity in any, on the part of the owners of the vessel having been shown, she was restored, but the cargo was condemned for intent to run the blockade.

*Ibid.*

A vessel destined for a neutral port with no ulterior destination for herself, and none by sea for her cargo, to a blockaded place, violates no blockade.

The Peterhoff, 5 Wall., 28.
As to the case, see 3 Phill. Int. Law (3 ed.), 395 *ff.*; 479 *ff.*

A neutral, professing to be engaged in trade with a neutral port situated so near to a blockaded port as to warrant close observation by the blockading squadron, must keep his vessel, while discharging or receiving cargo, so clearly on the neutral side of the blockading line as to repel, so far as position can repel, all imputation of intent to break the blockade. And neglect of that duty may well justify capture and sending in for adjudication; though it might not justify a condemnation in the absence of evidence that the neglect was willful.

The Dashing Wave, 5 Wall., 170.

Where a party, whose national character does not appear, gives his money to a neutral house, to be shipped with money of that house and in their name, and an attorney in fact, on capture of the money and libel of it as prize, states that such neutral house are the owners thereof, and that "no other persons are interested therein," the capture and sending in will be justified; though in the absence of proof of an enemy's character in the party shipping his money with the neutral's, a condemnation may not ensue. Where a vessel has been guilty of carelessness and a portion of her cargo is of a suspicious nature, the costs and

expenses of the capture may be ratably apportioned between the vessel and the suspicious portion of the cargo, though both are restored.

*Ibid.*

A neutral vessel, completely laden with a neutral cargo, and at anchor on the neutral side of a river which washed a blockaded coast, drifted into hostile waters and was captured, while temporarily at anchor there, on suspicion of intent to break the blockade. It was held that temporary anchorage in waters occupied by the blockading vessels did not justify capture in the absence of other grounds.

The Teresita, 5 Wall., 180.

A vessel sailing through blockaded waters was seized on suspicion of intent to break the blockade. Besides the fact that her manifest bore date as of a day when only a part of the cargo was laden, her bills of health and clearance pointed to one port as her port of destination, while the captain's letter of instructions required him to stop at another, not in a direct line, for instructions. The vessel's bills of health specified six men and no passengers, there being, in fact, one passenger; and the provisional certificate of registry represented as sole owner one person, and other papers another. It was held that these circumstances justified the seizure.

It further appeared that the vessel's name had been changed, and that her master had ten months before commanded a blockade runner Not only was her ownership in doubt, the ostensible ownership being apparently but a mere cover, but no claim was put in for her, except by the captain, who put in a claim for the ostensible owners, though without instructions from them and only in his capacity of master. The evidence, too, was very strong, that a portion of the cargo was enemy's property. Under these circumstances condemnation was decreed.

The Jenny, *ibid.*, 183.

In proceedings against a ship and cargo as prize of war, the burden of proving neutral ownership is on the claimants; and when there is no proof of such ownership, and still more when the weight of evidence is on the side of enemy ownership, condemnation will be pronounced.

*Ibid.*

During the civil war a British vessel bound from England to Nassau, New Providence, was captured by an American war steamer, and was condemned as intending to run the blockade of the southern coast of the United States; the grounds being that Nassau, though a neutral port, was constantly and notoriously used as a port of call and transshipment by persons engaged in systematic violation of the blockade, and in the conveyance of contraband of war; the vessel and cargo were consigned to a house well known to the court, from previous suits, to be so engaged; the second officer of the vessel and several of the seamen, ex-

amined *in preparatorio*, testified strongly that the purpose of the vessel was to break the blockade; and the owner, who was heard, on leave given him to take further proof touching the use he intended to make of the vessel after arrival at Nassau, the trade or business he intended she should engage in, and the purpose for which she was going to that port, said and produced nothing.

The Pearl, 5 Wall., 574.

A permit to enter or depart from a blockaded port, issued by an officer who has no authority to grant it, is invalid, and will not save a vessel from condemnation on the charge of blockade-running.

The Sea Lion, 5 Wall., 630; S. P., The Ouachita Cotton, 6 *ibid.*, 521; S. P., The Reform, 3 *ibid.*, 617; S. P., Coppell *v.* Hall, 7 *ibid.*, 542.

Where a neutral vessel, which had apparently set out on a lawful voyage, was captured, she was restored, the only evidence against her being that, when captured, she was out of the most direct and regular course, which was explained by the fact of there having been rough weather, which made it desirable for her to take the course she did.

The Sea Witch, 6 Wall., 242.

A cargo shipped from a neutral country by neutrals resident there, and destined ostensibly to a neutral port, was restored with costs after capture in a suspicious region, and where the vessel on its outward voyage had violated a blockade; there having been nothing to fix on the neutrals themselves any connection with the ownership or outward voyage of the vessel (which was itself condemned), nor anything to prove that their purposes were not lawful. But a certain portion of the cargo, which had been shipped like the rest, except that the shipper was a merchant residing and doing business in the enemy's country, was condemned.

The Flying Scud, 6 Wall., 263.

A vessel was condemned for intended breach of the blockade of the southern coast, having been found near Great Abaco Island, with no destination sufficiently proved, without sufficient documents, with a cargo of which much the largest part consisted of contraband of war, and with many letters addressed to one of the blockaded ports, for which her chief officer declared that she meant to run.

The Adela, *ibid.*, 266.

The liability of a vessel to capture and condemnation for breach of blockade ceases at the end of her return voyage.

The Wren, *ibid.*, 582.

To justify a neutral vessel in attempting to enter a blockaded port she must be in such distress as to render her entry a matter of uncontrollable necessity.

The Diana, 7 Wall., 354.

During the blockade of Port Royal in 1861 a Spanish steam vessel, with the permission of the commander of the blockading squadron, put into that port in distress, and was there seized as prize of war, and used by the Government till June, 1862, when she was brought to New York and condemned. In June of the following year, however, the Government in the mean time using the vessel, a decree of restitution was ordered; but the vessel never was restored. Subsequently the case was referred to a commissioner to ascertain the damages for the seizure and detention, and final judgment was rendered by the court on his award. This judgment was reversed on account of the impropriety of one of the items included in the decree of the district court. But it was held, that clearly the vessel was not lawful prize of war or subject to capture, and that her owners were entitled to fair indemnity, though it might well be doubted whether the case was not more properly a subject of diplomatic adjustment than of determination by the courts.

The Nuestra Señora de Regla, 17 Wall., 29.

The capture of a vessel for violation of blockade may be lawful, if made by a national vessel, though the latter be not part of the blockading force.

The Memphis, Blatch. Prize Cases, 260.

Where an American vessel had entered and cleared from a port under blockade, and, while returning to New Orleans, was captured by a vessel belonging to the French blockading squadron, from which the captain of the former rescued her and brought her to her destination, the port of New Orleans; and demand, subsequently, being made of the Executive to deliver up the vessel and cargo, both on account of the said breach of blockade and rescue, it was advised that the captors had no right of property in said vessel and cargo, and that the liability of the vessel to condemnation, if it ever existed, had ceased by the termination of her voyage at the port of her destination.

It was also advised that the case called for a judicial decision settling certain questions of fact concerning the legality of the blockade, capture, etc., before the Executive could act, and that, as independently of this, there was no constitutional right vested in the Executive to deliver up the property of an American citizen, claimed by him as his own, and in his actual possession, and not condemned, nor legally adjudged to belong to another.

3 Op., 377, Grundy, 1838.

Preparations towards entering a blockaded port, such as hovering around it, with other acts from which an intention to enter may be inferred, are grounds for seizure, unless the blockade is exclusively for ingress or egress.

The Coosa, 1 Newb. Adm., 393; The Hiawatha, Blatch. Pr. Ca., 1; 2 Blatch., 635; The Empress, Blatch. Pr. Ca., 175; Halleck's Int. Law, ch. 23, § 23.

But a mere abandoned purpose, there having been no overt act to execute it, is not ground for seizure.

1 Kent Com., 147; The John Gilpin, Blatch. Pr. Ca., 291.

The decision in the case of the Springbok (Blatch. Pr. Ca., 380, 434; 5 Wall., 1), noted in its proper place above, has been the subject of great discussion. The Springbok left London December 9, 1862, for Nassau, and when one hundred and fifty miles from the latter port was captured by the Federal cruiser Sonoma, the ground being that she intended to run the blockade. The vessel and her cargo were condemned by the district court of New York. This decree was reversed by the Supreme Court of the United States in December, 1866, so far as concerns the ship, but affirmed as to the cargo. There was nothing in the papers taken from the Springbok to show that the intention was to run the blockade. The condemnation of the cargo of the Springbok was put by the Chief Justice on the alternative of either contraband or blockade-running. "We do not now refer," he said (3 Wall., 26), "to the character of the cargo for the purpose of determining whether it was liable to condemnation as contraband, *but for the purpose of ascertaining its real destination; for, we repeat, contraband or not, it could not be condemned if really destined for Nassau and not beyond; and, contraband or not, it must be condemned if destined to any rebel port, for all rebel ports were under blockade.*" * * * "Upon the whole case we cannot doubt that the cargo was originally shipped with intent to violate the blockade; that the owners of the cargo intended that it should be transshipped at Nassau into some vessel more likely to succeed in running safely to a blockaded port than the Springbok; that the voyage from London to the blockaded port was, as to cargo, both in law and in the intent of the parties, one voyage; and that the liability to condemnation, if captured during any part of that voyage, attached to the cargo from the time of sailing."

The British foreign office was advised on the 13th of March, 1863, by Sir William Atherton, Sir Roundell Palmer, and Dr. Phillimore (the then law officers of the Crown) that "there was nothing to justify the seizure of the bark Springbok and her cargo, and that Her Majesty's Government would be justified in demanding the immediate restitution of the ship and cargo, without submitting to any adjudication by an American prize court."

But while this was the law so given, the British commissioner, when the case came before the Mixed Claims Commission, under the Treaty of Washington, in May, 1877, united with the other commissioners in finding against the claimant for the cargo.

The following is part of an opinion on the same case by Mr. Mollish, afterwards lord justice, and Sir W. Harcourt:

"The first observation we shall make is:

"That in a case where the ship itself is really and *bona fide* destined for a neutral port (and that is here admitted to be the case), the onus of the proof lies on the captors, and they ought to give clear and conclusive evidence to justify the inference that the cargo itself has a different destination.

"The Supreme Court, in their judgment, very justly state that the real question on which the condemnation must turn is the original destination of the cargo. But when we come to examine the grounds upon which the court founds a conclusion adverse to the cargo, we find that these grounds are many of them inaccurate in fact and erroneous in principle.

"The first ground taken by the court as justifying the conclusion that Nassau was not the real destination of the cargo is derived from the form of the bills of lading and the manifest. The court argue that because the bills of lading did not disclose the contents of the packages, and because no consignee was named, but the cargo was delivered to order and assigns, these circumstances showed an attempt at 'fraudulent concealment' of the destination of the cargo. We have before us a statement of some of the principal sworn brokers of London, which accords with our own experience, that the bills of lading are in the usual and regular form of consignments to an agent

for sale in such a port as Nassau. It is probable that the court may have been misled by what we believe to be the fact, viz, that in shipments to the American ports greater particularity of specification is required in order to comply with the requirements of the American custom-house. But as these documents are perfectly regular, and in the form usually adopted in the course of trade to an English port, there is nothing in them which could raise an inference of 'fraudulent concealment.'

"The next point taken by the court is, that a sale at Nassau could not have been intended, because the bills of lading made the cargo deliverable to order. It is quite true that such a form of the bills of lading was, as the court says, 'a negation that a sale had been made to any one at Nassau.' But that was not the case set up by the claimants. Their case was, that the cargo was sent to an agent at Nassau for sale there, and for such an object the form of the bills of lading was perfectly regular and appropriate.

"On these two main points, therefore, the judgment seems to us to have proceeded on a misapprehension of the facts.

"The next ground on which the court rely is the character of the cargo itself. Not, as the court justly say, that the cargo, if really destined for Nassau, could be condemned as contraband, but rather that the fact of its being contraband was a good ground of inference that it was not destined for Nassau. This point, which is much insisted on by the court, appears to us to be founded on an entire misapprehension. The fact that the goods, or some of them, were contraband, so far from furnishing an argument that they were not destined for sale at Nassau, is, on the contrary, as far as it goes, a proof the other way. Nassau was a place which had a very insignificant home trade of its own, but which had developed a very great trade as an *entrepôt* of contraband goods, which adventurers in blockade-running purchased there for the purposes of their business. The very things which a person sending goods for the Nassau market would be the most likely to consign there would be goods fitted for blockade-running. But such a trade on the part of the person who sent them to Nassau for sale there would be a perfectly lawful trade. If A sent a cargo of muskets to Nassau, intending to sell them there, they could not be condemned because he thought B was likely so buy them there in order to run them through the blockade. The fact, therefore, of the nature of the cargo does not seem to us to justify the material inference which the court draw from it, viz, that the cargo could not have been intended for sale at Nassau.

"The last point taken by the court in order to prove the material issue, viz, whether a *bona fide* sale was or was not intended at Nassau, is equally founded on a remarkable misapprehension of fact. The court say: 'If these circumstances were insufficient grounds for a satisfactory conclusion, another might be found in the presence of the Gertrude in the harbor of Nassau, with undisguised intent to run the blockade about the time when the arrival of the Springbok was expected. It seems extremely probable that she had been sent to Nassau to await the arrival of the Springbok and to convey her cargo to a belligerent and blockaded port.' Now, it is a remarkable fact in the case that this supposed circumstance, by which the court seek to eke out what appears to have been felt a somewhat weak chain of inference, is itself a complete mistake. The Gertrude was not at Nassau awaiting the arrival of the Springbok. On the contrary, we are informed that it appears by Lloyd's List that at the time when the Springbok was captured close to Nassau the Gertrude was lying at Queenstown, in Ireland. The inference of intended transshipment drawn from the assumed presence of the Gertrude at Nassau, therefore, entirely falls to the ground.

"It seems to us that these arguments relied on by the court fail to establish the point on which alone the judgment of condemnation could be founded, and that the facts of the case are at least equally consistent with the hypothesis of an intended sale at Nassau, which, considering the undoubted neutral destination of the vessel, we think it lay with the captors to rebut.

"Looking at the whole circumstances, we have no doubt that, if the facts of the case had been clearly set forth and distinctly apprehended, as they appear upon the papers before us, the cargo ought not to have been, and would not have been, condemned, and that, consequently, there has been in this case a miscarriage of justice."

The following criticisms by European publicists may be studied in this connection:

"In later times Great Britain has practically abandoned her theory of paper blockades. In an official proclamation, published at the commencement of the Crimean war (see London Gazette of the 20th March, 1854) we read, 'And she (Her Majesty the Queen) must maintain the right of a belligerent to prevent neutrals from breaking any *effective* blockade which may be established with an adequate force against the enemy's forts, harbors, or coasts.' The declaration of the congress of Paris of 1856, confirms the principle in the following words: 'Les blocus pour être obligatoires doivent être effectifs, c'est-à-dire, maintenus par une force suffisante pour interdire réellement l'accès du littoral de l'ennemi.' (Blockades in order to be binding must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.)

"Accordingly Bluntschli observes, in his work on Modern International Law § 829): 'A port is understood to be actually blockaded when ingress to and egress from it are prevented by vessels-of-war stationed off it, or by the land batteries of the blockading power. No specific number of vessels is required, nor a specific number of cannon in the land batteries; but the warlike force must be sufficiently close and strong to prevent merchant vessels from entering or leaving it, not on *individual* occasions, nor yet necessarily on *every* occasion, *but as a general rule.*'

"In section 833, Bluntschli propounds this other axiom of international law, '*A blockade lasts only as long as it is effective.*' If the blockading squadron is forced to withdraw before a superior force of the enemy, the blockade must be considered as raised. It follows, then, that a neutral vessel on the high seas, bound to a blockaded port, cannot be seized for breach of blockade, even though the master has knowledge of the blockade. To the eye of international law, a real breach of blockade is committed only when a neutral vessel attempts by force or stratagem to enter or leave the blockaded port. Bluntschli further contends (§ 835) that, in every case, the vessel can be *lawfully* captured *only while in the act of attempting to violate the blockade.*

"It must be conceded—it is, in fact, admitted—that the blockade of the ports of the rebel States during the war of secession was, on the whole, effective. The doctrine, however, upon which the Supreme Court of the United States has condemned the entire cargo of the Springbok, a neutral vessel, on her way to a neutral port, is quite monstrous, more especially as the court acquits that *vessel* of any intention to violate the blockade. If such a doctrine were carried to its logical conclusions, and were enforced by a belligerent great maritime power as rigorously as it has been by the United States, all neutral property on the high seas might be treated as lawful prize of war.

"The official report of Mr. Robert S. Hale, the agent and counsel of the United States Government, before the Mixed Commission, contains, at page 367 of the appendix, a copy of a 'Confidential *memorandum* for the use of the commissioners on the part of the United States in the American-British Joint High Commission, Washington, 1871, which was inclosed in a communication addressed to each of the American commissioners by the honorable Mr. Fish, the American Secretary of State, on February 22, 1871.' In these secret instructions Mr. Fish informed the American commissioners that 'one hundred and sixty-seven cases have been condemned by the prize courts of the United States. With the exception of one case, that of the Springbok, the Department of State is not aware of a disposition on the part of the British Government to dissent from any final adjudication of the Supreme Court of the United States in a prize case."

Gessner's Rev. of Springbok case. To same effect, see Gessner's Int. Law, 231.

"The Executive Government of the United States has always avowed a readiness on its part to redress any grievance resulting to neutral commerce from the decision of its prize courts, if the circumstances appear to call for it. The case of the Adela may be cited, in which the Hon. W. H. Seward, the United States Secretary of State, thus expressed himself in a note addressed to the Hon. W. Stuart, the British chargé d'affaires at Washington, on 27th September, 1863. 'If the principles of maritime law shall finally be decided against the claimants, due reparation therefor shall be made. The Government has no disposition to claim any unlawful belligerent rights, and will cheerfully grant to neutrals, who may be injured by the operations of the United States forces the same redress which it would expect if the position of the parties were reversed.' These are noble words, worthy of the representative of a great nation which can afford to be both generous and just.

"The insurrection of seven of the Southern States of the Federal Union of North American States having acquired the proportions of a civil war, the Government of the Union gave notice to the European powers that they had established a blockade of the entire Atlantic coast of the United States from the bay of Chesapeake to the mouth of the Rio Grande, an extent of about three thousand miles. From a correspondence respecting instructions given to naval officers of the United States in regard to neutral vessels and mails laid before the British Parliament (Parliamentary Papers, North America (1863), No. 5), it appears that the United States flag officer at Key West informed the British commander, Hewett, that the United States cruisers had received orders to seize any British vessels whose names were forwarded to them from the Government of Washington, and that the fact of such vessels being bound from one British port to another would not prevent the United States officers from carrying out those orders. A representation was accordingly made by Mr. Stuart, the British chargé d'affaires at Washington, to Mr. Seward, the Secretary of State, in consequence of the capture of the British steamer Adela, bound from Liverpool and Bermuda to Nassau, for which latter port she was carrying a British mail, and the Secretary of State on the following day communicated to Mr. Stuart a new set of instructions, which he was addressing in the name of the President to the Secretary of the Navy, 'laying down rules for the future guidance of United States naval officers, which essentially modified the instructions, under which they had been latterly supposed to be authorized to seize certain ships, of which a list had been furnished, when or where those ships were met with, irrespective of the observance of international law.' Mr. Seward subsequently communicated to Mr. Stuart a copy of the instructions, which the President had directed him to transmit to the Secretary of the Navy, and which copy was in fact forwarded by Mr. Stuart to Her Britannic Majesty's principal secretary of state for foreign affairs.

"Having premised that it was the duty of the naval officers to be vigilant in searching and seizing vessels of whatever nation which were carrying contraband of war to insurgents of the United States, but that it was equally important that the provisions of the maritime law in all cases be observed, the instructions proceeded to direct, in the third article, that when the visit was made the vessel was then not to be seized without a search carefully made, so far as to render it reasonable to believe that she was engaged in carrying contraband of war to the insurgents and to their ports, or otherwise violating the blockade, and that if it should appear that she was actually passing from one friendly or so-called neutral port to another, and not bound or proceeding to or from a port in the possession of the insurgents, she could not be lawfully seized. The date of these instructions was 8th August, 1862. They were cautiously worded, and if they had been carefully observed by the cruisers of the United States, their execution of the duty confided to them could have given no cause of offense to neutral nations.

"Since I took up my pen to review the progress made during the last thirty years in rendering war less onerous to neutrals, a debate has taken place in the Upper Chambers of the States General of the Netherlands on the subject of the condemna-

tion of the cargo of the Springbok, with a view to prevent the doctrine upon which the Supreme Court of the United States justified its decision from being generally accepted in European prize courts. Count van Lynden van Sandenburg, minister of state, in the sitting of the Upper Chamber of the States General, on Friday, 25th January, 1884, in the course of his speech, in which he set forth the history of the capture and release of the vessel and the condemnation of her cargo, stated that he know that the attention of several powers is now directed to the question, which has at length assumed an *international* character, seeing that it vitally affects neutral rights. 'It matters not,' he said, 'who the owners of her cargo may be, to what nationality they may belong, whether they are English, French, Dutch, or even American. A great principle is at stake, and the only satisfactory and conclusive proof that the United States Government can give that it at length abandons and renounces a doctrine destructive of neutral trade and a judgment pronounced in error, will be the awarding full compensation to the despoiled owners of the cargo, the long-suffering victims of a flagrant miscarriage of justice. Now, is it not,' he continued, 'the clear course, is it not the duty of the Netherlands Government, of the Government of the country which gave birth to Hugo Grotius, to approach the United States of North America, in conjunction with other maritime powers, for the purpose of prevailing on their Government to retrace its steps. In my opinion it is clearly our duty.'

"Herr Van der Does de Willebois, the Netherlands minister of foreign affairs, in his reply, stated that the Netherlands minister at Washington had already been instructed to take every opportunity to press earnestly the subject on the American Government."

Sir T. Twiss, Belligerent Rights, &c., 1884.

Sir R. Phillimore (3 Int. Law, 3d ed., 490), says: "It seems to me, after much consideration, and with all respect for the high character of the tribunal, difficult to support the decision of the majority of the Supreme Court of the United States in the case of the Springbok, that a cargo shipped for a neutral port can be condemned on the ground that it was intended to transship it at that port, and forward it by another vessel to a blockaded port." He refers to Sir Travers Twiss's pamphlet on "Belligerent Rights on the High Seas" as authority.

Mr. Hall, in his treatise on international law (Oxford, 1884), thus speaks: "During the American civil war the courts of the United States gave a violent extension to the notion of contraband destination, borrowing for the purpose the name of a doctrine of the English courts, of wholly different nature from that by which they were themselves guided. * * * By the American courts during the civil war the idea of continuous voyage was seized on, and was applied to cases of contraband and blockade. Vessels were captured while on their voyage from one neutral port to another, and then condemned as carriers of contraband, or for intent to break blockade. * * * The American decisions have been universally reprobated outside the United States, and would probably find no defenders in their own country." (§ 247, note.) In section 263 it is said that "during the American civil war, the courts of the United States strained and denaturalized the principles of English blockade law to cover doctrines of unfortunate violence." Mr. Hall cites, as dissenting from the doctrine, a letter from Mr. Justice Clifford to Mr. Lawrence. (3 Law Mag. and Rev. (4th series), 31.) Mr. Lawrence took the same position. (*Ibid.*)

"Suppose a state of war between France and the United States: A French cruiser would, under the old system, have the power of preventing a British neutral ship from carrying an American cargo of corn to Liverpool, and an American cruiser would equally have the right of taking a French consignment of silk or fancy goods out of a Cunard steamer on her way to America, because enemy's property was liable to seiz-

ure under the neutral flag. It is not too much to say that war itself would be regarded by the British nation as far preferable to such a state of neutrality. * * * In these six wars (Franco-Austrian war of 1859, the Mexican war, the American civil war, the Danish war of 1864, the German war of 1866, and the Franco-German war of 1870), no attempt was made to interfere with neutral ships of commerce, except by blockade, and the stoppage at sea of contraband of war, and, upon the whole, the world, but more especially this country, gained immensely by it."

144 Edinb. Rev., 359.

Fauchille, in his treatise on blockade (Paris, 1882), speaks of the judgment of the Supreme Court as follows:

"This decree, unprecise as it was, not even designating the port whose blockade the vessel was assumed to purpose to break, was nevertheless affirmed by the Mixed Commission, instituted by the two governments, by virtue of the twelfth article of the Treaty of Washington. By these decisions the theory of blockade violation received a new extension, which may be formulated as follows: A belligerent can seize and condemn for blockade breaking the cargo of a vessel immediately after its departure from one neutral port for another neutral port, no matter how distant may be the blockaded port, if there be a suspicion that the cargo, after having been disembarked in the friendly port, should afterwards be transported to a blockaded port and placed at the disposition of the enemy; it being held that the voyage from one neutral port to another neutral port, and the subsequent voyage from the second neutral port to a blockaded port constitute one and the same voyage which is tainted on principle.

"This theory of continuity of voyage is not a new invention, but only recently has it been applied to the violation of blockades. It is a revival of the famous rule of the war of 1756, by which it was held to be incompatible with neutrality for the subject of a neutral state to engage in time of war in a commerce between a belligerent and his colonies when such commerce was interdicted by the latter belligerent in time of peace. With the view of escaping the harshness of this rule neutrals took an intermediate neutral port as the medium by which they carried on trade between the colony and the mother country. In order to stop this trade Sir W. Scott invented what he called the doctrine of continuous voyages, by which the voyage from the intermediate port to the mother country was held to be continuous with that between the colony and the intermediate port, though no seizures were permitted except on voyages between the intermediate port and the belligerent port. This doctrine was pushed by the Supreme Court of the United States so as to make it sustain the seizure of a vessel between the port of original departure and the intermediate neutral port, and this on the conjecture of an ulterior adventure being projected for the goods in question from such intermediate neutral port to a blockaded port. * * * The effect of this decision is to impose on a voyage between two neutral ports the penalties which may be imposed on a voyage between a neutral and a belligerent port. The decision rests on the fiction that though the vessel in which the goods are to be carried is changed at the intermediate port, yet the voyage is the same; and the reason would apply no matter how many changes the goods might be subjected to, or how many successive neutral ports they might pass through. But international law repudiates such fictions, international law being eminently a law based on common sense. The fiction in the present case imposes on neutral commerce restrictions irrationally onerous. It gives to belligerent cruisers a power over neutral ports greater and more arbitrary than they possess in respect to belligerent ports, since, while neutrals can carry to non-blockaded belligerent ports objects which are not contraband of war, they cannot, without risk of seizure, carry the same objects to another neutral port. It cannot be said that this traffic between friendly ports can be prohibited on account of the suspicion that the cargo disembarked in a neutral port will ultimately be consigned to a blockaded port, for this restriction does not serve to protect neutral rights. All will be left to the judgment of the opposing belligerent. He will be sole judge of a ques-

tion in which his interests are greatly involved. The preliminary examination, which would extend to all vessels whatever issuing from neutral ports, would be undertaken on the high seas, involving an entire overhauling of papers and cargo, while the decision would be left to a prize court of the captor, after an examination, more or less protracted, and hence prejudicial to the neutral rights. Hence, the theory of continuity of voyage destroys the freedom of the seas, and the commercial freedom of neutrals. It makes the blockading belligerent the despot of the ocean, putting neutral commerce at his feet. It will be sufficient for him to blockade a single port to enable him, if his navy be sufficient, to paralyze all neutral commerce. * * * All the saltpeter of commerce, to borrow an illustration from Sir Travers Twiss, is sent from Bengal, through Calcutta, to London, which is the great *entrepôt* from which European nations receive this staple. Now, what would be the effect of war in such a relation? A neutral ship freighted with saltpeter *en route* for London would be liable to seizure by the belligerent, though London was a neutral port, on the ground that London was not the final port of destination, but that the saltpeter was ultimately to be forwarded from London to a belligerent. Or, there might be a war between France and Russia, in which France undertakes to blockade the Russian Baltic ports. A cargo of a character absolutely innocent, such as sugar or coffee, is embarked at an American port on an English ship destined for London. This vessel, if the 'continuous voyage' theory be good, could be arrested when half over the Atlantic by a French cruiser on the suspicion that the cargo, after its arrival at London, might be bought by a Russian agent and forwarded to some blockaded Baltic port. In The Peterhoff (5 Wall., 28; Blatch. Pr. Ca., 403, 521), the rule was pushed still further, so as to apply the doctrine of continuous voyages to cases where the goods were to be transported from one neutral port to another, and to be thence taken by land to the belligerent. The Peterhoff was an English merchant ship which was freighted in London for Matamoras, a neutral Mexican port. She was captured *en route* by the United States cruiser Vanderbilt, on the suspicion that her destination was a blockaded Texan port. On August 1, 1863, she was held good prize by the New York prize court. The seizure of the ship was not followed by protests from the British Government, Lord Russell's answer to the proprietors of the Peterhoff showing that that Government was by no means prepared to disavow the theory of continuous voyages as laid down by the Federal courts. (Arch. Dipl. 1863, iv, 105–109.) This 'approbation' by the British Government of the doctrine thus laid down, shows how little respect that Government has for the declaration of Paris, of which it was one of the principal signers, for this theory assigns the same validity to fictitious as to effective blockades, the declaration only authorizing the blockade of waters adjoining the place blockaded. Not only, also, would the *enemy's* coast be subject to this supervision, since blockading squadrons could be placed around neutral ports to arrest all vessels issuing therefrom which carry goods which might find their way into an enemy's territory. This doctrine, also, implicitly nullifies the rule, admitted by Great Britain in 1856, that an enemy's property on a neutral ship is free. But, anomalous as is this position of Great Britain in accepting this extension of the doctrine of continuity of voyages, still more anomalous is the position of the United States, which heretofore had vindicated the freedom of enemy's goods when under neutral flag. It is true that the United States did not, as did Great Britain, accede to the declaration of Paris, but, on the other hand, the United States had uniformly maintained the position that only effective blockades were obligatory, and President Lincoln had notified all the powers of his intention to maintain during the war these particular principles of the congress of Paris. (Archiv. Dipl. 1861, iv, 115.) In conclusion, we must hold that this ruling in the Springbok case is not only dangerous, but is a retrogressive step in international maritime war."

Du Blocus Maritime, par Paul Fauchille, Paris, 1882, 335 *ff.*

"Opinion delivered by Messrs. Arntz, professor of international law in the University of Brussels and advocate; Asser, professor of international law in the University of Amsterdam and legal councilor of the department of foreign affairs at The Hague, advocate, etc.; Bulmerincq, privy councilor, professor of international law in the University of Heidelberg, etc.; Gessner, doctor of civil law, acting imperial councilor of legation at Berlin; William Edward Hall, doctor of laws of the University of Oxford; De Martens, professor of international law in the University of St. Petersburg and councilor at the minister of foreign affairs there, etc.; Pierantoni, professor of international law in the University of Rome, and member of the council of diplomatic controversy, etc.; Renault, professor of international law in the Faculty of Law and in the Free School of Political Science in Paris; Alberic Rolin, professor of law in the University of Ghent and advocate; and Sir Travers Twiss, Q. C., formerly professor of international law in London and of civil law in Oxford, late Queen's advocate-general, etc.

"We, the undersigned members of the maritime prize commission, nominated by the Institute of International Law from amongst its members to frame a scheme of international maritime prize law, having been consulted as to the juridical soundness of the doctrine laid down and applied by the Supreme Court of the United States of America in the case of the Springbok, have *unanimously* given the following opinion:

"That the theory of continuous voyages, as we find it enunciated and applied in the judgment of the Supreme Court of the United States of America, which condemned as good prize of war the entire cargo of the British bark Springbok (1867), a neutral vessel on its way to a neutral port, is subversive of an established rule of the law of maritime warfare, according to which neutral property on board a vessel under a neutral flag, whilst on its way to another neutral port, is not liable to capture or confiscation by a belligerent as lawful prize of war; that such trade when carried on between neutral ports has, according to the law of nations, ever been held to be absolutely free, and that the novel theory, as before propounded, whereby it is presumed that the cargo, after having been unladen in a neutral port, will have an ulterior destination to some enemy port, would aggravate the hindrances to which the trade of neutrals is already exposed, and would, to use the words of Bluntschli, '*annihilate*' such trade, by subjecting their property to confiscation, not upon *proof* of an actual voyage of the vessel and cargo to an enemy port, but upon *suspicion* that the cargo, after having been unladen at the neutral port to which the vessel is bound, may be transshipped into some other vessel and carried to some effectively blockaded enemy port.

"That theory above propounded tends to contravene the efforts of the European powers to establish a uniform doctrine respecting the immunity from capture of all property under a neutral flag, contraband of war alone excepted.

"That the theory in question must be regarded as a serious inroad upon the rights of neutral nations, inasmuch as the fact of the destination of a neutral vessel to a neutral port would no longer suffice of itself to prevent the capture of goods non-contraband on board.

"That, furthermore, the result would be that, as regards blockade, every neutral port to which a neutral vessel might be carrying a neutral cargo would become *constructively* a blockaded port if there were the slightest ground for *suspecting* that the cargo, after being unladen in such neutral port was *intended* to be forwarded in some other vessel to some port actually blockaded.

"We, the undersigned, are accordingly of opinion that it is extremely desirable that the Government of the United States of America, which has been on several occasions the zealous promoter of important amendments of the rules of maritime warfare, in the interest of neutrals, should take an early opportunity of declaring, in such form as it may see fit, that it does not intend to incorporate the above-propounded theory into

its system of maritime prize law, and that the condemnation of the cargo of the Springbok shall not be adopted as a precedent by its prize courts."

(Here follow the names above given.)

14 Revue de droit int., 127–129. The Springbok case is criticised by Gessner, in same review, 7, 236; by Westlake, 7, 258; by Gessner in his Reform des Kriegsrechte; by Sir Travers Twiss in a pamphlet on this special topic; by "D. C. L." in a pamphlet to the same effect. It is supported by Mr. Bancroft Davis in a pamphlet entitled Les Tribunaux de Prises des États Unis, &c., 1878.

Fiore, in the second edition of his work on International Law, translated into French by Antoine (1886), vol. 3, § 1649, takes, when commenting on the Springbok case, the following distinctions:

"Contraband goods destined for one belligerent may be seized by the other belligerent when found on a neutral ship sailing between neutral ports if it be plain that the intention was to supply the goods to the former belligerent. In this sense voyages of such goods are continuous, as they constitute an indivisible unity as links in the same chain. But this by itself would not justify the seizure of the vessel, but only the seizure of such goods as are actually contraband, and of no other."

The following is a translation of the conclusion of an article on maritime warfare, contributed to the Revue des Deux Mondes, of September 1, 1883, by Monsieur Arthur Desjardins, avocat-general of the court of cassation, Paris, member of the Institute of France, etc.:

"The prize courts of the United States of America have slidden much further down the above slippery and dangerous path. Their decisions in the case of the British bark Springbok and its cargo are so manifestly in subversion of the universally accepted doctrines of international law, that Monsieur Charles de Boeck, in his recent able work (De la propriété privée ennemi sous pavillon ennemi) denounces them as '*highly dangerous innovations*,' and devotes an entire chapter to their examination and refutation. Dr. Gessner, an eminent jurist and councilor of the Berlin foreign office, has pronounced these judgments 'monstrous.' Bluntschli declared that they are more pregnant with danger to neutral commerce than the exploded '*paper blockades*.' Even in England the law officers of the Crown, Sir Robert Phillimore, Sir William Atherton, and Sir Roundell Palmer (now lord chancellor of England), pronounced the seizure of the Springbok illegal.

"The question which now awaits the decision of the maritime powers is whether they are to take a step, not *in advance*, but a decided *retrograde* step in respect of neutral rights; whether the progress made in 1856 is to be lost, whether all the jurists and statesmen who believed that they had pretty well defined the rights of neutrals, have for years past been only benighted dreamers of dreams.

"The Springbok, a British sailing vessel, chartered and loaded by British merchants, sailed from London, on the 2d December, 1862, bound for Nassau, in the British colony, the Bahamas, carrying a general cargo consisting chiefly of Manchester goods, haberdashery, groceries, drugs, stationery, &c. An insignificant portion of the cargo, worth about £700 sterling, consisted of articles which the American prize courts thought fit to regard as *contraband of war*, while the appraised value of the entire cargo was upwards of £66,000 sterling. The proportion of *alleged* contraband was little more than one per cent. Upon the 3d of February, 1863, the Springbok, while sailing direct to Nassau and about 150 miles distant from that port, was seized, *without any search*, by the United States cruiser Sonoma. The vessel and the entire cargo were summarily condemned as good prize of war by the New York district prize court. Upon appeal, the Supreme Court of the United States, restored the vessel on the ground that a neutral port was its *bona fide* destination, but that court condemned the entire cargo by a judgment which ran as follows:

"'Upon the whole case we cannot doubt that the cargo was originally shipped with *intent* to violate the blockade; that the owners of the cargo *intended* that it should

be transshipped at Nassau into some vessel more likely to succeed in reaching safely a blockaded port than the Springbok; that the voyage from London to the blockaded port was, as to cargo, both in law and in the intent of the parties, *one voyage;* and that the liability to condemnation, if captured during any part of that voyage, attached to the cargo from the time of sailing.'

"All the above-quoted legal display rests on a judicial sophism. In respect of the cargo between the port of loading and the *suspected* port of delivery (*a port which the prize court was unable to specify*), there is, forsooth, but '*one voyage.*' Now, a *voyage* in the widest application of the word, has never been held in maritime legal phraseology to comprise more than the space traversed by a vessel between its ports of loading and unloading. But to pretend that the '*voyage*' still continues after the cargo has been discharged and the commercial operation has been completed is, indeed, the very acme of the judicial temerity. The proposition is rendered more glaringly preposterous by the court's admission that the voyage '*as to the ship*' ended at Nassau. The voyage is at an end '*as to the ship,*' yet it is continuous '*as to the cargo.*' This is startling law. The proposition seems more monstrous and absurd when we bear in mind that no transshipment having taken place, it was utterly impossible to say whether or not the cargo would be sent forward, or, if so sent forward, to what port it might go. To tack such a hypothetical, indefinite, imaginary voyage without date of departure or fixed destination on to the completed voyage, and thus to convert the real port of destination (Nassau) into an *intermediate* port, is to misconstrue the facts of the case and to establish the right of confiscation by a wretched play upon words.

"To hold a vessel and cargo liable to capture simply because it is *on its way* to a blockaded port is, in our opinion, a departure from the true principles of international law. What, we ask, was the use of the congress of Paris in 1856 abrogating paper and other fictitious blockades, if England and the United States persist in maintaining that the bare *intent* constitutes a breach of blockade, and that the setting sail for a blockaded port establishes that intent. The paradox is altogether indefensible in the case of a vessel sailing from one neutral port to another neutral port. According to the English and American doctrine it would, under the circumstances, be necessary to prove that the vessel's destination was simulated; the intent would be inferred from the care taken to conceal it and to mislead the belligerent as to the real destination. But even in an English prize court the captor would be required to produce the clearest *proof* of the alleged concealed destination. There would be no guessing no surmising, no inferring, no jumping at illogical conclusions, as in the case of the Springbok. In the case of that vessel the Supreme Court's judgment is in the highest degree arbitrary and unjust. Firstly, the blockade is held to have been broken because there was an *intention* to break it; secondly, the neutral vessel is held to have had the intention to break the blockade, not because it was proceeding to a *certain* blockaded port, but because though bound to a *neutral* port it *might* subsequently proceed thence to 'some blockaded port,' or the cargo *might* be sent forward by transshipment to 'some blockaded port.' No! Such doctrines are repugnant to every principle of international justice. No more in the United States than in Europe are such subtleties compatible with the law of nations. The case of the Springbok is one of those upon which public opinion, even in the United States, has already decisively condemned the judges. * * *

"The American people are too enlightened, they possess too much practical sound sense, not to perceive that if the doctrine of their Supreme Court were generally adopted, if the Springbok precedent were followed by future belligerents, neutral commerce would be completely crippled, paralyzed, or destroyed on the advent of a maritime war. For instance, American coasting vessels carrying cotton from New Orleans to New York would be liable to capture while on that honest voyage, because the cotton might subsequently be forwarded to some blockaded port and some belligerent cruiser suspected such ulterior destination. In time of war, courage—*robur et æs triplex*—would be necessary to risk a voyage from one neutral port to another. If

the merchants in countries engaged in war were to abstain from risking their goods at sea because private enemy property does not yet enjoy immunity from capture, and if neutral vessels were laid up, and their owners renounced a lucrative neutral carrying trade out of fear of being seized, as the Springbok was, on suspicion of being engaged on 'a continuous voyage' to some undefined blockaded port, what would become of maritime international trade? What, we ask, will be the position of those nations which, in consequence of their need of foreign supplies, cannot possibly dispense with that trade? The subject is a very serious one. It deserves, it commands, the meditation and action of statesmen, and especially of American statesmen."

The "synopsis" of the Springbok's cargo shows, that out of a cargo of £65,677, only £700 was assigned to goods which might be considered contraband.

On the same topic may be consulted Mr. J. C. Bancroft Davis, "Tribunaux de prise aux etats Unis, Paris, 1878.

The ruling of the Supreme Court in the Springbok case, together with the opinions on it by foreign jurists, are given above at large, in consequence not merely of the extraordinary attention the decision of the court has attracted abroad, but of the vast importance of the issue to neutral rights. The decision in this case, so it was said by Bluntschli, at once one of the most liberal and most accurate of modern publicists, has inflicted a more serious blow on neutral rights than did all the orders in council put together. As is shown by the prior note, the disapproval of this famous decision, so strongly expressed by Bluntschli, is shared with more or less intensity by all the eminent publicists of the continent of Europe whose attention has been called to it, while even in England, from whose precedents the decision was in part drawn, it is treated by high authorities as aiming an unjustifiable blow at neutral rights. As to the opinion of the court, the following remarks may be made:

(1) The opinion of the court has not that logical precision which enables us to discover how far the question determined involves a question of blockade. It cannot be clearly ascertained from the opinion whether the goods confiscated were held good prize because it was intended that they should run the blockade of some particular blockaded Confederate port, or because they were contraband destined for belligerent use in the Confederacy.

(2) The decision was approved by a bare majority of the court, and among the dissenting judges was Mr. Justice Nelson, whose knowledge of international law was not equaled by that of any of his associates, and Mr. Justice Clifford, distinguished as much for strong sense as for his practice in maritime cases. That the case, in any view, was not, in the hurry of business, considered with that care which its great importance, as it now appears to us, demanded, is evident not merely from the looseness and vagueness of its terms, but from the fact that no dissenting opinion is recorded, nor the arguments of counsel even noted. It is a matter of great regret, also, that the masterly argument of Mr. Evarts, before the Mixed Commission afterwards instructed to act on this class of claims, and printed in the proceedings of that commission (vol. xxi, Lib. Dept. of State), an argument which is one of the ablest expositions of international law in this relation which has ever appeared, and is recognized as such by the highest foreign authority, had not been delivered before the Supreme Court so as to have enabled that tribunal to become aware of the great gravity of the question involved.

(3) While the great body of foreign jurists, British as well as continental, protested against the decision, it is not a little significant

that at the hearing before the commission the British commissioner united in affirming the condemnation. Down to this hearing it was understood that the British Government, acting under the advice of its law officers, had disapproved of the condemnation. Mr. Evarts' argument, however, went to show that the condemnation, while perhaps sustainable under the British system as defined by Sir W. Scott, was in antagonism, not merely to the doctrines set forth in Sir W. Scott's time by the United States, but to those modern restrictions of blockade, by which alone the rights of neutral commerce can be sustained against a belligerent having the mastery of the seas. It is not strange that the British commissioner should have declined to set aside a ruling so consistent with the older British precedents and so favorable to belligerent maritime ascendancy.

(4) The decision cannot be accepted without discarding those rules as to neutral rights for which the United States made war in 1812, and which, except in the Springbok and cognate cases, the executive department of the United States Government, when stating the law, has since then consistently vindicated. The first of these is that blockades must be of specific ports. The second is that there can be no confiscation of non-contraband goods owned by neutrals and in neutral ships, on the ground that it is probable that such goods may be, at one or more intermediate ports, transshipped or retransshipped, and then find their way to a port blockaded by the party seizing.

See *infra*, § 388, where the question of "continuous voyages" is more fully discussed.

(5) The ruling is in conflict with the views generally expressed by the executive department of the Government of the United States, a department which has not merely co-ordinate authority in this respect with the judiciary, but is especially charged with the determination of the law of blockade, so far as concerns our relations to foreign states.

See citations in this chapter, and also *supra*, §§ 238, 329*a*.

To agree to perform a duty effectively is a very different thing from agreeing to perform it absolutely; the latter engagement is a guarantee, the former is an engagement to perform the duty unless *casus* intervene. A carrier, for instance, does not insure against a sudden frost which a prudent person could not foresee, nor against peculiar and extraordinary storms; nor even against defective performance by employés, when this defectiveness arises from extraordinary interferences not to be prognosticated. And so it is with blockades. A blockade to be effective need not be perfect. It is not necessary that the beleaguered port should be hermetically sealed. It is not enough to make the blockade ineffective that on some particularly stormy night a blockade-runner slid through the blockading squadron. Nor is it enough that through some exceptional and rare negligence of the officers of one of the blockading vessels a blockade-runner was allowed to pass when perfect vigilance could have arrested him. But if the blockade is not in the main effective—if it can be easily eluded—if escaping its toils is due not to *casus* or some rare and exceptional negligence, but to a general laxity or want of efficiency—then such blockade is not valid.

Whart. Com. Am. Law, § 233.

"In some cases where a blockading squadron, from the nature of the channels leading to a port, can be eluded with ease, a large number of

successful evasions may be insufficient to destroy the legal efficiency of the blockade. Thus, during the American civil war the blockade of Charleston was usually maintained by several ships, of which one lay off the bar between the two principal channels of entrance, while two or three others cruised outside within signaling distance. This amount and disposition of force seems to have been thought by the British Government amply sufficient to create the degree of risk necessary under the English view of international law, although, from the peculiar nature of the coast, a large number of vessels succeeded in getting in and out during the whole continuance of the blockade."

Hall, Int. Law, 618, citing Bernard, Neut. of Great Britain, chaps. x and xi.

"If approach for inquiry were permissible, it will readily be seen that the greatest facilities would be afforded to elude the blockade."

Field, J.; The Cheshire, 3 Wall., 235; S. P., The Spes, 5 C. Rob., 80; The Charlotte Christine, 6 C. Rob., 101.

That the President of the United States may declare a blockade without the action of Congress, see The Sarah Starr, Blatch. Pr. Ca., 69; The Amy Warwick, 2 Sprague, 123; S. C., 2 Black., 635.

(2) MUST BE BROUGHT TO PRIZE COURT.

§ 363.

The subject and necessity of prize courts in cases of belligerent seizures of neutrals is discussed *supra*, §§ 329 *ff.*

The report of the British law officers on the rules of admiralty jurisdiction in time of war will be found in the Brit. and For. St. Pap. for 1832–'33, vol. xx, 889.

After a regular condemnation of a vessel and cargo in a prize court for breach of blockade, the President cannot remit the forfeiture and restore the property or its proceeds to the claimant.

10 Op., 452, Bates, 1863.

"In the absence of rules in relation to blockades in time of peace, those applicable to blockades in time of war are the only ones according to which the case of the Lone is to be considered. Whether seized in consequence of one or the other description of blockade, the duties of the captors are the same, both with reference to the captured vessel, which they are bound so to secure as to insure their continued possession of it, and to her crew, who are to be treated with all the humanity and kindness which are consistent with the security of the prize, and which, it is gratifying to perceive from your note, have been extended to citizens of the United States detained by naval forces of France. It would be to the President a cause of sincere regret if anything connected with the case under consideration should lead to a change in the conduct of the officers commanding those forces towards American citizens falling into their hands of which the United States would have just cause to complain."

Mr. Vail, Acting Sec. of State, to Mr. Pontois, Oct. 23, 1838. MSS. Notes, France.

### III. *PACIFIC BLOCKADE.*

§ 364.

Whether there can be such a thing as a pacific blockade is a question which was much discussed at the beginning of the late civil war in the United States. That the institution of a blockade does not itself imply a recognition of belligerent rights in the party blockaded was maintained by Mr. Gladstone; that a "pacific blockade" could be instituted in full conformity with international law was maintained by Mr. Sumner in an elaborate speech delivered in February, 1869. The precedents in this connection are as follows:

France, Great Britain, and Russia, having ineffectually attempted to mediate between Greece and Turkey, Turkey resolutely repelling their intervention, blockaded, in 1827, all the coasts of Greece where Turkish armies were encamped. This was stated by the three powers to the Sultan to be a pacific measure, but was not considered by him in that light, since it paralyzed his armies. The result was the battle of Navarino, by which the Turkish navy was destroyed.

The next nominally pacific blockade, to follow the enumeration of Fauchille (Blocus Maritime, Paris, 1882), was instituted by France in 1831, for the purpose of closing the Tagus, in order to redress injuries alleged to have been committed on French subjects by Portugal. This blockade resulted in a treaty signed at Lisbon, on July 14, 1831, by which reparation was given to France for the injuries complained of, and the Portuguese vessels captured by France were restored.

In 1833 France and Great Britain imposed a blockade on the ports of Holland without terminating the pacific relations between the blockading squadron and Holland. The object was to compel the assent of Holland to the recognition of Belgium.

In 1838 France took the same course in blockading the ports of Mexico and isolating the fort of St. Jean d'Ulloa, protesting at the same time that pacific relations continued between the two countries. Mexico, however, not regarding the measure as pacific, declared war against France.

In the same year, France and Great Britain united in blockading the ports of the Argentine Republic. The blockade lasted ten years, and during the whole of this period the blockading powers insisted that peace still continued.

In 1850 Great Britain, as a punishment for certain alleged injuries inflicted two years before by Greek soldiers on the officers of the British ship Fantome, and to compel payment of certain other indemnities, blockaded the ports of Greece. The blockade was withdrawn without war.

See 1 Calvo, § 676.

In 1860 Victor Emmanuel, then King of Piedmont, joined the revolutionary Government of Naples in blockading ports in Sicily, then held by the King of Naples. The relations between the two courts of Turin and Naples continued to be what were called pacific.

In 1862 Great Britain imposed what was called a pacific blockade on the port of Rio de Janeiro. The avowed object was redress for pillage, by the local population, of the Prince of Wales, an English vessel. Earl Russell, in imposing this blockade, declared that, while taking

this measure, the British Government continued to be animated by friendly sentiments towards the Emperor of Brazil.

*Ibid.*

In February, 1879, the coast of Bolivia, then in alliance with Peru, was blockaded by Chili, as a pretended pacific measure of redress, war not being declared until the succeeding April.

In 1880 something very much like a blockade was instituted by the appearance at the port of Dulcigno of a fleet of British, German, French, Austrian, Russian, and Italian men-of-war, the avowed object being to compel the Turkish Government to execute the treaty which conceded this town to Montenegro. This was declared to be nothing more than a "naval demonstration," intended to overawe the Sultan, who was asked by the six powers to join in this "demonstration" by withdrawing his forces from the town. But it was announced that if the town was not given up it would be blockaded.

Yet, notwithstanding these precedents, the weight of authority is that while as a war measure a blockade when effectual will be internationally respected, this will not be the case with a blockade instituted as part of a system of pacific pressure. As is declared by Hautefeuille (ii, 264), while treaty stipulations as to blockades are numerous, they all of them imply a war between one of the contracting parties with a third power, in which war the other contracting party is neutral. The declaration, also, of April 16, 1856, which was signed by all the powers except the United States, Spain, and Mexico, proscribes, in equally formal terms, blockades instituted in peace. This expression of opinion is all the more effective from the fact that it is not an assertion of a principle that is new, but rather a recognition of a principle that is established. The Institut de droit international, also, at its meeting at The Hague, in 1874, resolved by a large majority that pacific blockades were not legitimate methods of international pressure. (Revue de droit int., 1875, 609.) But this action was not unanimous, nor are publicists and statesmen in general accord when treating of this important question. "Nous nous sommes trouvés là dans une situation très difficile, nous faisions un blocus, ce qui n'est pas la guerre complète, la guerre déclarée." (Discours de M. Guizot, Feb. 8, 1841, cited by Fauchille, 48.) A pacific blockade is declared by Rolin-Jacquemyns, a very high authority, to be an intermediate state between peace and war. (Revue de droit int., 1876, 165.)

See Deane, Law of Blockade, 45–48. Holtz. Ency., i, 807.

Mr. Lawrence cites Hautefeuille, Droits des Nations Neutres (tom. ii, 274, 2*me* ed.), as stating that "the war of France with Mexico, which terminated by a treaty of peace in 1839, was preceded by two years of blockade. In the last case, a question, which it was agreed to refer to the arbitration of a third power, arose, on the conclusion of peace, whether the vessels sequestered during the blockade, and before the declaration of war by Mexico, should be restored. However the point, whether a blockade is to be deemed a pacific remedy, may be settled, as regards the parties immediately concerned, it cannot be sustained as to neutrals, otherwise than as a belligerent measure. From the right of conquest exercised over the territorial sea arises the right of blockade, which is the right of jurisdiction accorded by the primitive law to the territorial sovereign; a right by virtue of which he excludes all foreigners from passing through his dominions, and

the immediate consequence of which is to cut off the place surrounded by the conquered territory from all communication with the foreigners beyond it. The duty of these foreigners, of these neutrals, is to respect the law of the territorial sovereignty; they cannot enter his dominions without his consent, without being exposed to the application of the laws which they violate. A blockade is, then, an act of war. It is the result of a previous act, which can only take place during war, the complete conquest and continued possession of a part of the enemy's territory. (*Ibid.*, tom. iii, 10, 182.")

Lawrence's Wheaton (ed. 1863), 845.

Fiore (Droit int., 2d ed., 1885, trans. by Antoine), § 1231, while maintaining that pacific blockades are not inconsistent with the settled principles of international law, holds that they are virtually reprisals, and are subject to the rules governing reprisals as well as those governing blockades. He insists, however, that such a pacific blockade does not affect third powers. But this distinction is properly rejected in a note by the translator. A blockade merely binding the blockading and blockaded powers would be illusory.

### IV. *DUTY OF NEUTRAL AS TO BLOCKADE-RUNNING.*

### § 365.

During the late civil war large interests in England were concerned in movements for breaking the blockade in the Southern ports. The profits were enormous, and vast sums of money were spent, and great skill and energy employed in taking advantage of the opportunity. Nassau, a port ordinarily without business, became the center of a large and active trade, and teemed with adventurers, speculators, and sailors engaged in fitting out and manning vessels to run into the blockaded ports. Many of these vessels were built in England and Scotland for this very end; large, deep, swift, painted in such a way as not to catch the eye, capable of carrying large freight, and manned with bold and skillful navigators. The Government of the United States addressed to the British Government protests against this system, organized and carried on in and through British ports and with British capital. But Earl Russell, in a letter of May 10, 1862, declared that fitting out vessels of this class was not in contravention either of British municipal law or of the law of nations. He likened the case in this respect to that of exportations of munitions of war, the exportation of which no state is required by international law to prohibit. A blockade-runner, it is true, if proved to be such, can be seized with its cargo and confiscated, but the remedy is to be limited to this seizure. (Arch. Dipl., 1862, iv, 100) This position was elaborately sustained by Mountague Bernard in his treatise on British neutrality, ch. xii. By Rolin-Jacquemyns (Revue de droit international for 1871, 127–129), the position is accepted with some modifications, and only in subordination to the general rule that to impose on a neutral the duty of stopping the building and sailing of blockade-runners would impose a new and onerous burden on neutrals, and give an undue advantage to belligerency over neutrality. (See Fauchille, Blocus Maritime, Paris, 1882, 391. The subject is more fully examined *infra*, §§ 402 *ff.* See also Whart. on Contracts, § 479.)

"The carrying on trade with a blockaded port is not a breach of municipal law nor illegal, so as to prevent a court of the *loci contractus* from enforcing the contract of which the trade is the subject. A neutral state is not bound by the law of nations to impede or diminish its own trade by municipal restrictions. A neutral merchant may ship goods prohibited *jure belli*, and they may be rightfully seized and condemned. It is one of the cases where two 'conflicting rights' exist which either party may exercise without charging the other with doing wrong. As the transportation is not prohibited by the laws of the neutral sovereign, his subjects may lawfully be concerned in it, and as the right of war lawfully authorizes a belligerent power to seize and condemn the goods, he may lawfully do it. Whatever is not prohibited by the positive law of a country is lawful. Although the law of nations is part of the municipal law of England, and it may be said that by that law contraband trade is prohibited to neutrals, and consequently unlawful, yet the law of nations does not declare the trade to be unlawful. It only authorizes the seizure of the contraband articles by the belligerent powers. (The Helen, 35 Law J. (N. S.), Adm., 2; compare with it the Santissima Trinidad, 7 Wheat., 283; Richardson *v.* Marine Insurance Co., 6 Mass., 113; Seton and others *v.* Low, 1 Johns. Ex parte Chavasse, 34 Law J. (N. S.), Chanc., 17.)"

2 Halleck's Int. Law (Baker's ed.), 176. See *infra*, § 375.

EXHIBIT B.—*Form of sea-letter prepared during the administration of President Garfield.*

JAMES A. GARFIELD,

PRÉSIDENT DES ÉTATS-UNIS D'AMÉRIQUE.

*A tous ceux qui les présentes verront :*

QU'IL SOIT NOTOIRE que faculté et permission ont été accordées à
maître ou commandant
du navire appelé
de la ville de
de la capacité de tonneaux
ou environ, se trouvant présentement dans le port et hâvre de
et destiné
pour chargé de

qu'après que son navire aura été visité, et avant son départ, il prêtera serment entre les mains des officiers, autorisés à cet effet, que le dit navire appartient à un ou à plusieurs citoyens des États-Unis d'Amérique dont l'acte sera mis à la fin des présentes ; de même qu'il observera et fera observer par son équipage les ordonnances et les règlements maritimes, et remettra une liste signée et confirmée par témoins, contenant les noms et surnoms, les lieux de naissance et la demeure des personnes composant l'équipage de son navire, et de tous ceux qui s'y embarqueront, qu'il ne recevra pas à bord sans la connaissance et la permission des officiers autorisés à ce ; et dans chaque port ou havre où il entrera avec son navire, il montrera la présente permission aux officiers à ce autorisés et leur fera un rapport fidèle de ce qui s'est passé durant son voyage, et il portera les couleurs, les armes at les enseignes des États-Unis, durant son dit voyage.

EN TÉMOIGNAGE DE QUOI, *nous avons signé les présentes et y avons fait apposer le sceau des États-Unis, et les avons fait contresigner par*

*jour de*
*de l'an de Grace le* .

SÉRÉNISSIMES, Puissants, Hauts, Illustres, Nobles, Honorables, Vénérables, Sages, et Prudents Seigneurs, Empereurs, Rois, Républiques, Princes, Ducs, Comtes, Barons, Seigneurs, Bourgmestres, Échevins, Conseillers, comme aussi Juges, Officiers, Maires, Municipaux, Justiciers, et Régents de toutes les bonnes villes et endroits, soit ecclésiastiques ou séculiers, qui verront ou entendront lire ces lettres patentes. Nous
faisons savoir, que le capitaine du

(ayant comparu devant nous) a déclaré, sous serment,, que le navire nommé de
du port

d'environ tonneaux, qu'il commande actuellement, est un bâtiment des États-Unis d'Amérique, et qu'aucun citoyen ou sujet des puissances présentement en guerre u'y a aucune part ou intérêt soit directement ou indirectement, et ainsi que Dieu lui soit en aide ; et, comme nous désirerions voir prospérer le dit capitaine dans ses affaires légitimes, nous vous prions et requérons tous, à chacun de vons séparément, dans les lieux où le dit capitaine pourra arriver avec son bâtiment et sa cargaison, de vouloir bien le recevoir avec bonté et de le traiter de la manière qu'il convient, lui permettant, en payant les droits et frais d'usage, de passer, repasser, naviguer et frequenter les ports, passages et territoires à l'effet de vaquer à ses affaires, en tout endroit et de la manière qu'il jugera convenable : De quoi nous serons volontiers redevables.

*En témoignage de quoi, nous apposons aux presentes le sceau de*

JAMES A. GARFIELD,

PRESIDENTE DE LOS ESTADOS UNIDOS DE AMERICA.

*A todos los que la presente vieren :*

SEA NOTRIO que hemos concedido facultad y permiso á
capitan ó comandante del navio llamado , de la ciudad de y de la capacidad de toneladas sobre poco mas ó menos, hallándose actualmente en el puerto de
y destinado para
cargado de

que desques que su navío haya sido visitado, y antés de su salida, prestará juramento entre las manos de los oficiales autorizados para el efecto, de que el dicho navio pertenece á uno ó mas ciudadanos de los Estados Unidos de América, cuyo acto se pondrá al fin de la presente ; que igualmente guardará y hará guardar por su tripulacion las ordenauzas y reglamentos marítimos, entregará una lista firmada y confirmada por testigos, que contenga los nombros y apelidos, lugares de nacimiento y residencia de las personas que compongon la tripulacion de su navío, y de todos los que se embarcaren en él, los cuales no serán recibidos abordo sin el conocimiento y permiso de los oficiales autorizados para ello ; y en cado puerto adonde entrare con su navío, mostrará el presente permiso á los oficiales autorizados, y les hará una relacion fiel de lo occurido durante su viaje, llevando la bandera, armas é insignias de los Estados Unidos durante su navegacion.

EN TESTIMONIO DE LO CUAL, *hemos firmado las presentes, poniendo el sello de los Estados Unidos y las hemos hecho refrendar por a*
*dia de*
*del ano del Señor*

SERENISIMOS, Poderosos, Altes, Illustres, Nobles, Honorables, Venerables, Sabios, y Prudentes Señores, Emperadores, Reyes, Republicas, Principes, Duqes, Condes, Barones, Señores, Burgomaestres, Regidores, Consejeros, como igualmente Jueces, Oficiales, Corregidores, Municipales, y Regentes de todas las buenas ciudades y lugares, asi eclesiásticos como seglares, que viesen ó oyesen leer las presentes. Nos
hacemos saber que el capitan de

habiendo comparícido delante de nosotros, ha declarado, bajo de juramento, que el navio llamado
del puerto de
de cerca de

toneledas, que manda actualmente, es un buque de los Estados Unidos de América, y que ningun ciudadano ó vassallo de las potencias actualmente en guerra tiene directamente ó indirectamente en él la menor parte y que asi Dios le ayude ; y como deseamos ver prosperar al citado capitan en sus negocios legítimos, os pedimos y requirimos á todos en general, y á cada uno en particular, en el parage adonde el dicho capitan pueda arribar con su buque y carga, tengais á bien recibirle con benevolencia, y tratarle del modo que conviene, permitiéndole pagando los derechos y gastos de costumbre, pasar, y repasar, navegar y frecuentar los puertos, parages y territorios, á fin de evacuar sus negocios donde y como le parezca conveniente. De lo que os quedaremos reconocidos.

*En testimonio de lo cual fixamos aqui el sello de*

JAMES A. GARFIELD,

PRESIDENT OF THE UNITED STATES OF AMERICA.

*To all who shall see these presents, greeting :*

BE IT KNOWN, That leave and permission are hereby given to master or commander of the called
of the burden of
tons, or thereabouts, lying at present in the port of bound for
and laden with

to depart and proceed with the said
on his said voyage, such
having been visited,
and the said having made
oath before the proper officer that the said belongs to one or more of the citizens of the United States of America, and to him or them

IN WITNESS WHEREOF *I have subscribed my name to these presents, and affixed the seal of the United States of America thereto, and caused the same to be countersigned by*
*at*
*the day of*
*in the year of our Lord* .

By the President :

*Secretary of State.*

Most Serene, Sereue, most Puissant, Puissant, High, Illustrious, Noble, Honorable, Venerabie, Wise, and Prudent Lords, Emperors, Kiugs, Republics, Princes, Dukes, Earls, Barons, Lords, Burgomasters, Schephens, Counsellors, as also Judges, Officers, Justiciaries, and Regents, of all the good cities and places, whether Ecclesiastical or Secnlar, who shall see these patents or hear them read : We
make known that the master of
appearing
before us, has declared upon oath, that the vessel called
of the burden of about
tons, which he at present navigates, is of the United States of America, and that no subjects of the present belligerent Powers have any part or portion therein, directly or indirectly, so may God Almighty help him. And, as we wish to see the said master prosper in his lawful affairs, our prayer is, to all the beforementioned, and to each of them separately, where the said master shall arive with his vessel and cargo, that they may please to receive the said master with goodness, and to treat him in a becoming manner, permitting him, on paying the usual tolls and expenses in passing and repassing, to pass, navigate, and frequent the ports, passes, and territories to the end to transact his business, where and in what manner he shall judge proper. Whereof we shall be willingly indebted.

*In witness and for cause whereof we affix hereto the seal of*

JAMES A. GARFIELD,

PRESIDENT VAN DE VEREENIGDE STAATEN VAN AMERICA.

*Aan alle de geenen, die deeze teegen woordige zullen, salut :*

DOEN TE WEETEN, dat by deezen vryheiden en permissie gegeeven
werd aen Schipper en Bevelhebber van het schip (of vaartuig) genaamdt van de
van
groot Tonnen of daar omtrent, leggende tegenswoordig in de Haaven van gedestineert naar
en beladen met

om te vertreekken, en met zyn voornoemd Schip of vaartuig des zelfs gemelde reize voort te zetten, zodanig Schip of vaartuig gevisiteert zynde, en de voornoemde Schipper of Bevelhebber onder Eede, voor den daar toe gestelden officier verklaart hebbende dat het gemelde Schip of vaartuigaan een of meerder onderdaden, volk, of Ingezeetenen van de Vereenigde Staaten Van America, te behoort, en aan hem (of hunalleen).

IN GETUIGENS WAAR VAN *ik deeze teegenswoordige met myne naam hebbe onderteekend, en het Zeegel van deeze Vereenigde Staaten Van America daar aan gehegt, en het Zelve doen contrasigneeren door*
*tot aen*
*dag van in hetyaar van onzes Heeven Christi,*

*Secretary of State.*

ALLER Doorluchtigste, Doorluchtigste, Doorluchtige, Grootmachtigste, Grootmachtige, Hongh ende welgeboorne, wel Edele, Erntfeste, Achtbaare, Wyze, Voorzienige, Heeren, Keizeren, Koningen, Rupubliquen, Princen, Fursten, Hertogen, Graeven, Baronen, Heeren, Burgemeesteren, Scheepenen, Raden, Mitsgarders, Rechteren, Officieren, Justiciereu, ende Regenten, aller goede steden en plaatzen, het zy geestelyke of waereldlyke die deeze opene Letteren zullen zien ofte hooren leezen : Doen wy Burgemeesteren en Regeerders der Stad
te weeten dat Schipper van
(voor ons compareerende) by solemneelen Eede voorklaart heeft, dat het Schip genaamd
groot omtent
lasten t'welk hy thans voert in de Vereenigde Staaten van America t'huys behoord, en dat geen onderhaanen van den teegen woordige oorlogende mogendheeden daar direct of indirect eenig deel of gedeelte hebben : zoo waarlyk helpen hem God Almagtig. En teywyl wygen voornoemde Schipper gaarne gevorderd zagen in zyne wettigen zaaken zoo is ons verzock ; anu alle voornoemde en een yder in't byzonder alwaar den voornoemde Schipper, meu zyn Schip en lading aankomeu zal hem alle bystand gelieven te verleenen, enbehoorlykt te behandelen vergunnende hem op het betaaleu der gewoonlyke Tolleu enongeld en in het heen en weeder vaaren der haveenen stroomen en gebied te laaten passeeren vareen en frequenteeren, omme zyn handel te dryven alwaar eu in wat manier hi zigzal geraadenvinden en best oordelen zal, war aan wy ons gaarne willen schuldig agten.

*Deste oorkonde hebben het zelve bekrachtigd met hel zegel vanden*

# CHAPTER XIX.

## CONTRABAND.


I. Munitions of war contraband, § 368.
II. And whatever is essential to belligerent support.
(1) As to coal, § 369.
(2) As to provisions, § 370.
(3) As to money, § 371.
(4) As to horses, § 372.
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(6) As to soldiers, § 373*a*.
III. How far dispatches and diplomatic agents are contraband, § 374.
IV. Penalties on contraband.
May be seized on high seas, § 375.


### I. *MUNITIONS OF WAR CONTRABAND.*

§ 368.

By the "armed neutrality" entered into during the American Revolutionary War by Russia, Denmark, and Sweden in 1780, "being the three northern powers from whose dominions chiefly the other maritime nations of Europe received supplies of timber and other naval stores," the effort was made "to strike these from the list of contraband, or by some means to exempt them from capture." It was understood, however, at the time, that this was an exception from the law of nations. By this law "timber and other articles for the equipment of ships are contraband of war." Hence the recital of this principle in Jay's treaty ought to give no just cause of offense to France.

Mr. Pickering, Sec. of State, to Mr. Pinckney, Jan. 16, 1797. MSS. Inst., Ministers.

"If the circumstance, and the cargo and its destination, show unequivocally that its application must be to military purposes, materials fit for both peace and war may assume the character of contraband, but if those circumstances afford solid ground for the opinion that the suspected materials are designed only for the ordinary purposes of the nation then there can be no just motive for interrupting a commerce which ought to be pronounced lawful.

"This principle would seem to mark the boundaries of the conflicting rights of neutral and belligerent powers; for neutrals have a right to

carry on their usual commerce, and belligerents have a right to prevent them from supplying the enemy with instruments of war. * * *

"In the catalogue of contraband agreed on between the United States and Great Britain there is one description which leaves to construction what specific articles it may comprehend. It is in the following words: 'and generally whatever may serve *directly* to the equipment of vessels.'

"In construing this question the British courts of vice-admiralty appear to consider it as including whatever might, by any possibility, be applied to the equipment of vessels. Although the article be in itself unfit and improper for that use, and therefore be not in common so applied, yet if it might by possibility, from a want of other proper materials, admit of such an application, the courts adjudge, although such other materials be not wanting at the port of destination, that it is contraband of war.

"This construction we deem alike unfriendly and unjust. We conceive that the expression which has been cited comprehends only such articles as in themselves are proper for, and in their ordinary use are applied to, the equipment of vessels.

"Under the British construction all operation is referred to the word 'directly.' Expunge it from the sentence and according to them the sense will remain the same. But plain reason and the soundest and most universally admitted rules of construction forbid us to interpret by garbling a compact. The word 'directly' is an important word, which forms a necessary and essential part of the description, and must have been inserted for the purpose of having its due weight in ascertaining the sense of the article. We can discover no effect which is allowed to it unless it be admitted to limit the description to materials which, in their ordinary use and common application, are in considerable quantities proper for, or 'serve directly to, the equipment of vessels.' To exclude it, or to construe the article as if it was excluded, is to substitute another agreement for that of the parties.

"We do not admit the expression we are considering to be in itself doubtful. But if it was so, rules of construction prescribed by reason and adopted by consent seem to us to reject the interpretation of the British courts.

"As this contract is formed between a belligerent and neutral nation, it must have been designed to secure the rights of each, and consequently to protect that commerce which neutrals may lawfully carry on, as well as to authorize the seizure of articles which they may not lawfully carry to the enemy. But under the interpretation complained of, not only articles of doubtful use with respect to the equipment of vessels, but such as are not proper for that purpose, or, if proper, only in very small quantities, and which, therefore, are not in common so applied, are, because they may by mere possibility admit of that application,

classed with articles prohibited, on the principle that they are for the purposes of war.

"This construction ought to be rejected, because it would swell the list of contraband to an extent which the laws and usages of nations do not authorize; it would prohibit, as being for the equipment of vessels, articles plainly not destined for that purpose, but fitted and necessary for the ordinary occupations of men in peace. And it would consequently presuppose a surrender on the part of the United States of rights in themselves unquestionable, and the exercise of which is essential to themselves and not injurious to Britain in the prosecution of the war in which she is engaged."

Mr. Marshall, Sec. of State, to Mr. King, Sept. 20, 1800. MSS. Inst., Ministers. 2 Am. State Pap., (For. Rel.,) 483. See 5 Am. Law Rev., 256.

In the draft convention, suggested on January 5, 1804, by Mr. Madison, Secretary of State, to Mr. Monroe, minister to England, occurs the following:

"ART. IV. Contraband of war shall consist of the following articles only: Saltpeter, sulphur, cuirasses, pikes, swords, sword-belts, knapsacks, saddles and bridles, cannon, mortars, fire-arms, pistols, bombs, grenades, bullets, firelocks, flints, matches, and gunpowder; excepting however, the quantity of the said articles which may be necessary for the defense or use of the ship and those who compose the crew, and no other articles whatever, not here enumerated, shall be reputed contraband or liable to confiscation, but shall pass freely without being subjected to the smallest difficulty, unless they be enemy's property; and it is to be particularly understood that under the denomination of enemy's property is not to be comprised the merchandise of the growth, produce, or manufactures of the countries or dominions at war which shall have been acquired by the citizens or subjects of the neutral power, and shall be transported for their account, which merchandise cannot in any case or on any pretext be excepted from the freedom of the neutral flag."

On this Mr. Madison makes the following observations:

"This enumeration of contraband articles is copied from the treaty of 1781 between Great Britain and Russia. It is sufficiently limited, and that treaty is an authority more likely than any other to be respected by the British Government. The sequel of the article, which protects the productions of an hostile colony converted into neutral property, is taken from the same model, with the addition of the terms 'in any case or on any pretext.' This addition is meant to embrace more explicitly our right to trade freely with the colonies at war with Great Britain, and between them and all parts of the world in colonial productions, being at the time not enemy's but neutral property; a trade equally legitimate in itself with that between neutral countries directly and

in their respective vessels and such colonies, which her regulations do not contest.

"In support of this right, in opposition to the British doctrine that a trade not allowed by a nation in time of peace cannot be opened to neutrals in time of war, it may be urged that all nations are in the practice of varying more or less in time of war, their commercial laws from the state of these laws in time of peace, a practice agreeable to reason as well as favorable to neutral nations; that the change may be made in time of war on considerations not incident to a state of war, but on such as are known to have the same effect in time of peace; that Great Britain herself is in the regular practice of changing her navigation and commercial laws in times of war, particularly in relation to a neutral intercourse with her colonies; that at this time she admits a trade between neutral countries and the colonies of her enemies, when carried on directly between them or between the former and herself, interrupting only a direct trade between such colonies and their parent state, and between them and countries in Europe, other than those to which the neutral trade may respectively belong; that as she does not contest the right of neutrals to trade with hostile colonies within these limitations, the trade can be and actually is carried on indirectly between such colonies and all countries, even those to which the colonies belong; and consequently that the effect of her doctrine and her practice is not to deprive her enemy of their colonial trade, but merely to lessen the value of it in proportion to the charges incident to the circuitous course into which it is forced, an advantage to her which, if just in itself, would not be sufficiently so to balance the impolitic vexations accruing to a neutral and friendly nation."

MSS. Inst., Ministers.

"I have the honor to acknowledge the receipt of your note of the 25th ultimo, wherein you present certain reasons which lead your Government to ask that this Government, in common with other powers, consent to a general prohibition of the passage of the Dardanelles or the Black Sea by vessels carrying dynamite.

"In the form in which the request is presented, this Government would not feel justified in giving this measure its unqualified sanction, inasmuch as it is founded not so much on the inherent danger to life and property of the explosives named while in transit as on the possible ulterior wish to which they may be put. I need scarcely adduce argument to show that such a course is tantamount to enlarging the international definition of contraband of war, and making the substances in question contraband also in time of peace. To this proposition the United States could not assent, either as a general principle or in its practical application to a class of explosives whose employment is widely extending in all operations of mining and tunneling, and which,

rightly used, plays an important part in the internal development of the natural resources of nearly all countries.

"If, however, the question presented were one of regulating the conveyance of a dangerous detonating or inflammable substance, so that its transit might be unaccompanied by peril to life, this Government could find no objection to such a course. Our own laws (sections 4472, 5353, and 5354 of the Revised Statutes) prohibit the carriage of such explosives upon any vessel or vehicle whatever used for the conveyance of passengers to the United States or between the States and Territories; and section 5354 especially considers the death of any person when caused by the transit or attempted transit of such explosives as entailing upon the offenders the penalty for manslaughter. Our statutes, however, do not absolutely prohibit, but simply regulate the conveyance of explosives.

"This Government will be happy to consider any scheme for the regulation of the conveyance of explosives through the straits of the Porte, and if it shall not appear that the rights of peaceful and legitimate commerce or of transit through waters by which the world's commerce must necessarily pass are interfered with or prohibited, your Government may rest assured that no objection will be made to the enforcement of such legislation."

Mr. Frelinghuysen, Sec. of State, to Aristarchi Bey, Dec. 4, 1882. MSS. Notes, Turkey; For. Rel., 1883.

Mr. King's correspondence in 1799 as to contraband is given 2 Am. St. Pap. (For Rel.), 494 *ff.*

Mr. Seward's report of Jan. 26, 1863, giving correspondence in relation to the capture of British vessels sailing from one British port to another with contraband articles for the Confederate States, is given in Senate Ex. Doc. 27, 37th Cong., 3d sess.

There are two classes of goods as to which no question can arise in this connection. The first comprises things that could not possibly be used for warlike purposes, *e. g.*, books in no way connected with war, articles of family dress, etc. The second comprises articles which could not be used for any but warlike purposes, *e. g.*, cannon, torpedoes, and fire-arms so constructed as to be fitted only for military use. Between these two classes fall innumerable articles, whose character in this respect depends upon the concrete case. Iron, for instance, would not be ordinarily contraband; but if it be forwarded to a cannon foundry belonging to a belligerent to be made up into cannon, and if the whole transaction be for the purpose of thus applying the iron, then the iron in this particular case would be contraband.

Whart. Com. Am. Law, § 226. See 5 Am. Law Rev., 256.

That it is no breach of neutrality to sell munitions of war to a belligerent, see *infra*, § 391.

As to causal relationship requisite to impose responsibility in such cases, see Whart. Crim. Law, §§ 159 *ff.*, 1961.

II. *AND WHATEVER IS ESSENTIAL TO BELLIGERENT SUPPORT.*

(1) As to coal.

§ 369.

"The discussion which at this time is going on respecting the military character of coal, and whether it is now excluded from general commerce as contraband of war is a striking illustration of the tendency to enlarge this power of prohibition and seizure, and of the necessity of watching its exercise with unabated vigilance. Here is an article, not exclusively nor even principally used in war, but which enters into general consumption in the arts of peace, to which, indeed, it is now vitally necessary. It has become also important in commercial navigation. It is a product of nature with which some regions are bountifully supplied while others are destitute of it, and its transportation, instead of meeting with impediments, should be aided and encouraged. The attempt to enable belligerent nations to prevent all trade in this most valuable accessory to mechanical power has no just claim for support in the law of nations; and the United States avow their determination to oppose it so far as their vessels are concerned."

Mr. Cass, Sec. of State, to Mr. Mason, June 27, 1859. MSS. Inst., France.

"The undersigned, Secretary of State of the United States, having taken the President's instructions, has now the honor to reply to the note which was addressed to the undersigned by the honorable William Stuart, Her Britannic Majesty's chargé d'affaires, on the 25th day of September last, concerning certain proceedings of the collector of customs at New York, affecting clearances of vessels and cargoes from that port to British ports in the Bahama Islands.

"In June last, Lord Lyons, Her Britannic Majesty's minister, then residing here, submitted to the undersigned a letter which had then recently been addressed to his lordship by P. Edwards, esq., her Majesty's acting consul at New York. It was set forth in that communication that the custom-house authorities in that port had, upon several occasions, thrown serious impediments in the way of the shipment of coal, as ordinary merchandise, to Nassau, and, in some cases where the goods were already embarked and even cleared at the custom-house, they had refused to permit the vessel to go to sea until such goods had been relanded; and that one of the officials had shown him an order, issued from the Treasury Department, of the 18th of April, in which shipments of coal where prohibited to any ports or places north of Cape St. Roque and west of the fifteenth degree of longitude east, where there was a reason to suspect that it might be intended for the use of the so-called Confederate Government or ships, and this prohibition embraced all the British North American colonies, British West Indies, Bermuda, and the British possessions on the coast of South America. Mr.

Edwards also stated, in the same letter, that, upon inquiry of the officer having superintendence of the clearance bureau whether it was intended that this order should be strictly enforced, that officer replied that such was the collector's intention. Mr. Edwards proceeded to state that a British merchant, largely interested in the trade of the North American colonies and West Indies, had informed him that that merchant had made repeated applications to the custom-house to be allowed to export coal, some of which was to be tendered for the use of Her Majesty's vessels upon the West India station, at the same time offering to enter into bonds that it should be landed in foreign ports, but that his applications had all been rejected. Mr. Edwards then commented on what he assumed to be the instructions of the Hon. Mr. Chase, Secretary of the Treasury of the United States, to the collector at New York, and complained that the very great discretionary powers which those instructions were supposed to give to the collector had been used to the annoyance and injury of British trade, and, in this connection, he represented that in one case where a quantity of dry goods, consisting of plain and printed cotton fabrics, had been shipped on a British vessel for Nassau, the shippers were obliged, by the custom-house, to reland them before permission for the vessel to proceed to sea could be obtained; that in another a number of packages of shoes were prohibited from exportation; and that, in a more recent case, where an order had been received from some merchants at Nassau to ship a quantity of drugs, consisting of sulphate of quinine, cantharides, and acids, only a portion of the order was permitted to be exported. Mr. Edwards further stated that, at one time, strong exception was taken by the custom-house officials to what they alleged to be an extraordinary quantity of flour and provisions shipped at New York for the British West Indies, but that he was not aware that it amounted to actual prohibition. Mr. Edwards concluded with saying that much inconvenience had been experienced, and yet continued to be experienced, by British merchants in New York from the manner in which the instructions issued by the Treasury Department had been enforced; that articles of ordinary export were at times prohibited, while wares which could be of service to belligerents have been allowed to pass uninvestigated.

"The letter of Lord Lyons was immediately submitted to the Secretary of the Treasury for his consideration. That officer, upon examining the case, communicated a note to this Department, in which he stated that the restrictions upon the exportation of coal had been enforced by the collector under instructions of the Treasury, of the 18th of April, 1862, alike upon domestic and foreign shipping clearing to ports north of Cape St. Roque and west of the fifteenth degree of longitude east, and the Treasury would, with pleasure, remove all restrictions upon trade when the existing imperative necessity which had induced them should cease. The Secretary of the Treasury, with his

note, communicated to the undersigned a report upon the general subject from the collector of the customs at New York, in which that officer stated that, in the exercise of the discretion devolved upon him, he had prohibited the shipment of coals, dry goods, shoes, quinine, and other drugs, tin-ware, munitions of war, and sundry other articles, to Nassau and the West Indies, and other foreign ports, when he had reason to suspect that they were intended, by individual enterprise, or the special contracts of British subjects, directly to contribute to the welfare of the enemies of the United States; and, in regard to the statement of Mr. Edwards, that articles of ordinary export have at times been prohibited, while wares which could only be of service to a belligerent were allowed to pass unquestioned, the collector answered that he had no data in his possession which could be referred to for the facts thus charged.

"The note of the Secretary of the Treasury and the report of the collector of customs at New York were promptly communicated by the undersigned to the honorable Mr. Stuart, who transmitted the same to his Government.

"The note of Mr. Stuart which is now under consideration presents, as the undersigned is informed, the views of Her Majesty's Government upon the subject of the correspondence which has been briefly but, as is believed, fairly recited. By that note the undersigned is informed that Her Majesty's Government regard the subject as one of great importance, and that, however desirous of making every allowance for the difficulties of the position of the United States that Government may be, it is impossible for them to acquiesce in the system of interference with the legitimate trade of Great Britain which is now practiced by the United States authorities, such interference being not only in contravention of the treaties existing between Great Britain and the United States, but also the established principles of international law.

"Mr. Stuart then, upon the documents which have been recited, states the case which is thus pronounced to be inadmissible, as follows, namely: 'It appears that British vessels lawfully trading between New York and the Bahamas are in some instances refused clearances at New York, and in others, after having been regularly cleared, with full knowledge of the United States authorities of the articles on board, are detained and searched, and are required either to reland portions of their cargoes or to give bonds that no part of the cargo shall at any intermediate time be used by the enemies of the United States. And these proceedings are not claimed to be prescribed by any general law or regulation of commerce, but are avowed to be wholly discretionary with the collector of the customs, to be enforced by him whenever he shall entertain the suspicion and belief that the real destination of the cargo is, mediately or immediately, to some port in the possession of the enemies of the United States, or if he shall be satisfied that there is imminent danger that the goods, wares, and merchandise, of whatever description, loaded on such vessels will fall into the possession or under the control of the

insurgents. The collector of the customs, in his report of the 12th of June, states that, in the exercise of the discretion devolved upon him as an officer of the Government of a sovereign people, he had prohibited the shipment of coals and dry goods and shoes, and quinine and other drugs, and tin-ware, and munitions of war, and sundry other articles, to Nassau and the West Indies, and other foreign ports where he had reason to suspect that they were intended, by individual enterprise, or the special contracts of British subjects, to contribute directly to the welfare of the enemies of the United States.'

"Upon the facts thus assumed Mr. Stuart proceeds to argue the case, saying that Her Majesty's Government cannot call to mind any principle of international jurisprudence, nor any precedent approved by international law, to justify such interference with the trade of neutrals. That trade between Great Britain and the United States, at least as to ports and places in the undisturbed possession of the United States, is not in any degree affected by the state of war in which the United States are engaged; and, moreover, that trade between Great Britain and an enemy of the United States (the former preserving a strict neutrality or indifference between the belligerent parties) can be affected only by the international law of blockade. Mr. Stuart proceeds to remark that the United States will admit that shipments similar to those now subjected to interference from New York to Nassau and other British ports, if made in time of peace, could not be prohibited without giving manifest cause of just complaint to Great Britain, especially when such shipments remain open to other nations not having with the United States treaties of a more favorable nature. It follows, therefore, Mr. Stuart says, that to prohibit such shipments to British subjects, while permitting them to the subjects of other nations, is to assume a state of quasi-hostility to Great Britain, on account of geographical or other circumstances supposed to mix her up with the interests of the enemy of the United States. Mr. Stuart proceeds to remark that the doctrine assumed by the United States authorities would seem to be that goods which ordinarily may be lawfully shipped from the United States by British subjects to certain British ports in British bottoms may be embargoed if, in the judgment of an inferior officer, such as a collector of a port, there is imminent danger that on their passage to the British port the enemy will unlawfully seize them, or that, having safely arrived at that port, they may with greater facility be exported thence to the enemy, or that they may in any way fall into the possession of or under the control of the enemy. After declaring that he is instructed to say that Her Majesty's Government cannot assent to such a doctrine, Mr. Stuart observes that Great Britain has declared her neutrality in the contest now raging between the United States Government and the so-called Confederate States, and that she is consequently entitled to the rights of neutrals, and to insist that her commerce shall not be interrupted, except upon the principles

which ordinarily apply to neutrals; that these principles authorize nothing more than the maintenance of a strict and actual blockade of that enemy's ports, by such force as shall at least make it evidently dangerous to attempt to enter them. But the fact of a neutral ship having succeeded in evading a blockade affords no ground for international complaint, nor is it an offense which can be punished upon any subsequent seizure of the ship after she has successfully run the blockade. Mr. Stuart adds that Her Majesty's Government consider that it would be introducing a novel and dangerous principle in the law of nations if belligerents, instead of maintaining an effective blockade, were to be allowed, upon mere suspicion or belief, well or ill founded, that certain merchandise could ultimately find its way into the enemy's country, to cut off all or any commerce between their commercial allies and themselves; that this would be to substitute for the effectual blockade recognized by the law of nations a comparatively cheap and easy method of interrupting the trade of neutrals. But when this illegal substitution for such a blockade is applied to a particular nation, on account of the geographical position of its territories, or for other reasons, while the same ports of the belligerent are open for like exports to other nations, the case assumes a still graver complexion. Mr. Stuart adds that, although the question raised by the supposed interference with the trade of Great Britain is as to what are the international obligations of the United States towards Great Britain as a neutral country, and not as to what may be at any given moment the local laws of the United States, which laws cannot overreach treaty rights, it may not be amiss to point out that the system of interference complained of is apparently not in conformity even with the terms of the act of Congress under which the Treasury instructions were issued; that that act authorizes the refusal of clearances to foreign vessels only when the Secretary of the Treasury shall have satisfactory reasons to believe that the goods or some part of them are intended for ports or places in possession or under control of insurgents against the United States, and authorizes bonds to be taken only to secure the delivery of the cargo at the destination for which it is cleared, and in order that no part thereof should be used in affording aid or comfort to any person or parties in insurrection against the authority of the United States.

"Mr. Stuart then argues that if this latter condition is to be understood, as in reasonable construction it must, of any use preceding delivery at the specified destination, it may not be objectionable, but if meant to make the master and owner responsible for any subsequent use of the articles constituting the cargo after they have passed beyond their power of control, it is unreasonable and perfectly inadmissible. Mr. Stuart further remarks that, with respect to the apprehension of imminent danger that goods, etc., may fall into the possession or under the control of the insurgents, it may also be observed that the act of

Congress appears to contain no provisions applicable to any exports by sea from the United States, the third section, which relates to that subject, being strictly confined to importations into any part of the United States, and to transportation upon any railroad, turnpike, or other road or other means of transportation within the United States. Therefore (Mr. Stuart remarks) it would appear that what has been done with respect to this point is not only contrary to the obligations of treaties and of international law, but also beyond the special and extraordinary enactments prepared by Congress itself. Mr. Stuart concludes that the President cannot expect that Great Britain should allow British trade with her own colonies, by way of the United States, or the trade between her own colonies and the United States, to be fettered by restrictions and conditions inconsistent with treaties between the United States and Great Britain, and repugnant to international law, and that therefore Her Majesty's Government expect that the President, in the exercise of his discretion, will prohibit the imposing of all such restrictions and conditions as have thus been complained of.

"The undersigned regrets that Mr. Stuart, while so steadily insisting that the proceedings of which he complains are in contravention of international law, has not thought it important to favor the undersigned with references to the particular principles or maxims of that law which are thus assumed to be infringed. This omission is the more regretted because the examination of authorities made by the undersigned has failed in bringing those principles and maxims into view. Mr. Stuart has equally omitted to indicate the particular treaty obligations of the United States which he claims have been infringed. The undersigned, however, finds in the convention to regulate the commerce between the United States and His Britannic Majesty, which was concluded on the 3d day of July, 1815, and which was renewed by the convention of the 6th August, 1817, the treaty obligations which, in the absence of reference by Mr. Stuart, are assumed to be those to which Mr. Stuart alludes. The first of these is in the words following:

"'ARTICLE 1. There shall be, between the territories of the United States of America and all the territories of His Britannic Majesty in Europe, a reciprocal liberty of commerce. The inhabitants of the two countries, respectively, shall have liberty freely and securely to come, with their ships and cargoes, to all such places, ports, and rivers in the territories aforesaid to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any part of said territories respectively; also to hire and occupy houses and warehouses for the purposes of their commerce, and, generally, the merchants and traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce, but subject always to the laws and statutes of the two countries, respectively.

"'ARTICLE 2. No higher or other duty shall be imposed on the importation into the United States of any articles, the growth, produce, or

manufacture of His Britannic Majesty's territories in Europe, and no higher or other duties shall be imposed on the importation into the territories of His Britannic Majesty in Europe of any articles, the growth, produce, or manufacture of the United States, than are or shall be payable on the like articles, being the growth, produce, or manufacture of any other foreign country; nor shall any higher or other duties or charges be imposed in either of the two countries on the exportation of any articles to the United States, or to His Britannic Majesty's territories in Europe, respectively, than such as are payable on the exportation of the like articles to any foreign country. Nor shall any prohibition be imposed on the exportation or importation of any articles, the growth, produce, or manufacture of the United States, or of His Britannic Majesty's territories in Europe, to or from the said territories of His Britannic Majesty in Europe, or to or from the said United States, which shall not equally extend to all other nations.'

"By enactments of the legislatures of the two countries, the British colonies are brought within the effect of the stipulations in these conventions.

"Having thus, as far as possible, established the standard by which the proceedings complained of are to be tried, the undersigned proceeds to examine those proceedings themselves.

"On the 20th of May, 1862, the Congress of the United States enacted a law, the first three sections of which are as follows:

"'SECTION 1. That the Secretary of the Treasury, in addition to the powers conferred upon him by the act of the 13th of July, 1861, be, and he is hereby, authorized to refuse a clearance to any vessel or other vehicle, laden with goods, wares, or merchandise, destined for a foreign or domestic port, whenever he shall have satisfactory reasons to believe that such goods, wares, or merchandise, or any part thereof, whatever may be their ostensible destination, are intended for ports or places in possession or under control of insurgents against the United States; and if any vessel or other vehicle, for which a clearance or permit shall have been refused by the Secretary of the Treasury, or by his order as aforesaid, shall depart or attempt to depart for a foreign or domestic port without being duly cleared or permitted, such vessel or other vehicle, with her tackle, apparel, furniture, and cargo, shall be forfeited to the United States.

"'SEC. 2. That whenever a permit or clearance is granted for either a foreign or domestic port it shall be lawful for the collector, if he deem it necessary under the circumstances of the case, to require a bond to be executed by the master or the owner of the vessel in a penalty equal to the value of the cargo, and with sureties to the satisfaction of said collector that the said cargo shall be delivered at the destination for which it is cleared or permitted, and that no part thereof shall be used in affording aid or comfort to any person or parties in insurrection against the authority of the United States.

"'SEC. 3. That the Secretary of the Treasury be, and he is hereby, further empowered to prohibit and prevent the transportation on any vessel, or upon any railroad, turnpike, or other road or means of transportation within the United States, of any goods, wares, or merchandise of whatever character, and whatever may be the ostensible destination of the same, in all cases where there shall be satisfactory reason to believe that such goods, wares, or merchandise are intended for any place in the possession or under the control of the insurgents against the United States, or that there is imminent danger that such goods, wares, or merchandise will fall into the possession or under the control of such insurgents; and he is further authorized, in all cases when he shall deem it expedient so to do, to require reasonable security to be given that the goods, wares, or merchandise, shall not be transported to any place under the insurrectionary control, and shall not in any way be used to give aid or comfort to such insurgents; and he may establish all such general or special regulations as may be necessary or proper to carry into effect the purposes of this act; and if any goods, wares, or merchandise shall be transported in violation of this act, or of any regulation of the Secretary of the Treasury established in pursuance thereof, or if any attempt shall be made so to transport, then all goods, wares, and merchandise so transported or attempted to be transported shall be forfeited to the United States.'

"After considering the arguments of Mr. Stuart in the most careful manner, it is not apparent to the undersigned that they invalidate the act of Congress, the substance of which has been recited. By the law of nations every State is sovereign over its own citizens and strangers residing within its limits, its own productions and fabrics, and its own ports and waters, and its highways, and, generally, within all its proper territories. It has a right to maintain that sovereignty against sedition and insurrection by civil preventives and penalties and armed force, and it has a right to interdict and prohibit, within its own boundaries, exportation of its productions and fabrics and the supplying of traitors, in arms against itself, with material and munitions, and any other form of aid and comfort. It has a right, within its own territories, to employ all the means necessary to make these prohibitions effective. It does not appear to the undersigned that the United States have surrendered this right by the convention between themselves and Great Britain which has been recited. It is true that by the first article of the convention of 1815 British merchants have liberty fully and freely to come with their ships and cargoes into the ports, rivers, and places within the territories of the United States, and to be protected in their commerce there, but this right is expressly restricted to the ports, rivers, and places only into which other foreigners are permitted to enter, and in which they are permitted to reside and trade, and they are, moreover, expressly declared, while entering, residing, and trading in such ports, rivers, and places, to be subject to the laws and stat-

utes of the two countries. So, by the third article of the convention of 1815, it is stipulated that prohibitions shall not be imposed on the exportation or importation of any articles the growth, produce, or manufacture of either country; this stipulation, however, is not absolute, but only a stipulation that any such prohibition shall extend equally to all other nations as well as Great Britain. The law of Congress seems to be free from the special objections which are raised by Mr. Stuart. It does not confine its prohibitions or its requirements to British vessels trading between New York and the Bahamas, but applies them to all vessels of all nations, including the United States, wherever trading, whether with the Bahamas or with any other part of the world. The prohibitions and requirements are not uncertain as to the authority which prescribes them or the form of the prescription, but they are declared and promulgated in solemn enactment by the Congress of the United States. The conditions on which the prohibitions and requirements are suspended are not left to capricious suspicions or beliefs, but they are dependent on satisfactory evidence of ascertainable facts. They involve no question of neutral rights, because no neutral has or can have a right more than any citizen of the United States to do an act within their exclusive jurisdiction which is prohibited by the statutes and laws of the country. The act has nothing to do with the blockade of the insurrectionary ports, because it confines its prohibitions and requirements to transactions occurring, and to persons residing or being, within the ports actually possessed by the United States, and under their undisputed protection and control.

"Having thus vindicated the act of Congress under which the proceedings of which Mr. Stuart has complained are supposed to have occurred, the undersigned will next examine the manner in which the act has been directed by the Secretary of the Treasury to be executed.

"On the 14th of April, 1862, before the act of Congress was passed, it had been reported to the President that anthracite coal was being shipped from some of the ports of the United States to southern ports within and to other southern ports without the United States for the purpose of supplying fuel to piratical vessels which were engaged in depredating on the national commerce on the high seas. The Secretary of the Treasury, therefore, by authority of the President, who is charged with the supreme duty of maintaining and executing the laws, issued to the collectors of the customs at New York and other ports the following instruction:

"'Clear no vessel with anthracite coal for foreign ports nor for home ports south of Delaware Bay till otherwise instructed.'

"It was thereupon represented to the President that this order was unnecessarily stringent and severe upon general commerce, because it prohibited the exportation of coal to ports situated so far from the haunts and harbors of the pirates that the article would not bear the expense of transportation to such haunts and harbors, and thereupon

the Secretary of the Treasury, by the President's authority, on the 18th of May issued a new instruction on the subject to the collectors of the customs, which was of the effect following:

"'The instructions of the 14th ultimo, concerning the prohibition of the exportation of coals, are so far modified as to apply only to ports north of Cape St. Roque, on the eastern coast of South America, and west of the fifteenth degree of longitude east. Coal may be cleared to other foreign ports, as before, until further directed.'

"The subject of supplies of coal and other merchandise having, in the mean time, engaged the attention of Congress, with the result of the passage of the law before mentioned, the Secretary of the Treasury, on the 23d of May last, and as speedily as possible after the approval of the law, issued the following instruction to the collectors of the customs of the United States:

"'Until further instructed you will regard as contraband of war the following articles, viz: Cannon, mortars, fire-arms, pistols, bombs, grenades, firelocks, flints, matches, powder, saltpeter, balls, bullets, pikes, swords, sulphur, helmets or boarding-caps, sword belts, saddles and bridles, always excepting the quantity of the said articles which may be necessary for the defense of the ship and of those who compose the crew, cartridge-bag material, percussion and other caps, clothing adapted for uniforms, rosin, sail-cloth of all kinds, hemp and cordage material, ship lumber, tar and pitch, ardent spirits, military persons in the service of the enemy, dispatches of the enemy, and articles of like character with those specially enumerated.

"'You will also refuse clearances to all vessels which, whatever the ostensible destination, are believed by you, on satisfactory grounds, to be intended for ports or places in possession or under the control of insurgents against the United States, or that there is imminent danger that the goods, wares, or merchandise, of whatsoever description, will fall into the possession or under the control of such insurgents. And in all cases where, in your judgment, there is ground for apprehension that any goods, wares, or merchandise shipped at your port will be used in any way for the aid of the insurgents or the insurrection, you will require substantial security to be given that such goods, wares, or merchandise shall not in any way be used to give aid or comfort to such insurgents. You will be especially careful, upon applications for clearances, to require bonds with sufficient sureties for fulfilling faithfully all the conditions imposed by law or departmental regulations from shippers of the following articles to the ports opened, or to any other ports from which they may easily be and are probably intended to be reshipped in aid of the existing insurrection, namely: liquors of all kinds, coals, iron, lead, copper, tin, brass, telegraph instruments, wire, porous cups, platinum, sulphuric acid, zinc, and all other telegraph materials, marine engines, screw propellers, paddle-wheels, cylinders, cranks, shafts, boilers, tubes for boilers, fire bars, and every article

whatever which is, can, or may become applicable for the manufacture of marine machinery or for the armor of vessels.'

"These are the Treasury regulations under which the proceedings of the collector at New York, which are complained of by Mr. Stuart, are supposed to have taken place. It is not apparent to the undersigned that these regulations in any way transcend the authority conferred upon the Secretary of the Treasury and upon the collectors of the United States by the before-recited act of Congress. Nor is it apparent that they are more obnoxious than that act itself is to the objections which have been raised by Mr. Stuart. They do not expressly, nor by any implication, discriminate against Great Britain, her colonies or dependencies, and in favor of any other nation, or even in favor of the United States. They do not discriminate between British ports, British merchants, British vessels, or British merchandise, and the ports, merchants, and vessels of the United States or those of any other nation. The instructions leave nothing to the caprice of the collector as a subordinate officer, but they are explicit commercial regulations, prescribed by the highest authority. The conditions on which prohibitions are to attach are to be ascertained upon satisfactory evidence, and for the collector's exercise of power in applying them he is responsible to the head of the Department to which he belongs. The regulations have no connection whatever with the blockade, but they affect only persons, vessels, merchandise, ports, waters, and highways, exclusively within the United States and within the territories which are in the absolute and unquestioned possession of the United States, and subject in fact as well as in law to their authority.

"Fully admitting the principle for which Mr. Stuart so earnestly contends, that all proceedings and even regulations and laws of the United States which affect foreign commerce must not discriminate to the prejudice of Great Britain, the undersigned finds no adequate grounds for supposing that the principle is violated in these regulations. The instructions issued on the 14th of April and the 18th of May, prohibiting the exportation of coals to ports within geographical limits, which leave freedom of export to the other one-half of the world, may seem to furnish ground for exception. But the prohibition applies to all American and all foreign merchant vessels and cargoes as well as to those of Great Britain, and to all the states which are situated within the assigned limits, as well as to British dependencies situated therein. It is understood to be an accepted maxim that no law reaches in effect beyond the point where the reason of the law fails, especially if the law so extended should be productive of injuries without object and without compensation or benefit. There is not the least reason to suppose that the insurgents of the United States could in any way derive benefit from the exportation of anthracite coal to Archangel, or to Shanghai, or to Japan. Nor is it manifest that the British nation, its merchants, and vessels, do not, in common with other nations, their merchants, and

vessels, derive benefits and advantages from the export permitted to all ports of whatever nation beyond the limits assigned by the Secretary of the Treasury. Nevertheless the President, desirous to remove all possible grounds for misconstruction, has directed that those instructions shall be rescinded, so that the case will stand altogether upon the act of Congress and the general instructions of the Treasury, which have been recited.

"In regard to the special proceedings of the collector of the customs at New York, which are complained of, the information presented to the undersigned is vague and uncertain. There is no satisfactory evidence in the papers under consideration that he has in any case made a clearance or exacted a bond which involved any infringement of the law of Congress and the regulations of the Treasury. This Government will cheerfully examine upon its merits any case of infringement which may be presented to it, and will promptly render the redress which shall be due, if the complaint shall be sustained; and it will further instruct all its collectors that, in performing their duties, they will be governed by not merely the letter but the spirit of the regulations of the Treasury, and of the act of Congress, so as to make no injurious or invidious discrimination to the prejudice of Great Britain."

Mr. Seward, Sec. of State, to Mr. Stuart, Oct. 3, 1862. MSS. Notes, Gr. Brit.; Dip. Corr., 1862. See 5 Am. Law Rev., 264.

"The duties of neutrality by the law of nations cannot be either expanded or contracted by national legislation. The United States, for instance, may, in excessive caution, require from its citizens duties more stringent than those imposed by the law of nations, but this, while it may make them penally liable in their own land, does not by itself make them or their Government extra-territorially liable for this action in disobeying such local legislation. On the other hand, a Government cannot diminish its liability for breach of neutrality by fixing a low statutory standard.

"It is also to be observed that the fact that certain articles of commerce are contraband does not make it a breach of neutrality to export them. There has not been since the organization of our Government, a European war in which, in full accordance with the rules of international law as accepted by the United States, munitions of war have not been sent by American citizens to one or both of the belligerents, yet it has never been doubted that these munitions of war, if seized by the belligerent against whom they were to be used, could have been condemned as contraband.

"The question, then, is whether furnishing to belligerents coal and lifeshells, which appear to have composed the cargo of one of the British vessels which gave rise to this correspondence, is a breach of neutrality which the law of nations forbids.

"The question must be answered in the negative as to coal, and the same conclusion may be adopted with regard to life-shells, which are said to be projectiles used in the bringing to shore or rescue of wrecks.

"Under these circumstances it is not perceived why in the present case the United States authorities should intervene to prevent such supply from being forwarded to the open ports of either belligerent. Even supposing such articles to be contraband of war and consequently liable to be seized and confiscated by the offended belligerent, it is no breach of neutrality for a neutral to forward them to such belligerent ports, subject, of course, to such risks. When, however, such articles are forwarded directly to vessels-of-war in belligerent service, another question arises. Provision and munitions of war sent to belligerent cruisers are unquestionably contraband of war. Whether, however, it is a breach of neutrality by the law of nations to forward them directly to belligerent cruisers, depends so much upon extraneous circumstances that the question can only be properly decided when these circumstances are presented in detail."

Mr. Bayard, Sec. of State, to Mr. Smithers, June 1, 1885. MSS. Inst., China; For. Rel., 1885.

As to exportation of coal as contraband, see Whart. Com. Am. Law, § 251; Whart. Crim. Law (9th ed.), §§ 1901 *ff.* As to depots of coal, see *infra*, § 398.

The following is taken from the proceedings of the Geneva tribunal (*infra*, § 402*a*):

It was maintained in the American case that the proofs showed that the insurgent cruisers were permitted to supply themselves with coal in British ports in greater quantities and with greater freedom, and with less restrictions than were imposed upon the United States; and it was insisted that, in consequence of these facts, there was an absence of neutrality, which made those ports bases of hostile operations against the United States under the second rule of the treaty.

On this point the award says that—

In order to impart to any supplies of coal a character inconsistent with the second rule, prohibiting the use of neutral ports or waters as a base of naval operations for a belligerent, it is necessary that the said supplies should be connected with special circumstances of time, of persons, or of place, which may combine to give them such character.

It does not appear by the terms of the award that Great Britain is held responsible for the acts of any vessel solely in consequence of illegal supplies of coal. The question is, therefore, a speculative one, so far as relates to this controversy. The opinions of the four arbitrators who signed the award furnish, however, the explanation of what they mean when they speak of "special circumstances of time, of persons, or of place."

Mr. Adams says:

I perceive no other way to determine the degree of responsibility of a neutral in these cases, than by an examination of the evidence to show the *intent* of the grant in any specific case. Fraud or falsehood in such a case poisons everything it touches. Even indifference may degenerate into willful negligence, and that will impose a burden of proof to relieve it before responsibility can be relieved.

Count Sclopis says:

I will not say that the simple fact of having allowed a greater amount of coal than was necessary to enable a vessel to reach the nearest port of its country constitutes in itself a sufficient grievance to call for an indemnity. As the lord chancellor of England said on the 12th of June, 1871, in the House of Lords, England and the United States equally hold the principle that it is no violation of the law of nations to furnish arms to a belligerent. But if an excessive supply of coal is connected with other circumstances which show that it was used as a veritable *res hostilis*, then there is an infraction of the second article of the treaty. * * * Thus, for example, when I see the Florida and the Shenandoah choose for their fields of action, the one the stretch of sea between the Bahama Archipelago and Bermuda, to cruise there at its ease, and the other Melbourne and Hobson's Bay for the purpose, immediately carried out, of going to the Arctic Seas, there to attack the whaling vessels, I cannot but regard the supplies of coal in quantities sufficient for such services infraction of the second rule of Article VI.

Mr. Stämpfli says of the Sumter:

The permission given to the Sumter to remain and to take in coal at Trinidad does not of itself constitute a sufficient basis for accusing the British authorities of having failed in their duties as neutrals, because the fact cannot be considered by itself, since the Sumter both before and after that time was admitted into the ports of many other states, where it staid and took in coal, * * * so that it cannot be held that the port of Trinidad served as a base of operations.

In the Franco-German war of 1870, Prince Bismarck earnestly remonstrated with Great Britain for permitting the export of coal to France. This remonstrance, however, was ineffectual. "When Prussia was in the same position as that in which Great Britain then found herself, her line of conduct was similar, and she found herself equally unable to enforce upon her subjects stringent obligations against the exportation even of unquestionable munitions of war. During the Crimean war, arms and munitions were freely exported from Prussia to Russia, and arms of Belgian manufacture found their way to the same quarter through Prussian territory, in spite of a decree issued by the Prussian Government, prohibiting the transport of arms coming from foreign states."

2 Halleck's Int. Law. (Baker's ed.), 258, note. France took the ground that coal was not contraband; *ibid.*, 260.

Neutral duties as to allowing belligerents to receive supplies of coal are discussed *infra*, §§ 398 *ff.*; Whart. Com. Am. Law, §§ 226, 241.

It is certainly no breech of neutrality to sell coal for use on a belligerent steamer visiting the port of sale casually under stress of weather. But it would plainly be a breach of neutrality to establish a coaling depot to supply all steamers of any particular belligerent.

Whart. Com. Am. Law, § 226. *Infra*, § 398.

(2) As to provisions.

§ 370.

"In one of your letters of March 13, you express your apprehensions that some of the belligerent powers may stop our vessels going with grain to the ports of their enemies, and ask instructions which may

meet the question in various points of view, intending, however, in the mean time to contend for the amplest freedom of neutral nations. Your intention in this is perfectly proper, and coincides with the ideas of our own Government in the particular case you put, as in general cases. Such a stoppage to an unblockaded port would be so unequivocal an infringement of the neutral rights, that we cannot conceive it will be attempted. With respect to our conduct as a neutral nation, it is marked out in our treaties with France and Holland, two of the belligerent powers; and as the duties of neutrality require an equal conduct to both parties, we should, on that ground, act on the same principles towards Great Britain. We presume that this would be satisfactory to her, because of its *equality*, and because she too has sanctioned the same principles in her treaty with France. Even our 17th article with France, which must be disagreeable, as from its nature it is unequal, is adopted, exactly, by Great Britain in her 40th article with the same power; and would have laid her, in a like case, under the same unequal obligations against us. We wish then that it could be arranged with Great Britain that our treaties with France and Holland, and that of France and Great Britain (which agree in what respects neutral nations) should form the line of conduct for us all, in the present war, in the cases for which they provide. Where they are silent, the general principles of the law of nations must give the rule. I mean the principles of that law as they have been liberalized in latter times by the refinement of manners and morals, and evidenced by the declarations, stipulations, and practice of every civilized nation. In our treaty with Prussia indeed we have gone ahead of other nations in doing away restraints on the commerce of peaceful nations, by declaring that nothing shall be contraband, for, in truth, in the present improved state of the arts, when every country has such ample means of procuring arms within and without itself, the regulations of contraband answer no other end than to draw other nations into the war. However, as nations have not given sanction to this improvement, we claim it, at present, with Prussia alone."

Mr. Jefferson, Sec. of State, to Mr. Pinckney, May 7, 1793. MSS. Inst., Ministers.

"Reason and usage have established that when two nations go to war, those who choose to live in peace retain their natural right to pursue their agriculture, manufactures, and other ordinary vocation, to carry the produce of their industry for exchange to all nations, belligerent or neutral, as usual, to go and come freely without inquiry or molestation, and in short, that the war among others shall be for them as if it did not exist. One restriction on their natural rights has been submitted to by nations at peace, that is to say, that of not furnishing to either party implements merely of war for the annoyance of the other, nor anything whatever to a place blockaded by its enemy. What these implements of war are, has been so often agreed and is so well understood, as to leave little question about them at this day. There does

not exist perhaps a nation, in our common hemisphere, which has not made a particular enumeration of them in some or all of their treaties, under the name of contraband. It suffices for the present occasion to say that corn, flour, and meal are not of the class of contraband, and consequently remain articles of free commerce. A culture which, like that of the soil, gives employment to such a proportion of mankind, could never be suspended by the whole earth, or interrupted for them, whenever any two nations should think it proper to go to war.

"The state of war, then, existing between Great Britain and France, furnishes no legitimate right to either to interrupt the agriculture of the United States or the peaceable exchange of its produce with all nations; and consequently the assumption of it will be as lawful hereafter as now, in peace as in war. No ground, acknowledged by the common reason of mankind, authorizes this act now, and unacknowledged ground may be taken at any time and all times. We see, then, a practice begun to which no time, no circumstances, prescribe any limits, and which strikes at the root of our agriculture, that branch of industry which gives food, clothing, and comfort to the great mass of the inhabitants of these States. If any nation whatever has a right to shut up, to our produce, all the ports of the earth except her own and those of her friends, she may shut up these also, and so confine us within our own limits. No nation can subscribe to such pretensions; no nation can agree, at the mere will or interest of another, to have its peaceable industry suspended and its citizens reduced to idleness and want. The loss of our produce, if destined for foreign markets, or that loss which would result from an arbitrary restraint of our markets, is a tax too serious for us to acquiesce in. It is not enough for a nation to say we and our friends will buy your produce. We have a right to answer that it suits us better to sell to their enemies as well as their friends. Our ships do not go to France to return empty. They go to exchange the surplus of one produce which we can spare for surpluses of other kinds which they can spare and we want; which they can furnish on better terms and more to our mind than Great Britain or her friends. We have a right to judge for ourselves what market best suits us, and they have none to forbid us the enjoyment of the necessaries and comforts which we may obtain from any other independent country."

Same to same, Sept. 7, 1793; *ibid.* 1 Wait's St. Pap., 393. See Mr. Jefferson to Mr. Hammond, Sept. 22, 1793; *ibid.*, 399. Mr. Jefferson to minister from France, Nov. 30, 1793. 4 Jeff. Works, 84. Mr. Pinckney to Lord Grenville, Jan. 28, 1794. 1 Am. St. Pap. (For. Rel), 240, 448.

"If, by a circuit of construction, food can be *universally* ranked among military engines, what article, to which human comfort of any kind can be traced, is not to be registered as contraband? In some peculiar circumstances it must be confessed corn, meal, and flour are so; as in a blockade, siege, or investment. There the exclusion of them directly

and obviously goes to the reduction of the place; but neutral commerce is, in this instance, infringed only where the exclusion, if continued without intermission, would be decisive in its effect."

Mr. Randolph, Sec. of State, to Mr. Hammond, May 1, 1794. 1 Am. St. Pap. (For. Rel.), 450. See 4 Lodge's Hamilton, 304; 5 *ibid.*, 253.

"Before the treaty with Great Britain her cruisers captured neutral vessels bound to France with provisions. She asserted that in certain cases provisions were contraband of war, consequently that she might lawfully capture and confiscate such provisions. We opposed the principle and the practice. Britain insisted on her right. In this dilemma it was agreed by the treaty that whenever provisions becoming contraband by the law of nations should be captured, they should be paid for with a reasonable mercantile profit. This stipulation, without admitting the principle, by securing the American merchants from loss in case of capture, would certainly tend to promote rather than to discourage adventures in provisions to France."

Mr. Pickering, Sec. of State, to Mr. Pinckney, Jan. 16, 1797. MSS. Inst., Ministers.

"Certain *provisions* are not allowed, by the consent of nations, to be contraband but where everything is so, as in the case of a blockaded town, with which all intercourse is forbidden."

Mr. Jefferson to Mr. Everett, Feb. 24, 1823. 7 Jeff. Works, 270. See 7 Am. Law Rev., 456.

"As a means of annoyance, this international prohibition against carrying to a country engaged in hostilities articles useful for military purposes is practically of little value to its enemy. It found its way into the code of nations when the means of supply were much more restricted than at present, and before the progress of improvement had placed it in the power of almost every nation to provide itself with whatever it may want, either for offensive or defensive operations. * * *

"There is no accepted enumeration of the articles coming within the prohibition. And to add to the dangers of collision, the principle by which they are to be tested is so loosely defined that it is practically of little use, but to furnish a pretext when one is wanting, to enable parties at war to enlarge the contraband list at their pleasure. Some of the later and approved writers upon the law of nations, as Hautefeuille and Ortolan, object to this power of extension *ad libitum*, and the former particularly confines the list to objects of first necessity for war, and which are exclusively useful in its prosecution, and which can be directly employed for that purpose without undergoing any change—that is to say, to arms and munitions of war."

Mr. Cass, Sec. of State, to Mr. Mason, June 27, 1859. MSS. Inst., France.

"I have followed with peculiar interest the European discussion relating to the French declaration making *rice* contraband of war.

"The greater number of the European powers, so far as I have observed, have failed to avow their position on this question. England, however, found her navigation and commercial interests so much involved that her Government appears to have protested against the doctrine. At the risk of duplicating the information already on the files of the Department, I inclose herewith a printed summary of the Anglo-French views of the question, deeming it worthy of preservation in the files of important international questions.

"But more especially I beg your attention to the importance of the principle involved in this declaration, as it concerns our American interests. We are neutrals in European wars. Food constitutes an immense portion of our exports. Every European war produces an increased demand for these supplies from neutral countries. The French doctrine declares them contraband, not only when destined directly for military consumption, but when going in the ordinary course of trade as food for the civil population of the belligerent Government. If food can be thus excluded and captured, still more can clothing, the instruments of industry, and all less vital supplies be cut off on the ground that they tend to support the efforts of the belligerent nation. Indeed, the real principle involved goes to this extent, that everything the want of which will increase the distress of the civil population of the belligerent country may be declared contraband of war. The entire trade of neutrals with belligerents may thus be destroyed, irrespective of an effective blockade of ports. War itself would become more fatal to neutral states than to belligerent interests.

"The rule of feudal times, the starvation of beleaguered and fortified towns, might be extended to an entire population of an open country. It is a return to barbaric habits of war. It might equally be claimed that all the peaceful men of arms-bearing age could be deported, because otherwise they might be added to the military forces of the country.

The United States and other countries have hitherto refused to recognize *coal* as contraband of war, indispensable as it is to the equipment of war steam cruisers, because its chief use is for peaceful objects. But this French doctrine goes far beyond that.

"Although the Franco-Chinese war is ended, there is always danger that this precedent will be again adopted in the heat of another war, unless resisted by energetic protests in the interests of neutral trade and of humanity itself. Its adoption indeed would practically nullify the advantages of neutrals intended to be secured by the Paris declarations of 1856."

Mr. Kasson, minister at Berlin, to Mr. Bayard, Sec. of State, Apr. 23, 1885. MSS. Dispatches, Germ., For. Rel., 1885.

Provisions sent to a belligerent are not, in general, deemed contraband; but they may become so, although the property of a neutral, on account of the particular situation of the war, or on account of their destination. If destined for the ordinary use of life in the enemy's country, they are not, in general, contraband; but it is otherwise if destined for military use. Hence, if destined for the army or navy of the enemy, or for his ports of naval or military equipment, they are deemed contraband. Another exception from being treated as contraband is, where the provisions are the growth of the neutral exporting

country. But if they be the growth of the enemy's country, and more especially if the property of his subjects, and destined for enemy's use, there does not seem any good reason for the exemption; for, as Sir William Scott has observed, in such a case the party has not only gone out of his way for the supply of the enemy, but he has assisted him by taking off his surplus commodities.

The Commercen, 1 Wheat., 382.

Provisions may become contraband of war when destined to a port of naval equipment of an enemy, and *a fortiori*, when destined for the supply of his army.

Maisonnaire *v.* Keating, 2 Gallison, 325.

(3) As to money.

§ 371.

Money sent a belligerent country for payment of debts or purchase of goods is not to be regarded as contraband of war. It is otherwise when forwarded to assist belligerent operations.

See *infra*, § 390.

"While it may be conceded that the cases to which you refer as deciding that even provisions bound to an enemy's port may, in peculiar circumstances, be regarded as contraband, are founded in correct principles, I have not yet succeeded in finding a case in which paper money, intended for a foreign Government, has been seized or condemned as contraband."

Mr. Blaine, Sec. of State, to Mr. Martinez, June 3, 1881. MSS. Notes, Chili.

"You seek to justify the seizure on the ground that money, or its representative, may, under special circumstances, be regarded as contraband of war, and consequently, that the seizure, in this case, was a lawful one. You do not, however, specify the circumstances under which money may be so regarded, nor do you refer to the text of the law of nations or to the cases in prize courts where the doctrine has been maintained. Diligent but fruitless search has here been made for them. It is possible that the maritime courts of a belligerent may, in some instance, have so determined, but there is not believed to be any reported case of the kind.

Same to same, May 18, 1881; *ibid.*

Money, silver-plate, and bullion, when destined for hostile use or for the purchase of hostile supplies, being contraband of war, where a foreign vessel entered New Orleans under the license of the President's proclamation of May 12, 1862, the determination of the question as to whether articles of this class, part of her outward-bound cargo, were contraband, devolved upon the Federal general commanding in that city.

Believing them to be so, he was authorized to order them to be removed from her, and her clearance to be withheld until his order should be complied with.

U. S. *v.* Diekelman, 92 U. S., 520.

That it is not a breach of neutrality to permit subjects or citizens to lend money to a belligerent, see *infra*, §§ 388–390.

(4) As to horses.

§ 372.

By the 24th article of the treaty with France of 1778, "horses with their furniture" were contraband.

1 Op., 61, Lee, 1796.

As between countries on the same continent, horses are usually regarded as contraband, since, when they can be readily transported, they form an important and peculiarly available contribution to military strength.

Hall's Int. Law, 615.

(5) As to merchandise.

§ 373.

"If Mexico shall prescribe to us what merchandise we shall not sell to French subjects, because it may be employed in military operations against Mexico, France must equally be allowed to dictate to us what merchandise we shall allow to be shipped to Mexico, because it might be belligerently used against France. Every other nation which is at war would have a similar right, and every other commercial nation would be bound to respect it as much as the United States. Commerce in that case, instead of being free or independent, would exist only at the caprice of war."

Mr. Seward, Sec. of State, to Mr. Romero, Dec. 15, 1862. MSS. Notes, Mex.

Citizens of the United States have, by the law of nations and by treaty, the right to carry to the enemies of Spain, whether insurgents or foreign foes, all merchandise not contraband of war, subject only to the requirements of legal blockade. "Articles contraband of war, when destined for the enemies of Spain, are liable to seizure on the high seas, but the right of seizure is limited to such articles only, and no claims for its extension to other merchandise, or to persons not in the civil, military, or naval service of the enemies of Spain, will be acquiesced in by the United States. This Government certainly cannot assent to the punishment by Spanish authorities of any citizen of the United States for the exercise of a privilege to which he may be entitled under public laws and treaties."

Mr. Fish, Sec. of State, to Mr. Roberts, Apr. 3, 1869. MSS. Notes, Spain.

In Dana's Notes to Wheaton we have the following summary:

"Of the continental writers, Hautefeuille contends for the absolute rule limiting contraband to such articles as are in their nature of first necessity for war, substantially exclusively military in their use, and so made up as to be capable of direct and immediate use in war. (Tit. 8, § 2, tom. ii, 84, 101, 154, 412; tom. iii, 222.) Ortolan is of the same opinion, in principle, and contends that all modern treaties limit the application of contraband to articles directly and solely applicable to war; yet he admits that certain articles not actually munitions of war, but whose usefulness is chiefly in war, may, under circumstances, be contraband; as sulphur, saltpeter, marine steam machinery, etc.; but coal, he contends, from its general necessity, is always free. (Tom. ii, ch. vi, 179–206.) Massé (Droit Comm., i, 209–211), admits that the circumstances may determine whether articles doubtful in their nature are contraband in the particular case, as the character of the port of destination, the quantity of goods, and the necessities and character of the war. The same view is taken by Tetens, a Swedish writer (Sur les droits reciprogues, 111–113). Hubner (lib. ii, ch. i, §§ 8, 9), seems to be of the same opinion with Tetens and Massé. Klüber (§ 288) says that naval stores are not contraband, but adds, that in case of doubt as to the quality of particular articles, the presumption should be in favor of the freedom of trade.

"The subject is not affected by the declaration of Paris, of 1856."

Dana's Wheaton, 629, note 226.

The English courts treat as goods absolutely contraband ammunition and materials for ammunition; military and naval equipments and stores (Charlotte, 5 C. Rob., 305); hemp, cordage, and other materials for fitting up shipping (Neptunus, 3 C. Rob., 329; 6 C. Rob. 408); and steam engines and machinery for steamers (Lushington, Prize Law, §§ 169–172).

It has also been ruled that printing presses, materials, and paper, and postage stamps, belonging to the enemy, and intended for its immediate use, are contraband. (The Bermuda, 3 Wall. 514, 552.)

"The doctrine of occasional contraband received its widest extension in the war of England against revolutionary France. The British representative to our Government claimed, in 1793 and 1794, that by the law of nations all provisions were to be considered as contraband, in the case where the depriving the enemy of these supplies was one of the means employed to reduce him to reasonable terms of peace, and that the actual situation of France was such as to lead to that mode of distressing her, inasmuch as she had armed almost the whole laboring class of the people for the purpose of commencing and supporting hostilities against all the Governments of Europe. If a Government had armed nearly its whole laboring population the laws of political economy would probably reduce it to weakness far sooner than the cruisers of its enemy would have that effect."

Woolsey, Int. Law, § 182.

That the contraband quality of merchandise depends upon its object, see 5 Am. Law Rev., 260. *Supra*, § 368.

According to Chief Justice Chase, contraband goods are divided into three classes. "Of these the first consists of articles manufactured, and

primarily and ordinarily used, for military purposes in time of war; the second, of articles which may be and are used for purposes of war or peace, according to circumstances; and the third, of articles exclusively used for peaceful purposes.

"Merchandise of the first class destined to a belligerent country, or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege."

The Peterhoff, 5 Wall., 58.

Artillery, harness, men's army bluchers, artillery boots, Government regulation gray blankets, are of the first class.

*Ibid.*

Contraband is liable to capture when destined to the hostile country or to the actual military or naval use of the enemy (according to the above rule), whether a violation of blockade be intended or not.

*Ibid.*

"The following list is given by Mr. Godfrey Lushington, in his Manual of Naval Prize Law, viz:

"'*Goods absolutely contraband.*—Arms of all kinds and machinery for manufacturing arms. Ammunition and materials for ammunition, including lead, sulphate of potash, muriate of potash, chloride of potassium, chlorate of potash, and nitrate of silver, gunpowder and its materials, saltpeter, and brimstone; also, gun cotton. Military equipments and clothing; military stores; naval stores, such as masts (The Charlotte, 5 Rob., 305), spars, rudders, and ship-timber (The Twende Brodre, 4 Rob., 33), hemp (The Apollo, 4 Rob., 158), and cordage, sail cloth, (The Neptunus, 3 Rob., 108), pitch and tar (The Jonge Tobias, 1 Rob., 329), copper fit for sheathing vessels (The Charlotte, 5 Rob., 275); marine engines, and the component parts thereof, including screw propellers, paddle-wheels, cylinders, cranks, shafts, boilers, tubes for boilers, boiler-plates, and fire bars, marine cement, and the materials used in the manufacture thereof, as blue lias and Portland cement; iron in any of the following forms: anchors, rivet iron, angle iron, round bars of $\frac{3}{4}$ to $\frac{5}{8}$ of an inch diameter, rivets, strips of iron, sheet-plate iron exceeding $\frac{1}{4}$ of an inch, and low moor and bowling plates.'"

2 Halleck's Int. Law (Baker's ed.), 260, 261.

"In order to constitute contraband of war, it is absolutely essential that two elements should concur, viz, a hostile quality and a hostile destination. If either of these elements is wanting, there can be no such thing as contraband. Innocent goods going to a belligerent port are not contraband. Here there is a hostile destination, but no hostile quality. Hostile goods, such as munitions of war, going to a neutral port, are not contraband. Here there is a hostile quality, but no hostile destination."

Historicus, 191.

As to effect of treaties, see App., Vol. III, § 370.

That each case is to be determined by the test of fitness for belligerent purposes, see 5 Am. Law Rev., 258, citing the Peterhoff, 5 Wall., 28, where it was held that "blankets, boots, and other articles, which, from the marks on the cases and from their own appearance were evidently intended for the use of the Confederate forces were confiscable."

Cotton was contraband of war, during the late civil war, when it was the basis on which the belligerent operations of the Confederacy rested.

House Rep. 262, 43d Cong., 1st sess. Mrs. Alexander's cotton, 2 Wall., 404; cited *supra*, § 352. See as to seizure of aliens' cotton, *supra*, §§ 203, 224, 228, 343, 352.

"Cotton was useful as collateral security for loans negotiated abroad by the Confederate States Government, or, as in the present case, was sold by it for cash to meet current expenses, or to purchase arms and munitions of war. Its use for such purposes was publicly proclaimed by the Confederacy, and its sale interdicted, except under regulations established by, or contract with, the Confederate Government. Cotton was thus officially classed among war supplies, and as such, was liable to be destroyed, when found by the Federal troops, or turned to any use which the exigencies of war might dictate. * * *

"Cotton in fact was to the Confederacy as much munitions of war as powder and ball, for it furnished the chief means of obtaining those indispensables of warfare. In international law, there could be no question as to the right of the Federal commanders to seize it as contraband of war, whether they found it on rebel territory or intercepted it on the way to the parties who were to furnish in return material aid in the form of the sinews of war, arms, or general supplies."

Mr. Bayard, Sec. of State, to Mr. Muruaga, June 28, 1886. MSS. Notes, Spain. See *supra*, §§ 203, 224, 228, 343; App., Vol. III, § 373.

(6) As to soldiers.

§ 373a.

"It is important not to confound, as has sometimes been artfully attempted, the right of search with the pretended right of impressment. In opposing this we do not contend against the right of search for purposes in which we have, like other nations, acquiesced; that is to say, so far as relates to objects which we have admitted to be liable to capture and condemnation, such as enemies' property and contraband articles. But we deny the right of capturing or taking out of neutral ships (and, therefore, searching for) persons of any description whatever, with one single exception," that of soldiers in service of the enemy provided for in several treaties. * * * "Yet, as all those treaties were with nations that acknowledged the principle of 'free ships free goods,' I am not ready to assert that, with respect to Great Britain, since we admit that enemy's property is liable to capture and condemnation, the exception ought not to be to the same extent as respects persons, so as to admit that all enemies may be taken out, although they be not soldiers, and in the actual service of the enemies."

Mr. Gallatin to Mr. Everett, Aug. 9, 1828. 2 Gallatin's Writings, 404.

"In consequence of instructions from the American Government, I called at the foreign office a few days ago, to represent to your lordship the conduct of Captain May, of the British mail steamer Teviot, who, unmindful of his duty as a neutral, and using improperly the extraordinary privileges which the American Government has granted to British mail steamers ever since the commencement of the present war with Mexico, in the month of August last, brought from the Havana to Vera Cruz, General Paredes, late President of Mexico, the author of the war of Mexico against the United States, and their avowed and embittered enemy.

"By the principles of British law, according to the opinion of Sir William Scott (6 Robinson's Reports, 430) Captain May has rendered the Teviot liable to confiscation. Or the President of the United States might effectually prevent similar aid to the enemy by withdrawing from these steamers the privilege of entering the port of Vera Cruz. But I am confident Her Majesty's Government will render such steps unnecessary by adopting efficient means to prevent, for the future, such violations of their neutrality.

"If Captain May or any of his officers implicated in this serious charge are officers in the British service, I feel bound to ask for their dismissal or punishment in such other way as may clearly manifest that the British Government has disapproved their conduct."

Mr. Bancroft, U. S. minister at London, to Lord Palmerston, Oct. 8, 1847. MSS. Dispatches, Gr. Brit.

"In answer to your letter of the 8th instant, complaining of the conduct of Captain May, of the British mail steamer Teviot, in having conveyed General Paredes from the Havana to Vera Cruz, I have the honor to state to you that the lords commissioners of the admiralty, having investigated the circumstances of this affair, Her Majesty's Government have informed the directors of the Royal Mail Steam Packet Company, to whom the steamer Teviot belongs, that the directors are bound to testify, in a marked manner, their disapproval of Captain May's conduct in having thus abused the indulgence afforded to the company's vessels by the Government of the United States; and the directors of the company have accordingly stated to Her Majesty's Government that they will immediately suspend Captain May from his command; and that they publicly and distinctly condemn any act on the part of their officers which may be regarded as a breach of faith towards the Government of the United States, or as an infringement or invasion of the regulations established by the United States officers in those ports of Mexico which are occupied by the forces of the United States."

Lord Palmerston to Mr. Bancroft, Nov. 16, 1847. MSS. Dispatches, Gr. Brit.

In an article by Mr. Horatio King on the "Trent affair," in the Magazine of American History for March, 1886, vol. xv, 278, it is stated that "during the Mexican war General Paredes, a bitter enemy of the United States, who was arrested in 1846, at the beginning of the war, and being in Europe, was brought to Vera Cruz on the 14th of August, 1847, in the British mail steamer Teviot. Secretary Buchanan made complaint in a letter to Mr. Bancroft, our minister to England, saying: 'A neutral vessel which carries a Mexican officer of high military rank to Mexico for the purpose of taking part in hostilities to our country is liable to confiscation, according to Sir William Scott.'"

See 5 Am. Law. Rev., 267.

### III. *HOW FAR DISPATCHES AND DIPLOMATIC AGENTS ARE CONTRABAND.*

§ 374.

Mr. Seward's letters and instructions in respect to the Trent affair, so far as concerns the question of reference to a prize court, are given *supra*, sections 325, 328. So far as concerns the question of the contraband character of diplomatic dispatches and diplomatic agents, the following papers are to be considered:

"In connection with the case of Messrs. Mason and Slidell, the Department has recently been engaged in examining that of M. Fauchet, a minister from France during Washington's administration, who, while on his way to embark at Newport, R. I., on his return home, probably escaped seizure by the commander of the British ship Africa, near that port, in consequence of the packet Peggy, in which he was proceeding from New York to Newport, being compelled by stress of weather to put into Stonington, Conn. Here M. Fauchet received intimations of the intention of the commander of the Africa, which induced him to proceed to Newport by land and across the ferries. When the weather moderated the Peggy proceeded on her course, and when she approached the Africa she was boarded from that vessel, the trunks of the passengers were searched, and disappointment shown at the absence of M. Fauchet. This act having been committed within the maritime jurisdiction of the United States, and the British vice-consul at Newport having been implicated in it, his exequatur was formally revoked by President Washington and explanations demanded of the British Government; first through their minister here, and then through Mr. John Quincy Adams, acting chargé d'affaires at London."

Mr. Seward, Sec. of State, to Mr. Adams, Dec. 16, 1861. MSS. Inst., Gr. Brit.

The report of Mr. Seward, Sec. of State, Dec. 9, 1862, giving the documents in respect to the attempted seizure of M. Fauchet, French minister to the United States, by the commander of the British ship-of-war Africa, in 1795, is printed in Senate Ex. Doc. 4, 37th Cong., 3d sess.

For an account of the attempt of the captain of the British ship-of-war Africa to seize M. Fauchet, the French minister to the United States, while in our territorial waters, see 3 Life of Pickering, 231 *ff.*

"All writers and judges pronounce naval or military persons in the service of the enemy contraband. Vattel says war allows us to cut off from an enemy all his resources, and to hinder him from sending ministers to solicit assistance. And Sir William Scott says you may stop the ambassador of your enemy on his passage. Dispatches are not less clearly contraband, and the bearers or couriers who undertake to carry them fall under the same condemnation.

"A subtlety might be raised whether pretended ministers of a usurping power, not recognized as legal by either the belligerent or the neutral, could be held to be contraband. But it would disappear on being

subjected to what is the true test in all cases—namely, the spirit of the law. Sir William Scott, speaking of civil magistrates who are arrested and detained as contraband, says:

"'It appears to me on principle to be but reasonable that when it is of sufficient importance to the enemy that such persons shall be sent out on the public service at the public expense, it should afford equal ground of forfeiture against the vessel that may be let out for a purpose so intimately connected with the hostile operations.'"

Mr. Seward, Sec. of State, to Lord Lyons, Dec. 26, 1861. MSS. Notes, Gr. Brit. See Mr. Seward, Sec. of State, to Lord Lyons, Jan. 13, 1862. MSS. Notes, Gr. Brit., Dip. Corr., 1862.

The following paper is here introduced as showing the position taken by the British Government as to the doctrine of contraband in this relation:

*Earl Russell to Lord Lyons.*

"FOREIGN OFFICE, *January* 23, 1862.

"MY LORD: I mentioned in my dispatch of the 10th instant that Her Majesty's Government differed from Mr. Seward in some of the conclusions at which he had arrived, and that I should state to you, on a future occasion, wherein these differences consisted. I now proceed to do so. It is necessary to observe that I propose to discuss the questions involved in this correspondence solely on the principles of international law. Mr. Seward himself, speaking of the capture of the four gentlemen taken from on board the Trent, says: 'The question before us is, whether this proceeding was authorized by, and conducted according to, the law of nations.' This is, in fact, the nature of the question which has been, but happily is no longer, at issue. It concerned the respective rights of belligerents and of neutrals. We must, therefore, discard entirely from our minds the allegation that the captured persons were rebels, and we must consider them only as enemies of the United States at war with its Government, for that is the ground on which Mr. Seward ultimately places the discussion. It is the only ground upon which foreign Governments can treat it.

"The first inquiry that arises, therefore, is, as Mr. Seward states it, 'Were the persons named and their supposed dispatches contraband of war?' Upon this question Her Majesty's Government differ entirely from Mr. Seward. The general right and duty of a neutral power to maintain its own communications and friendly relations with both belligerents cannot be disputed.

"'A neutral nation,'" says Vattel (book iii, chap. 7, § 118), 'continues, with the two parties at war, in the several relations nature has placed between nations. It is ready to perform towards both of them all the duties of humanity, reciprocally due from nation to nation.' In the performance of these duties, on both sides, the neutral nation has itself a most direct and material interest, especially when it has numerous citizens resident in the territories of both belligerents, and when its citizens, resident both there and at home, have property of great value in the territories of the belligerents which may be exposed to danger from acts of confiscation and violence, if the protection of their own Government should be withheld. This is the case with respect to British subjects during the present civil war in North America.

"Acting upon these principles, Sir William Scott, in the case of the Caroline (Chr. Rob., 461, cited and approved by Wheaton, Elements, part iv, chap. 3, § 22), during the war between Great Britain and France, decided that the carrying of dispatches from the French ambassador resident in the United States to the Government of France by an United States merchant ship was no violation of the neutrality of the United States in the war between Great Britain and France, and that such dispatches could not be treated as contraband of war. 'The neutral country,' he said, 'has a right to preserve its relations with the enemy, and you are not at liberty to conclude that any communication between them can partake, in any degree, of the nature of hostility against you. The enemy may have his hostile projects to be attempted with the neutral state, but your reliance is on the integrity of that neutral state, that it will not favor nor participate in such designs, but, as far as its own councils and actions are concerned, will oppose them. And if there should be private reasons to suppose that this confidence in the good faith of the neutral state has a doubtful foundation, that is matter for the caution of the Government, to be counteracted by just measures of preventive policy; but it is no ground on which this court can pronounce that the neutral carrier has violated his duty by bearing dispatches, which, as far as he can know, may be presumed to be of an innocent nature, and in the maintenance of a pacific connection.'

"And he continues, shortly afterwards:

"'It is to be considered, also, with regard to this question, what may be due to the convenience of the neutral state, for its interests may require that the intercourse of correspondence with the enemy's country should not be altogether interdicted. It might be thought to amount almost to a declaration that an ambassador from the enemy shall not reside in the neutral state, if he is declared to be debarred from the only means of communicating with his own; for to what useful purpose can he reside there without the opportunities of such a communication? It is too much to say that all the business of the two states shall be transacted by the minister of the neutral state resident in the enemy's country. The practice of nations has allowed to neutral states the privilege of receiving ministers from the belligerent states, and the use and convenience of an immediate negotiation with them.'

"That these principles must necessarily extend to every kind of diplomatic communication between Government and Government, whether by sending or receiving ambassadors or commissioners personally, or by sending or receiving dispatches from or to such ambassadors or commissioners, or from or to the respective Governments, is too plain to need argument; and it seems no less clear that such communications must be as legitimate and innocent in their first commencement as afterwards, and that the rule cannot be restricted to the case in which diplomatic relations are already formally established by the residence of an accredited minister of the belligerent power in the neutral country. It is the neutrality of the one party to the communications, and not either the mode of the communication or the time when it first takes place, which furnishes the test of the true application of the principle.

"The only distinction arising out of the peculiar circumstances of a civil war, and of the non-recognition of the independence of the *de facto* Government of one of the belligerents, either by the other belligerent or by the neutral power, is this: That 'for the purpose of avoiding the difficulties which might arise from a formal and positive solution of these questions diplomatic agents are frequently substituted, who are clothed

with the powers and enjoy the immunities of ministers, though they are not invested with the representative character, nor entitled to diplomatic honors.' (Wheaton's Elements, part iii, chap. 1, § 5.) Upon this footing Messrs. Mason and Slidell, who are expressly stated by Mr. Seward to have been sent as pretended ministers plenipotentiary from the Southern States to the courts of St. James and of Paris, must have been sent, and would have been, if at all, received; and the reception of these gentlemen upon this footing could not have been justly regarded, according to the law of nations, as a hostile or unfriendly act towards the United States. Nor, indeed, is it clear that these gentlemen would have been clothed with any powers, or have enjoyed any immunities beyond those accorded to diplomatic agents not officially recognized.

"It appears to Her Majesty's Government to be a necessary and certain deduction from these principles that the conveyance of public agents of this character from Havana to St. Thomas, on their way to Great Britain and France, and of their credentials or dispatches (if any) on board the Trent, was not and could not be a violation of the duties of neutrality on the part of that vessel; and, both for that reason and, also, because the destination of these persons and of their dispatches was *bona fide* neutral, it is, in the judgment of Her Majesty's Government, clear and certain that they were not contraband.

"The doctrine of contraband has its whole foundation and origin in the principle which is nowhere more accurately explained than in the following passage of Bynkershoek. After stating in general terms, the duty of impartial neutrality, he adds: 'Et sane id, quod modo dicebam, non tantum ratio docet, sed et usus, inter omnes fere gentes receptus. Quamvis enim libera sint cum amicorum nostrorum hostibus commercia, usu tamen placuit, * * * ne alterutrum his rebus juvemus, quibus bellum contra amicos nostros instruatur et foveatur. Non licet igitur alterutri advehere ea, quibus in bello gerendo opus habet; ut sunt tormenta, arma, et, quorum præcipuus in bello usus, milites. * * * Optimo jure interdictum est, ne quid eorum hostibus subministremus; quia his rebus nos ipsi quodammodo videremur amicis nostris bellum facere.' (Bynkershoek, Quæst. Jur. Publ., lib. i, chap. 9.)

"The principle of contraband war is here clearly explained, and it is impossible that men or dispatches which do not come within that principle can in this sense be contraband. The penalty of knowingly carrying contraband of war is, as Mr. Seward states, nothing less than the confiscation of the ship; but it is impossible that this penalty can be incurred when the neutral has done no more than employ means usual among nations for maintaining his own proper relations with one of the belligerents. It is of the very essence of the definition of contraband that the articles should have a hostile, and not a neutral destination. 'Goods,' says Lord Stowell (The Imina, 3 Chr. Rob., 167), 'going to a neutral port cannot come under the description of contraband, all goods going there being equally lawful. The rule respecting contrabands,' he adds, 'as I have always understood it, is, that articles must be taken *in delicto*, in the actual prosecution of the voyage to an enemy's port.' On what just principle can it be contended that a hostile destination is less necessary, or a neutral destination more noxious, for constituting a contraband character in the case of public agents or dispatches than in the case of arms and ammunition? Mr. Seward seeks to support his conclusion on this point by a reference to the well-known dictum of Sir William Scott in the case of the Caroline, that 'you may stop the ambassador of your enemy on his passage' (The Carolina, 6 Chr. Rob.,

468), and to another dictum of the same judge in the case of the Orozembo (The Orozembo, 6 Chr. Rob., 434), that civil functionaries, 'if sent for a purpose intimately connected with the hostile operations,' may fall under the same rule with persons whose employment is directly military.

"These quotations are, as it seems to Her Majesty's Government, irrelevant; the words of Sir W. Scott are in both cases applied by Mr. Seward in a sense different from that in which they were used. Sir William Scott does not say that an ambassador sent from a belligerent to a neutral state may be stopped as contraband while on his passage on board a neutral vessel belonging to that or any other neutral state, nor that, if he be not contraband, the other belligerent would have any right to stop him on such a voyage.

"The sole object which Sir William Scott had in view was to explain the extent and limits of the doctrine of the inviolability of ambassadors in virtue of that character; for he says:

"'The limits that are assigned to the operations of war against them, by Vattel and other writers upon these subjects, are, that you may exercise your right of war against them whenever the character of hostility exists. You may stop the ambassador of your enemy on his passage; but when he has arrived, and has taken upon him the functions of his office, and has been admitted in his representative character, he becomes a sort of middle man, entitled to peculiar privileges, as set apart for the protection of the relations of amity and peace, in maintaining which all nations are in some degree interested.'

"There is certainly nothing in this passage from which an inference can be drawn so totally opposed to the general tenor of the whole judgment as that an ambassador proceeding to the country to which he is sent, and on board a neutral vessel belonging to that country, can be stopped on the ground that the conveyance of such an ambassador is a breach of neutrality, which it must be if he be contraband of war. Sir William Scott is here expressing not his own opinion merely, but the doctrine which he considers to have been laid down by writers of authority upon the subject. No writer of authority has ever suggested that an ambassador proceeding to a neutral state on board one of its merchant ships is contraband of war. The only writer named by Sir William Scott is Vattel (Vattel, lib. iv, chap. 7, § 85), whose words are these: 'On peut encore attaquer et arrêter ses gens' (*i. e.*, gens de l'ennemi), 'partout où on a la liberté d'exercer des actes d'hostilité. Non seulement donc on peut justement refuser le passage aux ministres qu'un ennemi envoye à d'autres souverains; les arrête même, s'ils entreprennent de passer secrètement et sans permission dans les lieux dont on est maître.'

"And he adds, as an example, the seizure of a French ambassador when passing through the dominions of Hanover during war between England and France, by the King of England, who was also sovereign of Hanover.

"The rule, therefore, to be collected from these authorities is, that you may stop an enemy's ambassador in any place of which you are yourself the master, or in any other place where you have a right to exercise acts of hostility. Your own territory, or ships of your own country, are places of which you are yourself the master. The enemy's territory, or the enemy's ships, are places in which you have a right to exercise acts of hostility. Neutral vessels guilty of no violation of the laws of neutrality are places where you have no right to exercise acts of hostility.

"It would be an inversion of the doctrine that ambassadors have peculiar privileges to argue that they are less protected than other men. The right conclusion is, that an ambassador sent to a neutral power is inviolable on the high seas, as well as in neutral waters, while under the protection of the neutral flag.

"The other doctrine of Sir William Scott, in the case of the Orozembo, is even less pertinent to the present question. That related to the case of a neutral ship which, upon the effect of the evidence given on the trial, was held by the court to have been engaged as an enemy's transport to convey the enemy's military officers, and some of his civil officers whose duties were intimately connected with military operations, from the enemy's country to one of the enemy's colonies which was about to be the theater of those operations—the whole being done under color of a simulated neutral destination. But as long as a neutral Government, within whose territory no military operations are carried on, adheres to its professions of neutrality, the duties of civil officers on a mission to that Government, and within its territory, cannot possibly be 'connected with' any 'military operations' in the sense in which these words were used by Sir William Scott, as, indeed, is rendered quite clear by the passages already cited from his own judgment in the case of the Caroline. In connection with this part of the subject, it is necessary to notice a remarkable passage in Mr. Seward's note, in which he says: 'I assume, in the present case, what, as I read British authorities, is regarded by Great Britain herself as true maritime law, that the circumstance that the Trent was proceeding from a neutral port to another neutral port does not modify the right of belligerent capture.' If, indeed, the immediate and ostensible voyage of the Trent had been to a neutral port, but her ultimate and real destination to some port of the enemy, Her Majesty's Government might have been better able to understand the reference to British authorities contained in this passage. It is undoubtedly the law as laid down by British authorities, that if the real destination of the vessel be hostile (that is, to the enemy, or the enemy's country), it cannot be covered and rendered innocent by a fictitious destination to a neutral port. But if the real terminus of the voyage be *bona fide* in a neutral territory, no English, nor, indeed, as Her Majesty's Government believe, any American authority can be found which has ever given countenance to the doctrine that either men or dispatches can be subject, during such a voyage, and on board such a neutral vessel, to belligerent capture as contraband of war. Her Majesty's Government regard such a doctrine as wholly irreconcilable with the true principles of maritime law, and certainly with those principles as they have been understood in the courts of this country.

"It is to be further observed that packets engaged in the postal service, and keeping up the regular and periodical communications between the different countries of Europe and America, and other parts of the world, though in the absence of treaty stipulations they may not be exempted from visit and search in time of war, nor from the penalties of any violation of neutrality, if proved to have been knowingly committed, are still, when sailing in the ordinary and innocent course of their legitimate employment, which consists in the conveyance of mails and passengers, entitled to peculiar favor and protection from all Governments in whose service they are engaged. To detain, disturb, or interfere with them, without the very gravest cause, would be an act of a most noxious and injurious character, not only to a vast number and

variety of individual and private interests, but to the public interests of neutral and friendly Governments. It has been necessary to dwell upon these points in some detail, because they involve principles of the highest importance, and because if Mr. Seward's arguments were acted upon as sound the most injurious consequences might follow.

"For instance, in the present war, according to Mr. Seward's doctrine, any packet ship carrying a Confederate agent from Dover to Calais, or from Calais to Dover, might be captured and carried to New York. In case of a war between Austria and Italy, the conveyance of an Italian minister or agent might cause the capture of a neutral packet plying between Malta and Marseilles, or between Malta and Gibraltar, the condemnation of the ship at Trieste, and the confinement of the minister or agent in an Austrian prison. So in the late war between Great Britain and France on the one hand, and Russia on the other, a Russian minister going from Hamburg to Washington in an American ship might have been brought to Portsmouth, the ship might have been condemned, and the minister sent to the tower of London. So also a Confederate vessel-of-war might capture a Cunard steamer on its way from Halifax to Liverpool, on the ground of its carrying dispatches from Mr. Seward to Mr. Adams. In view, therefore, of the erroneous principles asserted by Mr. Seward, and the consequences they involve, Her Majesty's Government think it necessary to declare that they would not acquiesce in the capture of any British merchant ship in circumstances similar to those of the Trent, and that the fact of its being brought before a prize court, though it would alter the character, would not diminish the gravity of the offense against the law of nations which would thereby be committed.

"Having disposed of the question whether the persons named, and their supposed dispatches, were contraband of war, I am relieved from the necessity of discussing the other questions raised by Mr. Seward, namely, whether Captain Wilkes had lawfully a right to stop and search the Trent for these persons and their supposed dispatches; whether that right, assuming that he possessed it, was exercised by him in a lawful and proper manner; and whether he had a right to capture the persons found on board.

"The fifth question put by Mr. Seward, namely, whether Captain Wilkes exercised the alleged right of capture in the manner allowed and recognized by the law of nations, is resolved by Mr. Seward himself in the negative. I cannot conclude, however, without noticing one very singular passage in Mr. Seward's dispatch.

"Mr. Seward asserts that 'if the safety of this Union required the detention of the captured persons it would be the right and duty of this Government to detain them.' He proceeds to say that the waning proportions of the insurrection, and the comparative unimportance of the captured persons themselves, forbid him from resorting to that defense. Mr. Seward does not here assert any right founded on international law, however inconvenient or irritating to neutral nations; he entirely loses sight of the vast difference which exists between the exercise of an extreme right and the commission of an unquestionable wrong. His frankness compels me to be equally open, and to inform him that Great Britain could not have submitted to the perpetration of that wrong, however flourishing might have been the insurrection in the South, and however important the persons captured might have been.

"Happily all danger of hostile collision on this subject has been avoided. It is the earnest hope of Her Majesty's Government that

similar dangers, if they should arise, may be averted by peaceful negotiations conducted in the spirit which befits the organs of two great nations.

"I request you to read this dispatch to Mr. Seward, and give him a copy of it.

"I am, &c.,

"RUSSELL."

"The Trent affair, all the world sees, was an accident for which not the least responsibility rests upon this Government. For a time our national pride and passion appealed to us to abandon an ancient liberal policy; but, even though unadvised, we did not listen to it, and we are to-day, after that occurrence, as ready and as willing to join other maritime powers in meliorations of the law, to the extent that France desires, as we were before it happened, and before the civil war commenced. Forced into a belligerent attitude, and treated as such by neutral powers, we, of course, while these hostilities last, must claim for ourselves the rigors which other maritime powers agree to apply to us when we are neutrals. But even to-day, in the midst of this strife, if the other powers, including Great Britain, should agree to abolish naval blockades altogether and forever, and to exempt private property from confiscation in maritime war, we are prepared to consider the propositions. But we can make no proposition except as a whole nation. France and Great Britain, having declared the insurgents a belligerent, are not prepared to treat with us as more than a part of a nation. Is it not clear that the sooner they reconsider that unnecessary step, so prematurely taken, the better it will be for all parties concerned? I send you a copy of my rejoinder to Earl Russell on the Trent affair, which will show you more at large our views on this point."

Mr. Seward, Sec. of State, to Mr. Dayton, Feb. 19, 1862. MSS. Inst., France; Dip. Corr., 1862.

As to documents in the Trent case, see Senate Ex. Doc. 8, 39th Cong., 2d sess.; Brit. and For. St. Pap., 1864-'65, vol. 55; 2 Phill. Int. Law (3d ed.), 168.

"There is no recognized sanction of the principle that a *bona fide* authenticated and sealed public mail of a friendly or neutral power, found on a commercial vessel navigating between two neutral ports, can be violated lawfully, either by a naval officer or a prize court, merely because the vessel on which it is found is searched and seized as contraband."

Mr. Seward, Sec. of State, to Mr. Welles, Apr. 15, 1863, Apr. 20, 1865. MSS. Dom. Let. See same to same, Oct. 31, 1862, excepting "simulated or forged mails."

In a case in New York, where official dispatches of importance were sent from Batavia to New York, and there given unofficially, without notice of their nature, to the master of a United States ship, to be sent to a private person in France, the ship was released upon the captain testifying under oath that he was ignorant of the nature and contents of the letters. (The Rapid, Edwards, 228.) On the other hand, the En-

glish courts have held, with undue harshness, that a vessel is not exempt from confiscation for carrying such dispatches, even where it was involuntarily pressed into the belligerent service by force, or where the character of the dispatches was fraudulently concealed. (The Carolina, 4 C. Rob., 259; The Orezembo, 6 C. Rob., 436.) Sir R. Phillimore (iii, § 272), sustains these cases, which Mr. Hall dissents from (p. 593). Bluntschli (§ 803) maintains that military dispatches (*e. g.*, orders of a commanding officer to a subordinate to carry on military operations) are unquestionably contraband, but that it is otherwise with dispatches professing pacific negotiation, which are to be regarded as diplomatic correspondence. (See cases noted in Wheaton, § 504, Dana's note.) In the Tulip (Fisher's Pr. Cas., 26), it was held that a neutral ship may, by the law of nations, carry dispatches from a minister resident in the neutral country to the ports of the belligerent in the country to which the minister belongs. If stopped on the high seas by the other belligerent, however, the duty of the ship's master, it was held, is to deliver up the dispatches to the arresting belligerent.

The following is from Mr. Field's proposed international code: "Section 861. Documents are contraband when they are official communications from or to officers of a hostile nation, and fitted to subserve the purposes of the war, but not otherwise.

"Sir William Scott interprets 'dispatches,' treated of in the decisions as warlike or contraband communications, to be '*official communications of official persons, on the public affairs* of the Government.' (The Caroline, 6 Ch. Robinson's Rep., 465.) But to this rule there is an exception in the case of communications to or from a neutral nation, or the hostile nation's ministers or consuls resident in the neutral nation."

As to the effect of war upon the *mail service*, see Field, sections 862, 919.

"Lushington (Naval Prize Law, Introd., p. xii) says, that to give up altogether the right to search mail steamers and bags, when destined to a hostile port, is a sacrifice which can hardly be expected from belligerents; citing Disp. of Earl Russell to Mr. Stuart, November 20, 1862; Parliamentary Papers, No. Amer., Nov. 5, 1863."

*Ibid*, § 862.

Mr. Horatio King, in the Magazine of American History for March, 1886, makes the following statement:

"Hon. Edward Everett, before the Middlesex Mechanics Association at Lowell, justified the capture of Messrs. Mason and Slidell as perfectly lawful—their confinement in Fort Warren as perfectly lawful—and said 'they would no doubt be kept there until the restoration of peace, which we all so much desire, and we may, I am sure, cordially wish them a safe and speedy deliverance.' Mr. George Sumner, a well-read lawyer, said in the Boston Transcript of November 18, 'The act of Captain Wilkes was in strict accordance with the principles of international law, recognized in England, and in strict conformity with English practice.' Even the British consul at New Orleans, Mr. Muir, it was authoritatively stated, justified the seizure and supplied legal authority to appear in a legal editorial of one of the city papers. * * * There was a banquet at the Revere House, in Boston, in honor of Captain Wilkes, Hon. J. Edmunds Wiley presiding. His act was highly applauded by Mr. Edmunds, Governor Andrew, and Chief-Justice Bigelow." When such eminent men sustained the highest belligerent claims, we cannot be sur-

prised that analogous high pretensions were made by English statesmen and courts during the agony of the Napoleonic wars.

Dr. Woolsey (Int. Law, § 184) speaks as follows: "The case of the Trent, in which this and several other principles of international law were involved, may here receive a brief notice. This vessel, sailing from one neutral port to another on its usual route as a packet ship, was overhauled by an American captain, and four persons were extracted from it on the high seas, under the pretext that they were ambassadors, and bearers of dispatches from the Confederate Government, so called, to its agents in Europe. The vessel itself was allowed to pursue its way, by waiver of right as the officer who made the detention thought, but no dispatches were found. On this transaction we may remark: (1) That there is no process known to international law by which a nation may extract from a neutral ship on the high sea a hostile ambassador, a traitor, or any criminal whatsoever. Nor can any neutral ship be brought in for adjudication on account of having such passengers on board. (2) If there had been hostile dispatches found on board, the ship might have been captured and taken into port; and when it had entered our waters, these four men, being citizens charged with treason, were amenable to our laws. But there appears to have been no valid pretext for seizing the vessel. It is simply absurd to say that these men were living dispatches. (3) The character of the vessel as a packet ship, conveying mails and passengers from one neutral port to another, almost precluded the possibility of guilt. Even if hostile military persons had been found on board, it might be a question whether their presence would involve the ship in guilt, as they were going from a neutral country to a neutral country. (4) It ill became the United States—a nation which had ever insisted strenuously upon neutral rights—to take a step more like the former British practice of extracting seamen out of neutral vessels upon the high seas, than like any modern precedent in the conduct of civilized nations, and that, too, when she had protested against this procedure on the part of Great Britain and made it a ground of war. As for the rest, this affair of the Trent has been of use to the world, by committing Great Britain to the side of neutral rights upon the seas."

An extended discussion of the topic treated in this section will be found in Dana's Wheaton, § 504, note, 641 *ff.* Mr. Dana states that in case of the Trent having been brought into an American prize court, Messrs. Mason and Slidell "could not be condemned or released by the court. They would doubtless have been held as prisoners of war by the United States Government." But "there is no decided case in England or America that required the condemnation of the vessel, even if Messrs. Mason and Slidell had not the immunity of diplomatic persons."

In an article in the North American Review for July, 1862 (vol. 95, 8), Mr. Seward's position that the Trent should have been sent to a prize court is elaborately criticised. The chief objection taken is that (as Mr. Seward admitted) as the judgment of a prize court "could determine nothing in relation to the lawfulness of the capture of these persons," the appeal to the prize court would, even in case of condemnation, be ineffectual. But the answer is that the "persons" in question would then have been brought, and brought lawfully, into the jurisdiction of the United States, liable to be dealt with by any process that might be instituted against them.

"Had Mason and Slidell once reached their destination, they would thereafter have been invested with that immunity which pertains to a diplomatic agent on board a neutral vessel. But on their way thither they were, by the American doctrine, to be regarded as *embryotic* ministers only; their diplomatic character and privileges had not vested absolutely, but were contingent upon their uninterrupted arrival at the countries to which they were respectively accredited. * * * The whole subject of the transportation of diplomatic persons remains *in dubio*."

5 Am. Law Rev., 268.

"One thing, however, the United States claim, and with a good show of right, that the Trent case did settle conclusively, and that is, that where the passage of contraband persons is to be interrupted, it is unjustifiable to remove them bodily from the vessel and to allow her to proceed. She must herself be seized and carried into the belligerent port for trial in the prize courts."

*Ibid.*

Prof. Mountague Bernard, after a full discussion of the Trent case, holds that a neutral merchant or packet ship carrying persons in an enemy's employment is not liable to condemnation unless she is used by the enemy as a transport.

Neutrality of Great Britain, &c., ch. 9. See 2 Revue de droit int., 126.

Mr. Seward's reasonings "would serve to justify, and may be taken to encourage, the captain of the Tuscarora to seize the Dover packet boat and carry her into New York for adjudication, in case Messrs. Mason and Slidell should take a through ticket from London to Paris."

Historicus, 192.

"Although dispatches are classed as contraband articles, and their carriage is illegal, because of their peculiar character, ambassadors are neither contraband articles nor denounced by international law."

Abdy's Kent (1878), 359.

"The suppression of Mr. Seward's pacific note, and the positive denial of the fact that such a communication had been received, published in the prime minister's personal organ, would have formed the subject of discussion in Parliament if Parliament had not been at that time in a remarkably complaisant mood. The expedition to Canada, at a season when no military operations could possibly have been undertaken in that quarter, has entailed upon this country a waste of several millions, besides other bad effects. Undoubtedly the prime minister of that day did exhibit his usual love of displaying military force; and all will admit that anything like a gratuitous menace was peculiarly offensive and unworthy when directed against a nation in distress. But can Americans honestly say that no color of justification for a display of force was afforded on their side?"

Goldwin Smith in 13 Macmillan's Mag., 169.

According to Heffter (§ 161*a*), as adopted by Perels (§ 47), the "transport of the diplomatic agent of a belligerent to a neutral port cannot be by itself regarded as a violation of neutrality; the object of the agents must be an alliance for the continuance of the war, in which case

the arrest and carrying off would be not unjustifiable." Perels dissents from Gessner's distinction that such arrest would not be justifiable, even in the latter case, if made when the agent was passing between two neutral ports.

It is argued by Fiore, droit int. (trans. by Antoine, 1886, vol. 3, § 1605), that a belligerent can preclude agents of the other belligerent from crossing his territory, but he cannot preclude them from being transported in a neutral ship on the high seas. In the Trent case, he goes on to say, that if belligerent dispatches are contraband of war, so, *a fortiori*, is it with the diplomatic agents carrying them; but this position, he thinks, was victoriously combatted by Lord Russell, in his reply. Mr. Fiore goes on to say that a great majority of publicists dissented from the position that the arrest of Messrs. Mason and Slidell could be sustained.

For further notices of the Trent case see 46 Hunt's Merch. Mag., 1; 5 Am. Law Rev., 267; 8 South. Law Rev., 33; Abdy's Kent (1878), 355.

For details as to action in Trent case, see 1 Thurlow Weed's Life, 634 *ff.*; Lond. Quart. Rev., Jan., 1862.

That insurgents may have informal diplomatic relations with neutrals, see *supra*, § 69; Whart. Com. Am. Law, § 165; 5 J. Q. Adams' Memoirs, chap. xii, where several interviews of Mr. Adams, when Secretary, with such emissaries, are noted.

Deviating in this respect from the practice adopted in the general arrangement of this work, the reply of Lord Russell to Mr. Seward's instructions in the Trent case is given above, in connection with those instructions. The reason is that Lord Russell's reply takes ground which was substantially adopted by the leading European powers, and, therefore, placing it side by side with Mr. Seward's instructions, gives us a basis from which we can gather certain general rules in respect to the important subject of which it treats. These rules are as follows:

(1) Diplomatic agents sent by one belligerent to a neutral are not, in themselves, contraband of war, subject to seizure by the other belligerent if found on a neutral ship on the high seas. It is true that a belligerent diplomatic agent may carry with him dispatches which are promotive of the belligerent designs of the power he represents; and if so, such dispatches will be contraband of war, and, if the agent carrying them be proved to be cognizant of their character and employed in carrying out the belligerent purpose they disclose, he may be subjected to the same taint and exposed to the same contingencies. But it does not follow that a diplomatic agent from a belligerent, when on a neutral vessel, bound to a neutral port, is necessarily employed in the furtherance of belligerent designs. He may be engaged on an errand of peace. This may be in two ways. He may be seeking to consummate some such general plan for the mitigation of the sufferings of war, as was set forth by the declaration of Paris of 1856, or by the Geneva conference which met during the Franco-German war. It is well known that both Great Britain and France sought to obtain the accession of other powers to the principles with regard to freedom of neutral ships adopted by the Treaty of Paris; and it is noticed in other sections of this work that the United States Government, when a neutral during the Napoleonic wars, sought to have agreements of the same character made between itself and the then great belligerent powers. Such a condition of things would be likely again to occur in any future maritime war. China, for instance, is rapidly becoming an important power, with a

great population capable of being efficiently employed in naval enterprises, and with a Government which is able to appreciate and employ remarkably capable diplomatists. (See London Spectator, Sept. 11, 1886, 1203.) The relations of China to France are such as that war between these powers may at any time be renewed, and this on a large scale; and if such a war should arise, the United States would be not unlikely to intervene to mitigate its horrors, and the United States Government would be prompted, should such an intervention take place, to say to China: "Send to us, if you choose, an envoy specially charged with the mission of coming to some such arrangement as may make the war in which you are engaged conform to modern civilized usage. You have held," so the United States might say, "that in an extreme case you might permanently obstruct your ports of entry. This is a matter as to which your envoy might treat at Washington with the French legation." Or the United States might, as it has done in other cases, consent to mediate and say: "Send your envoy to Washington for the purpose of canvassing with the French envoy the terms of peace, just as we sent our envoys to St. Petersburg in 1813 for the same purpose." Now the United States Government, as in a peculiar degree the vindicator of neutral rights, and as eminently bound to promote peace, and to prevent any undue supremacy on the high seas of any great maritime power, would not tamely acquiesce in the seizure, on one of her own merchant ships on the high seas, of envoys sent to her from China for such pacific purposes as this. The question then comes up, suppose, under such circumstances, a Chinese envoy should be arrested on the high seas in a United States ship, and suppose that no papers were found in his custody showing that his design was to add to the strength of Chinese belligerency, could the arresting belligerent impute from the nature of things a contraband character to such envoy? Now, the reasoning of Lord Russell, sustained by the other great European powers and acquiesced in by Mr. Seward, is that no such contraband character is to be so imputed. And the reasons are obvious. First, when an agent is engaged in a mission which is only on a particular contingency illegal, such arrest cannot be sustained unless such illegal contingency can be shown to exist. Secondly, even were we to reject this position, diplomacy, it must be recollected, is the police of peace; and until the contrary is shown, a diplomatic agent on the high seas is to be presumed to be on a pacific errand.

(2) The case is not altered when the diplomatic agent, whose status is under discussion, represents an insurgent power whose belligerency (but not whose sovereignty) has been recognized by the power in one of whose ships such envoy is arrested. During the latter part of the long contest between Spain and her South American colonies, those colonies had informal agents at Washington, who were received so far as such reception enabled the United States to intercede with both belligerents for the adoption of humane modes of warfare, and ultimately for the settlement of judicious terms of peace. The United States would certainly have witnessed with grave displeasure the seizure and confiscation by Spain on a United States ship of one of those envoys bound to the United States; and if Spain had insisted on such a measure she would have hastened the acknowledgment of South American independence. It is not impossible that the United States may be placed in a similar condition of neutral interposition between Great Britain and a revolted province, either in the Old or the New World. If so, the United States would not be likely to silently acquiesce in the seizure on board

of one of her merchant ships of envoys to herself from such insurgents (they being recognized as belligerents), unless it should be proved that the object of those envoys was to obtain, in violation of the law of nations, troops or contraband of war.

(3) Where there is ground to suspect an envoy from a belligerent to a neutral to be on a mission distinctively belligerent, then, if he be arrested by the other belligerent on board a neutral ship, he and the ship on which he is found must be taken to a prize court for adjudication. Undoubtedly the proceedings against him in such a prize court would be novel, as such a case, if it should ever occur, would be the first instance in which an admiralty proceeding *in rem* would be instituted against a person. But be this as it may, Mr. Seward's position, that such a case would be for a prize court, is not, supposing that there be criminative evidence against the envoy, showing him to be on a distinctively belligerent service, directly controverted by Lord Russell, and may be held to be now generally accepted. At the same time it should be remembered that the action of a prize court in condemning such envoy as contraband would not bar the neutral nation on whose ship the arrest was made from proceeding against the arresting nation for a violation of neutral rights. *Supra*, § 329.

## IV. *PENALTIES ON CONTRABAND.*

### MAY BE SEIZED ON HIGH SEAS.

### § 375.

In the correspondence between Mr. Pickering, Secretary of State, and Mr. Adet, minister of France, in 1796, while it was agreed on both sides that horses are contraband of war, it was maintained correctly by Mr. Pickering, in opposition to Mr. Adet, that the only means of redress in such cases by the offended belligerent was the seizure of such contraband on the high seas, or in his own country, and that the Government of the country of exportation was not required by international law to prohibit such exportation.

Mr. Pickering, Sec. of State, to Mr. Adet, Jan. 12, May 25, 1796. MSS. Notes, For. Leg. 1 Am. St. Pap. (For. Rel.), 646 *ff.*, 649.)

"In reference to your letter of the 2d February last, I soon after took occasion to intimate to you what appeared to be the President's way of thinking on the subject. I have now the honor to state to you that while, by the law of nations, the right of a belligerent power to capture and detain the merchant vessels of neutrals, on just suspicion of having on board enemy's property, or of carrying to such enemy any of the articles which are contraband of war, is unquestionable, no precedent is recollected, nor does any reason occur which should require the neutral to exert its power in aid of the right of the belligerent nation in such captures and detentions. It is conceived that, after warning its citizens or subjects of the legal consequences of carrying enemy's property or contraband goods, nothing can be demanded of the sovereign of the neutral nation but to remain passive. If, however, in the

present case, the British captors of the brigantine Experience, Hewit, master; the ship Lucy, James Conolly, master, and the brigantine Fair Columbia, Edward Carey, master, have any right to the possession of those American vessels or their cargoes, in consequence of their capture and detention, but which you state to have been rescued by their masters from the captors and carried into ports of the United States, the question is of a nature cognizable before the tribunals of justice, which are opened to hear the captors' complaints, and the proper officer will execute their decrees.

"You suggest that these rescues are an infringement of the law of nations. Permit me to assure you that any arguments which you shall offer to that point will receive a just attention.

"With regard to the British seamen and deserters who have assisted in the rescues, with great truth I am authorized to assure you that the Government have no desire to retain them; but besides that the many months elapsed since those events, and the consequent dispersion of the men, would probably render their delivery impracticable, it is not known to be authorized by any law. This has brought into view your project of stipulations for the mutual delivery of deserters, whether seamen or soldiers; and I have now the honor to inclose a counter-project by which you will see the objections which have occurred to your propositions. The President has been pleased to direct and empower me to negotiate with you on this subject, and it will afford him great pleasure if we can make a satisfactory arrangement."

Mr. Pickering, Sec. of State, to Mr. Liston, May 3, 1800. MSS. Notes, For. Leg.; reprinted in Dip. Corr. for 1862, 149.

The rule "that a vessel on a return voyage is liable to capture by the circumstances of her having on the outward voyage contraband articles to an enemy's port" is an interpolation in the law of nations.

Mr. Madison, Sec. of State, report of Jan. 25, 1806. MSS. Dept. of State.

"It is natural that Peru should be incensed at the exportation of nitrate for the benefit and account of her adversary. It is to be regretted, however, that she should allow her resentment to lead her to claim a belligerent right not acknowledged by any authority, that of capturing on the high seas vessels of a neutral for having on board a cargo from a place which she controlled before the war. In this case, however, her title to it was annulled, or at least suspended, by the armed occupation by Chili of the region whence the article was taken. The attempt of Peru, therefore, to avenge upon neutrals her want of good fortune in the contest will not, it is to be feared, add to her reputation for magnanimity or regard to public law, and certainly will not be acquiesced in by the Governments of neutrals, whose interests may thereby be affected."

Mr. Evarts, Sec. of State, to Mr. Christiancy, Mar. 2, 1880. MSS. Inst., Peru; For. Rel., 1880.

The carriage of contraband goods does not subject the vessel and remaining cargo to confiscation, unless they all belong to the same owner, or unless there has been some actual co-operation in an attempted fraud upon the belligerent, by covering up the voyage under false papers, and with a false destination. When the contraband goods have been deposited at the port of destination, neither the vessel nor the cargo is liable to seizure on the return voyage, though the latter may have been purchased with the proceeds of the contraband.

The same rule would seem to apply, by analogy, to cases where the contraband articles have been deposited at an intermediate port on the outward voyage, and before it terminated. But if the voyage be disguised, and the vessel sails under false papers, and with a false destination, the mere deposit of the contraband in the course of the voyage does not exempt the vessel from seizure.

Carrington *v.* Ins. Co., 8 Pet., 495.

Mere consent to transportation of contraband will not always or usually be taken as a violation of good faith by the neutral owner of a ship. There must be circumstances of aggravation. The nature of the contraband articles and their importance to the belligerent, and general features of the transaction must be taken into consideration in determining whether the neutral owner intended or did not intend, by consenting to the transportation, to mix in the war.

Contraband of war is always subject to seizure when being conveyed to a belligerent destination, whether the voyage be direct or indirect; such seizure, however, is restricted to actual contraband, and does not extend to the ship or other cargo, except in cases of fraud or bad faith on the part of the owners or of the master with the sanction of the owners.

The Bermuda, 3 Wall., 514; The Springbok, 5 *ibid.*, 1. These cases are criticised *supra*, § 362.

Contraband articles contaminate the non-contraband parts of a cargo, if belonging to the same owner, and the non-contraband must share the fate of the contraband.

The Peterhoff, 5 Wall., 28.

Conveyance of contraband attaches in ordinary cases only to the freight of the contraband merchandise. It does not subject the vessel to forfeiture.

*Ibid.*

The trade of neutrals with belligerents in articles not contraband is absolutely free, unless interrupted by blockade.

*Ibid.*

Where contraband and not contraband belong to the same owner, the latter must share the fate of the former.

*Ibid.*

So far as concerns those portions of the above rulings in which the law of contraband is blended with that of blockade, they are considered in the discussion of the Springbok case. (*Supra*, § 362.) It may be here stated that while contraband goods, when at sea, are liable to be seized at any period of their transit, if the fact that they were intended for the opposing belligerent is established, the taint cannot be extended to non-contraband goods in the same cargo.

The Stephen Hart (Blatch. Pr. Ca., 387), where it was held if the guilty intention of transporting contraband goods existed when the goods left their own port, such intent could not be obliterated by the innocent intention of shipping at a neutral port in the way, and that such voyages form one transaction, is stated and examined in Abdy's Kent (1878), 349.

"The right of the neutral to transport, and of the hostile power to seize, are conflicting rights, and neither party can charge the other with a criminal act."

1 Kent Com., 142; approved by Lord Westbury, Ex parte Chavasse, 11 Jur., N. S., 400. See 11 Op., 408, 451; The Helen, L. R., 1 Ad. & Ec., 1.

The following passage from Kent's Com., 142, is quoted by Sir W. Harcourt (Historicus, 129), with high encomium:

"It is a general understanding, grounded on true principles, that the powers at war may seize and confiscate all contraband goods without any complaint on the part of the neutral nation, and without any imputations of a breach of authority in the neutral sovereign himself. It was contended on the part of the French nation, in 1796, that neutral Governments were bound to restrain their subjects from selling or importing articles contraband of war to the belligerent powers. But it was successfully shown, on the part of the United States, that neutrals may lawfully sell, at home, to a belligerent purchaser, or carry themselves to the belligerent powers, contraband articles, subject to the right of seizure *in transitu*. This right has since been explicitly declared by the judicial authorities of this country. The right of the neutral to transport, and of the hostile power to seize, are conflicting rights, and neither party can charge the other with a criminal act."

Sir W. Harcourt, on the same page, also adopts as "conclusive and authoritative," the following from Judge Story's opinion in the Santissima Trinidad:

"There is nothing in our laws or in the laws of nations that forbids our citizens from sending armed vessels as well as munitions of war to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation." See *infra*, §§ 391, 393.

In other sections the liability of neutral or alien property to seizure is considered as follows: Rights of aliens generally, § 201; subjection of, to local seizures, § 203; injury of, from belligerent action, §§ 223 *ff.*; injury of, from mob violence, § 226; belligerents' spoliation by neutral, § 227; neutrals' spoliation by belligerent, § 228; subjection of alien to reprisal, § 318; confiscation of goods of, as a war measure, § 336; imputability of enemy's character to neutral, § 352; cotton belonging to neutral, susceptibility of, to seizure when in belligerent lines, §§ 203, 224–228, 352, 353, 373.

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# CHAPTER XX.

## PIRACY AND PRIVATEERING.


I. DEFINITION OF PIRACY.
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### I. *DEFINITION OF PIRACY.*

#### (1) MUST BE ROBBERY ON THE HIGH SEAS.

§ 380.

Armed cruisers, which, though claiming to be commissioned by insurgents, prey on merchant vessels of all nationalities indiscriminately, are to be regarded as pirates.

Mr. Adams, Sec. of State, to Mr. Nelson, Apr. 28, 1823. MSS. Inst., Ministers.

A mere intention or even preparation to commit piracy is not piracy.

Mr. Clayton, Sec. of State, to Mr. Calderon de la Barca, July 9, 1850. MSS. Notes, Spain.

A merchant vessel whose subordinate crew rise in revolt, and, after killing the captain, make depredations on other shipping, is a pirate by the law of nations.

Mr. Marcy, Sec. of State, to Mr. Starkweather, Sept. 18, 1854. MSS. Inst., Chili.

"General hostility," as distinguished from special, is a condition of piracy by the law of nations, and does not exist in a case of homicide by revolt of crew.

Mr. Seward, Sec. of State, to Mr. Van Valkenburgh, Feb. 19, 1869. MSS. Inst., Japan.

Definitions of piracy are given *infra*, § 381.

An exposition of the statutes of the United States in relation to piracy is given in the opinion of Mr. E. Peshine Smith, law officer of the Department, January 6, 1871, communicated by Mr. Fish, Sec. of State, to Mr. Mazel, June 6, 1871. MSS. Notes, Netherlands.

A robbery committed on the high seas may be piracy under the act of the 13th of April, 1790, for the punishment of certain crimes against the United States, although such robbery, if committed on land, would not by the law of the United States be punishable with death. The crime of robbery, as mentioned in this act, is the crime of robbery as recognized and defined at common law.

The crime of robbery, committed by a person who is not a citizen of the United States, on the high seas, on board of a ship belonging exclusively to subjects of a foreign state, is not piracy under the act, and is not punishable in the courts of the United States.

U. S. *v.* Palmer, 3 Wheat., 610.

A commission granted by Aury, styling himself brigadier of the Mexican Republic, a Republic of whose existence nothing is known, and generalissimo of the Floridas, a province in the possession of Spain, will not authorize citizens of the United States, under our statute, to cruise as privateers; and it appearing that a capture by such persons, though ostensibly made under such a commission, was made, in fact, not *jure belli*, but *animo furandi*, the offense is statutory piracy.

By the act of the 30th April, 1790, section 8, persons on board of any vessel which has thrown off its national character by cruising piratically, are triable on a charge of piracy in the courts of the United States.

U. S. *v.* Klinfock, 5 Wheat., 144; U. S. *v.* Pirates, *ibid.*, 184. Seo *infra*, § 381.

Robbery or forcible depredations upon the sea, *animo furandi*, is piracy by the law of nations.

U. S. *v.* Smith, 5 Wheat., 153.

By assuming the character of pirates, the crew of a vessel lose all claim to national character or protection. Hence an American citizen, fitting out a vessel in a port of the United States to cruise against a power with which the United States are at peace, is not protected, by a commission from a belligerent, from punishment for any offense committed by him against vessels of the United States. On an indictment in such a case, a jury may find that a vessel, within a marine league of the shore, at anchor in an open roadstead, where vessels only ride under the shelter of the land at a season when the course of the winds is invariable, is upon the high seas.

U. S. *v.* Pirates, *ibid.*, 184, 204, 206.

Though the independence of Buenos Ayres has not been acknowledged by the United States, we have recognized the existence of a state of civil war between Spain and its colonies, and each party to that war is respected by us in its exercise of all belligerent rights, including the right of capture.

The Santissima Trinidad, 7 Wheat., 283. See *infra*, § 381.

The African slave trade not being repugnant to the law of nations, a vessel cannot be brought in by an American cruiser for adjudication for being engaged in it, even where the vessel belongs to a nation which has prohibited the trade.

The Antelope, 10 Wheat., 66.

A piratical aggression by an armed vessel is a good ground for confiscation and is so made by the act of March 3, 1819. But not every hostile attack in time of peace is piratical. It may be by mistake, or in necessary self-defense, or to repel a supposed meditated attack by pirates. If justifiable, no blame attaches.

The Marianna Flora, 11 Wheat., 1.

Probable cause is a sufficient excuse for a capture for piratical aggression.

*Ibid.;* The Palmyra, 12 Wheat., 1.

A non-commissioned cruiser may seize for the benefit of the Government.

Carrington *v.* Merchants' Ins. Co., 8 Pet., 495.

Under the 9th article of the treaty of 1819, between the United States and Spain, providing for the restoration of property rescued from pirates and robbers on the high seas, it is necessary to show: (1) That what is claimed falls within the description of vessel or merchandise; (2) that it has been rescued on the high seas from pirates and robbers; (3) that the asserted proprietors are the true proprietors.

U. S. *v.* The Amistad, 15 Pet., 518.
As to this case in detail, see *supra,* § 161.

Under this article negroes lawfully held as slaves and subject to sale under the laws of Spain, on board a Spanish vessel, may be deemed merchandise; but native Africans, unlawfully kidnapped and imported into a Spanish colony contrary to the laws of Spain, as in this case, are not merchandise; nor can any person show that he is entitled to them as their proprietor, nor are they pirates and robbers, if they rise and kill the master and take possession of the vessel to regain their liberty.

*Ibid.*

Native Africans, unlawfully detained on board of a Spanish vessel are not bound by a treaty between the United States and Spain, but may, as foreigners to both countries, assert their rights to their liberty before the courts of the United States.

*Ibid.*

Under the fourth section of the act of March 3, 1819, any piratical aggression subjects the vessel to forfeiture, though not made *causa lucri*, and though the owners were entirely innocent, and the vessel was armed for a lawful purpose and sailed on a lawful voyage.

U. S. *v.* brig Malek Adhel, 2 How., 210.

Persons trading to the west coast of Africa, on which coast two kinds of commerce are carried on—one (the regular trade) lawful, the other (the slave trade) criminal—should keep their operations so clear and distinct in their character as to repel the imputation of a purpose to engage in the latter.

The Slavers, 2 Wall., 350.

Piracy is defined by the law of nations to be a forcible depredation upon property on the high seas, without lawful authority, done *animo furandi;* that is, as defined, in this connection, in a spirit and intention of universal hostility. A pirate is said to be one who roves the sea in an armed vessel, without any commission from any sovereign state, on his own authority, and for the purpose of seizing by force and appropriating to himself, without discrimination, every vessel he may meet.

In a state of war between two nations a commission to a private armed vessel from either of the belligerents affords a defense, according to the law of nations, in the courts of the enemy, against a charge of robbery or piracy on the high seas of which it might be guilty in the absence of such authority.

U. S. *v.* Baker, 5 Blatch., 11–13.

If the prize be a pirate the officers and crew are to be prosecuted in the circuit court of the United States, without respect to the nation to which each individual may belong.

If it be regularly commissioned as a ship-of-war, the officers and crew are to be detained as prisoners, except such as are citizens of the United States, who are to be tried for treason.

1 Op., 85, Lee, 1798.

Prosecutions for piracy committed out of the jurisdiction of any particular State, should take place in the district where the offender is apprehended, or into which he may be first brought.

1 Op., 185, Rush, 1815.

Certain citizens of the United States were arrested while sailing as privateers under a commission from Artigas, a Portuguese colony, then in a state of insurrection, but not recognized as a sovereign power by our Government. It was advised that they should be indicted as pirates under the act of 1790.

1 Op., 249, Wirt, 1818.

The recaptors of American vessels from pirates are entitled to salvage; but the rate rests in the discretion of the court before which the cases shall be brought.

1 Op., 531, Wirt, 1822.

A French vessel with kidnapped Africans on board was captured by pirates, and from them recaptured by an American vessel and brought

into port. A demand made by the French minister for the restoration of the Africans was held to be well founded.

*Ibid.*, 534.

A recapture from pirates gives a fair claim for salvage by the general maritime law, and by the act of March 3, 1800, national ships are entitled to salvage from ships of friendly powers rescued from their enemies, which act, in spirit, applies to rescues from pirates.

*Ibid.*, 577.

By analogy to the act of the 3d of March, 1800, the rate of salvage to which recaptors of an American vessel from pirates are entitled is one-sixth of the vessel and cargo, or, if the vessel has been armed since her capture, one-half of the vessel and one-sixth of the cargo.

*Ibid.*, 584.

If the vessel had been long in the hands of pirates and used as their own, a higher rate of salvage should be allowed than if she were recaptured in the moment of her capture, having just struck, and the crew being still capable of resistance.

*Ibid.*

It is not statutory piracy for the captain of a vessel, to whom the vessel and cargo have been consigned with instructions to proceed to the Pacific and there sell vessel and cargo and remit the proceeds to the owners, to fail to remit such proceeds after having made sale according to instructions; and his arrest on such a charge would be false imprisonment.

2 Op., 19, Wirt, 1825.

Under the act of March 3, 1819, persons charged with piracy must be tried in the circuit court for the district into which they are first brought, or in which they were found; and it is not in the power of the President to send them to another tribunal, domestic or foreign.

2 Op., 559, Taney, 1833.

During the civil war, the existence of which had been recognized by the United States, between Texas and Mexico, a Texan armed schooner captured an American merchantman, on the ground that she was laden with provisions, stores, and munitions of war for the Mexican army. It was held that the capture could not be deemed an act of piracy unless it should appear that the principal actors in it were citizens of the United States, in which case they might be indicted for piracy under the 9th section of the crimes act of the 30th of April, 1790, which declares "that if any citizen shall commit any piracy or robbery, against the United States or any citizen thereof, upon the high seas, under color of any commission from any foreign prince or state, or on any pretense of authority from any person, such offender shall, notwithstanding the pretense of any such authority, be deemed, adjudged, and taken to be

a private felon and a robber, and on being thereof convicted shall suffer death."

3 Op., 120, Butler, 1836.

When a civil war breaks out in a foreign nation, and part of such nation erects a distinct and separate Government, and the United States, though they do not acknowledge the independence of the new Government, do yet recognize the existence of a civil war, our courts have uniformly regarded such party as a belligerent nation in regard to acts done *jure belli*.

*Ibid.*

Such acts may be unlawful when measured by the laws of nations or by treaty stipulations; the individuals concerned in them may be treated as trespassers, and the nation to which they belong may be held responsible by the United States, but the parties concerned are not treated as pirates.

*Ibid.*

Persons, however, acting under a commission from one of the belligerents, who make a capture, ostensibly in the right of war, but really with the design of robbery, are guilty of piracy.

*Ibid.*

Although it has been doubted whether a mere body of rebellious men can claim all the rights of a separate power on the high seas, without absolute or qualified recognition from foreign Governments, there is no authority for a doubt that the parties to a civil war have the right to conduct it with all the incidents of lawful war within the territory to which they both belong.

9 Op., 140, Black, 1858.

When, during the existence of a civil war in Peru, American vessels found a port of that country, and points on its coast where guano is deposited, in the possession of one of the parties to the contest, and procured under its authority and jurisdiction clearances and licenses at the custom-house to load with guano, they were guilty of nothing (having acted fairly in pursuance of the license) for which the other party to the civil war could lawfully punish or molest them afterward.

*Ibid.*

To make the fire of one vessel into another a piratical aggression under the act of March 3, 1819, it must be a *first* aggression, unprovoked by any previous act of hostility or menace from the other side.

9 Op., 455, Black, 1860.

*Obiter*, that piracy can be committed on the great lakes, *e. g.*, Lake Erie.

11 Op., 114, Bates, 1864.

Where a portion of the crew of the steamer Edgar Stewart forcibly displaced the master from command and took possession of the vessel, it was advised that this did not constitute the offense of piracy, but of mutiny; that, for the latter offense, the parties charged are liable to be tried and punished under the laws of the United States, and that they may be tried therefor in any district into which they are first brought.

14 Op., 589, Hill, acting, 1872.

By the British statute of 17 George III, ch. 9, in 1777, after reciting that whereas a rebellion and war have been openly and traitorously levied and carried on in certain of His Majesty's colonies and plantations in America, and "acts of treason and *piracy* have been committed on the high seas and upon the ships and goods of His Majesty's subjects, and many persons have been seized and taken, who are expressly charged or strongly suspected of such treasons and felonies, and many more such persons may be hereafter so seized and taken, and whereas such persons have been or may be brought into this Kingdom and into other parts of His Majesty's dominions, and it may be inconvenient in many such cases to proceed forthwith to the trial of such criminals, and at the same time of evil example to suffer them to go at large," it was enacted that "all such persons (describing them) may be detained in custody, without bail or main-prize, till the 1st of January, 1778, and no judge shall bail or try any such person without an order of the Privy Council, before that time." (31 Pickering's Statutes, 312, continued annually by successive re-enactments till the end of the war. *Ibid.*, vol. 32, 1, 175: vol. 33, 3, 183; vol. 34, 1.)

Lawrence's Wheaton (ed. 1863), 249. *Supra*, § 382.

The operation of this act was confined mainly to American privateersmen captured by British cruisers. None, however, were executed as pirates under this statute, and all were ultimately exchanged or released.

Mr. Jefferson's report of December 30, 1790, relative to the Mediterranean trade, and the expediency of resorting to forcible measures to suppress Algerine piracy, is in 1 Am. St. Pap. (For. Rel.), 104.

President Monroe's message of May 21, 1824, explanatory of the convention with Great Britain making the slave trade piratical is given in Senate Doc. 374, 18th Cong., 1st sess.; 5 Am. St. Pap. (For. Rel.), 344.

See also on this topic Senate Rep., Jan. 10, 1825; Senate Doc. 390, 18th Cong., 2d sess.; 5 Am. St. Pap., 489. House Doc. No. 398, 18th Cong., 2d sess; 5 Am. St. Pap. (For. Rel.), 585.

As to proceedings by United States consuls in foreign ports in cases of piracy, mutiny, or any other offense against the United States, see Mr. Buchanan, Sec. of State, to Committee of Claims, Mar. 4, 1846. MSS. Report Book.

It has been held in England that piracy, being an offense *jure gentium*, an act of piracy, committed on the high seas on a vessel of the United States, is not so exclusively an offense within the jurisdiction of the United States as to sustain a demand by the United States on Great Britain for the surrender of the parties concerned under the British-American extradition treaty.

Tivnan, *in re*, 5 Best. & S. 645; Cockburn, C. J., diss. See adverse criticism in Abdy's Kent (1878), 413; and see also Whart. Cr. Pl. and Pr., §§ 45, 72; Whart. Cr. Law, §§ 284, 1686. Compare *supra*, §§ 33*a*, 35*a*.

(2) WARLIKE ATTACKS OF INSURGENTS NOT PIRACY.

§ 381.

Several judicial rulings on this topic will be found *supra*, § 380.

The question whether Captain Semmes, of the Alabama, should be prosecuted for piracy was discussed in the Atlantic Monthly for July and August, 1872, by Mr. Bolles, who was the Solicitor of the Navy Department, and to whom this question was referred. This article states at the outset that—

"By establishing a blockade of Confederate ports, our Government had recognized the Confederates as belligerents, if not as a belligerent state, and had thus confessed that Confederate officers and men, military or naval, could not be treated as pirates or guerrillas, so long as they obeyed the laws of war; the same recognition was made when cartels for exchange of prisoners were established between the Federal and Confederate authorities; and, above all, when the Federal Executive, after the courts had declared Confederate privateersmen to be pirates, had deliberately set aside those judgments, and admitted the captured and condemned officers and men of the Savannah and the Jeff Davis to exchange as prisoners of war."

The conclusion is as follows:

"It is evident that after it had been, as it soon was, resolved that neither treason nor piracy should be charged against Semmes before a military or naval tribunal, and that his methods of capturing, 'plundering,' and destroying vessels should not be treated as offenses against public law and duty, but that he should be dealt with as a belligerent naval officer, bound to obey the laws of war and entitled to their protection, it was needless to inquire where or by whom the Alabama was built, manned, armed, or commissioned, or whether a Government without an open port can legitimately own or employ a naval force. These inquiries, however interesting or important they might be in other connections, were of no sort of interest or importance as elements of a trial for violating the laws of war in the conduct of a cruiser subject to those laws and protected by them.

"In this way the field and the duty of inquiry were reduced to the two subjects of cruelty to prisoners and perfidy toward Captain Winslow and the power he represented."

*Ibid.*

These articles by Mr. Bolles are commented on by Sir A. Cockburn, in his opinion in the Geneva tribunal, and in 2 Bulloch's Secret Service Conf. States, 116 *ff.*

That a commission of some kind from a belligerent or insurgent power is necessary to relieve persons attacking a vessel on the high seas and surreptitiously disposing of it and its cargo, from the charge of piracy, supposing their work be one of general devastation, was held by the British vice-admiralty court in Halifax, in 1864, in the Chesapeake case, cited more fully *supra*, § 27.

See Dana's Wheaton, 522.

In U. S. *v.* Baker, 5 Blatch., 6 (Trial of officers of the Savannah, 371), Judge Nelson charged the jury that "if it were necessary on the part of the Government to bring the crime charged against the prisoners within the definition of robbery and piracy as known to the common

law of nations, there would be great difficulty in so doing, perhaps, upon the counts—certainly upon the evidence. For that shows, if anything, an intent to depredate upon the vessels and property of one nation only, the United States, which falls far short of the spirit and intent which are said to constitute the essential elements of the crime." To same effect see Woolsey, Int. Law, app. 3; Harlan, J., Ford *v.* Surget, 97 U. S., 619; Dole *v.* Ins. Co., 6 Allen, 373; 2 Cliff., 394; Fifield *v.* Ins. Co., 47 Pa. St., 166; and other cases. It is true that a contrary view was taken by Judges Grier and Cadwalader in Smith's case, in Philadelphia in 1862, when a conviction took place, but there was no sentence, and the prisoners were transferred to military control as prisoners of war, and not as pirates.

For the following statement as to the latter case I am indebted to Mr. Ashton, one of the counsel for the prosecution:

WASHINGTON, *January* 26, 1886.

I think that there was no motion made for a new trial in the piracy cases—certainly none was ever argued. After the conviction of the prisoners a State question arose as to what should be done with them. The Confederate Government, it was understood, threatened retaliation if they were harmed. The Attorney-General, Mr. Bates, was in favor of their being duly sentenced, but Mr. Seward thought that they should be exchanged as prisoners of war, and his advice prevailed with the President; and my recollection is that the district attorney and marshal were instructed, in letters written by Mr. Seward, to turn the men over to the military custody of the Government. Mr. Seward was somewhat in the habit at that time of directing the marshals and district attorneys, a practice that Mr. Bates always resented when his attention was called to it, and afterwards succeeded in correcting. At any rate we were instructed to release the prisoners from civil custody, but how to do that was the question. Judge Cadwalader, in consultation with me on the subject, suggested—you know how fertile he was in suggestion—that the men be brought into court on a writ of *habeas corpus*, and that each should be asked to say whether he preferred to remain in his present civil custody or to be remanded to the military custody from whence he came. I adopted this suggestion, a writ was issued, the men were brought into court, and each was asked the above question by the court. It was, of course, answered as we supposed it would be; and an order was made by the court for the delivery of the men, by the marshal of the district, to the military custody of the Government. In that way we got rid of our white elephants. My recollection is that Judge Grier was rather in favor of letting the law take its course in the cases, and that he would have sentenced the men if I had asked for judgment. Judge Cadwalader, though believing the men had been rightly convicted, was satisfied to let them go in the way I have mentioned.

I believe that there is a report of Smith's case in the Law Library of Congress, but I suppose what I have mentioned is not contained in it.

"You will, therefore, say to the secretary for foreign affairs:

"1. That we do not dispute the right of the Government of Hayti to treat the officers and crew of the Quaker City and Florida [vessels in the service of insurgents against Hayti] as pirates for all intents and purposes. How they are to be regarded by their own legitimate Government is a question of municipal law into which we have no occasion, if we had the right, to enter.

"2. That this Government is not aware of any reason which would require or justify it in looking upon the vessel named in a different light from any other vessels employed in the service of the insurgents.

"3. That regarding them simply as armed cruisers of insurgents not yet acknowledged by this Government to have attained belligerent rights, it is competent to the United States to deny and resist the exercise by those vessels or any other agents of the rebellion of the privileges which attend maritime war, in respect to our citizens or their property entitled to our protection. We may or may not, at our option, as justice or policy may require, treat them as pirates in the absolute and unqualified sense, or we may, as the circumstances of any actual case shall suggest, waive the extreme right and recognize, where facts warrant it, an actual intent on the part of the individual offenders, not to depredate in a criminal sense and for private gain, but to capture and destroy *jure belli*. It is sufficient for the present purpose that the United States will not admit any commission or authority proceeding from rebels as a justification or excuse for injury to persons or property entitled to the protection of this Government. They will not tolerate the search or stopping by cruisers in the rebel service of vessels of the United States, nor any other act which is only privileged by recognized belligerency.

"4. While asserting the right to capture and destroy the vessels in question, and others of similar character, if any aggression upon persons or property entitled to the protection of this Government shall recommend such action, we cannot admit the existence of any obligation to do so in the interest of Hayti or of the general security of commerce."

Mr. Fish, Sec. of State, to Mr. Bassett, Sept. 14, 1869. MSS. Inst., Hayti.

"The expedient of declaring a revolted national vessel to be a 'pirate' has often been resorted to among the Spanish American countries in times of civil tumult, and on late occasions in Europe. At the time of the Murcian rising, in 1873, the insurgents at Cartagena seized the Spanish iron-clads in harbor and cruised with them along the coast, committing hostilities. The Spanish Government proclaimed the vessels pirates, and invited their capture by any nation. A German naval commander then in the Mediterranean did in fact capture one of the revolted ships and claimed it as a German prize, but his act was disavowed. The rule is, simply, that a 'pirate' is a natural enemy of all men, to be repressed by any, and wherever found, while a revolted vessel is the enemy only of the power against which it acts. While it may be outlawed, so far as the outlawing state is concerned, no foreign state is bound to respect or execute such outlawry to the extent of treating the vessel as a public enemy of mankind. Treason is not piracy, and the attitude of foreign Governments towards the offender

may be negative merely, so far as demanded by a proper observance of the principle of neutrality."

Mr. Frelinghuysen, Sec. of State, to Mr. Langston, Dec. 15, 1883. MSS. Inst., Hayti; For. Rel., 1884.

"The Government of the United States cannot regard as piratical vessels manned by parties in arms against the Government of the United States of Colombia, when such vessels are passing to and from ports held by such insurgents, or even when attacking ports in the possession of the National Government. In the late civil war, the United States, at an early period of the struggle, surrendered the position that those manning the Confederate cruisers were pirates under international law. The United States of Colombia cannot, sooner or later, do otherwise than accept the same view. But, however this may be, no neutral power can acquiesce in the position now taken by the Colombian Government. Whatever may be the demerits of the vessels in the power of the insurgents, or whatever may be the status of those manning them, under the municipal law of Colombia, if they be brought by the act of the National Government within the operation of that law, there can be no question that such vessels, when engaged as above stated, are not, by the law of nations, *pirates*, nor can they be regarded as pirates by the United States."

Mr. Bayard. Sec. of State, to Mr. Becerra, Apr. 9, 1885. MSS. Notes, Colombia; For. Rel., 1885.

"The status of *purpose* or of *employment*, which the Government of Colombia seeks to create against such vessels by decreeing them to be pirates, is, of course, wholly distinct from their inherent status as *floating property*. On this latter point we are not as yet, adequately informed. The commanders of the naval vessels of the United States on the Colombian coast have, however, been told that if conclusive proof be shown that any vessels belonging to citizens of the United States have been unlawfully taken from them, the recovery of such property by the owners, or by others acting in their behalf, to the end of its restoration to their legitimate control, is warrantable."

*Ibid.*

"Pending these occurrences a question of much importance was presented by decrees of the Colombian Government, proclaiming the closure of certain ports then in the hands of the insurgents, and declaring vessels held by the revolutionists to be piratical and liable to capture by any power. To neither of these propositions could the United States assent. An effective closure of ports not in the possession of the Government, but held by hostile partisans, could not be recognized; neither could the vessels of insurgents against the legitimate sovereignty be deemed *hostes humani generis* within the precepts of international law, whatever might be the definition and penalty of their acts under the

municipal law of the state against whose authority they were in revolt. The denial by this Government of the Colombian propositions did not, however, imply the admission of a belligerent status on the part of the insurgents. The Colombian Government has expressed its willingness to negotiate conventions for the adjustment, by arbitration, of claims by foreign citizens arising out of the destruction of the city of Aspinwall by the insurrectionary forces."

President Cleveland, First Annual Message, 1885.

That vessels sent from foreign ports by insurgents having no ports of their own are pirates is argued by Mr. Seward, Sec. of State, to Mr. Dayton, Nov. 21, 1863. MSS. Inst., France.

On the other hand, it is no defense to an indictment against a citizen of the United States, for statutory piracy, for taking a privateer commission from foreign insurgents not recognized by us as belligerents, that the depredations charged were under the color of such commission.

1 Op., 251, Wirt, 1818.

Nor can this Government recognize as privateers, entitled to the immunities of such, vessels owned and manned by its own citizens, it being neutral, for an attack on a foreign or friendly power.

"The Government of the United States is prohibited by the laws of the Union from recognizing as a lawful Colombian privateer any vessel, commanded, officered, and manned chiefly by citizens of this Union."

Mr. Adams, Sec. of State, to Mr. Anderson, June 29, 1824. MSS. Inst., Ministers.

As to the question of cruisers of insurgents not recognized as belligerents, see *supra*, §§ 69, 70.

On April 24, 1885, the brigantine Ambrose Light, carrying the Colombian flag, and claiming to be commissioned as a vessel-of-war by "Pedroa Lara, governor of the provice of Baranquilla, in the United States of Colombia, with full powers conferred by the citizen president of the State," was seized by the United States gunboat Allianee about twenty miles to the westward of Cartagena, and was taken to New York for adjudication as a prize. The "Government," by whom the Ambrose Light was commissioned, while in possession of several important ports of Colombia, and blockading others, did not claim title under the titular Government of Colombia, acknowledged as such by the United States, but was organized by insurgents against that Government. On the hearing of the libel to procure the condemnation of the Ambrose Light, the proofs showed, according to the report of the case given in the Federal Reporter of December 8, 1885, (1) "that she had been sold to, and legally belonged to, Colente, one of the chief military leaders of the insurgents at Baranquilla;" (2) that "none of her officers or crew were citizens of the United States;" (3) that "she was engaged upon a hostile expedition against Cartagena, and designed to assist in the blockade and siege of that port by the rebels against the established Government;" (4) that she was instructed "to fight any Colombian vessel not showing the white flag with a red cross;" (5) that "Sabanilla and a few other adjacent sea-ports in the province of Baranquilla, including the city of

Baranquilla, had been for some months previous, and still were, under the control of the insurgents;" while (6) "the proofs did not show that any other depredations or hostilities were intended by the vessel than such as might be incident to the struggle between the insurgents and the Government of Colombia, and to the so-called blockade and siege of Cartagena."

It appears also that the correspondence between Mr. Becerra and Mr. Bayard was treated at the hearing as part of the evidence in the case. On this state of facts, Judge Brown, to adopt the statement in the carefully-drawn head-notes given in the Federal Reporter, held that "in the absence of any recognition of rebel belligerency, or of an existing state of war in Colombia, either by that Government or by any other nation, the rebel commission of their own vessel as a vessel-of-war was, in the eye of international law, unauthorized and void; that the seizure of the vessel as piratical was technically authorized by the law of nations; but that the implied recognition of an existing state of war in the Secretary's letter of the same date prevented any condemnation of the vessel; but that as her seizure was lawful at the time, her release should be ordered on the payment of the disbursements of the proceeding."

In a review of this decision by the Solicitor of the Department of State, published in the Albany Law Journal, for February 13, 1886, the following points are made:

"When we are notified, as we were in the present case, by a foreign sovereign that an armed insurrection is in existence within his domains, the fact is one of which we are bound to take notice. We cannot, it is true, give such insurgents hospitality in our ports; nor do we release their titular sovereign, as we would do in case we recognize their belligerency, from responsibility for their acts. But while such is the case we respond to such an announcement by applying to him and to them the rule of non-intervention in foreign disturbances on which our whole system of extraterritorial policy rests. * * * We recognize foreign insurgency by refusing to send our military and naval forces to attack its armies or its fleets, and by refusing to deliver up those concerned in it when they take refuge on our shores. We say in such cases to the titular Government, whether it be despotic or liberal, 'We cannot intervene to fight your battles, either on land or at sea; neither will we surrender political fugitives who have escaped from you to our ships or our shores.' But a recognition of foreign belligerency is a very different thing. It is never determined on until an insurrection has obtained permanency, and stands on something like settled parity with the Government it assails. Such a recognition is announced by a proclamation of neutrality, and is followed by placing insurgent and titular Governments on the same terms of access to the ports of the sovereign by whom the proclamation has been issued. Hence while in very many cases we have recognized foreign insurgencies, we have never recognized such insurgencies as belligerent until they have shown themselves, by long and enduring exhibition of strength, to be on something like a parity with the state against which they revolt. The Government of the United States unquestionably recognized the *insurgency* of the forces arrayed in April last against the Colombian titular Government. But it expressly declares that it did not recognize their *belligerency*. * * *

"I wish now to inquire what is the definition of piracy to be drawn from those who may really be considered standard authors in international law. It so happens that I have before me letters on this topic from Mr. Fiore, professor of international law at Naples; from Mr.

Westlake; from M. Martens, professor of international law at St. Petersburg; from Baron de Neumann, professor of international law at Vienna, and member of the Austrian House of Peers; and from M. Calvo, Argentine minister at Berlin. These gentlemen are all of them authors of high standing in international law, and are leading members of the Institute of International Law, in which I have the honor to be one of their associates. I sent them the note of Mr. Bayard to Mr. Becerra shortly after it was made public, and as is not unusual among the members of the institute, some of them were good enough to favor me with replies, written, I need scarcely say, some time before Judge Brown's decision was made known. In these replies the distinctions taken in Mr. Bayard's notes are unequivocally sustained. From M. Calvo's letter of June 5 last (and I believe I could cite no higher authority) I quote the following:

"'The government, the tranquillity and the existence of which are imperilled by rebellion, is sovereign, as no one denies, in punishing and repelling by all the forces it possesses the attacks directed against it; but it does not suffice that it should attach to these attacks the title of piracy, in order that the rebellion should be transformed, *ipso facto*, as regards foreign states, into a crime against the law of nations, punishable as such. These states can, at most, look on these acts as those of belligerents, especially if the rebellion is prolonged, assumes a serious form, and partakes clearly of the character of civil war. If the rebel ships do not limit themselves to attacking the Government or the forces of the Government against which they have rebelled, but commit acts of hostility or of damage against ships of other nations, these nations have then the right to obtain direct satisfaction by seizing them and inflicting the customary punishment on them, in conformity with the law of nations, or indirect, by handing them over to the Government whose allegiance they have thrown off by rebellion. It is then from this Government that the reparation is to be expected, which we have the right to ask for the wrong done, or the injury experienced. The note of Mr. Bayard of April 24, 1885, is one precedent more in favor of the liberal doctrines which are becoming more and more pronounced regarding the important question of blockade, and the diminution of the rights of belligerents in reference to those of neutrals, and to the liberty of intercourse and of navigation; and a tribute is due to the Government of Washington that it has constantly and faithfully taken the side of progress in this respect whenever it has found an opportunity.' * * *

"The works of the authors of which I speak, are of the highest rank among such standards, and the letters of the authors are the best interpreters of what their works say. But I pass these to take up two other authorities whom I select, because they undertake rather to give the sense of international jurists as a body rather than their own distinctive views.

"The first is Holzendorff in his Encyklopädie der Rechtswissenshaft, a work of singular accuracy and fullness. In this work we have the following:

"'*See-raub* (piraterie, piracy), ein Verbrechen, bestehend in dem räuberish gewaltsamen Angriff gegen Handelsschiffe auf hoher See.' Translating literally, this makes 'sea-robbery,' and the very title is significant, to consist in a forcible attack for purposes of robbery on merchant vessels on the high seas. He goes on to say that the offense is a crime by the law of nations; that the 'sea robber' is *hostis humani gen-*

*eris*, who may be tried in any state into which he may be brought, and when caught in the act, may be forthwith killed by the captor.

"Among the admirable qualities of the late Sir R. Phillimore not the least distinguished was the patient impartiality with which he collected the sense of that branch of the profession of which for years he was the leading English representative. And Sir R. Phillimore (1 Int. Law, 488) gives the following definition: 'Piracy,' he says, 'is an assault upon vessels navigated on the high seas committed *animo furandi*, whether the robbery or forcible depredation be effected or not, and whether or not it be accompanied by murder or personal injury.' He proceeds to quote Judge Story's statement in U. S. *v.* Smith (5 Wheat., 163), that 'whatever may be the diversity of definitions in other respects, all writers concur in holding that robbery or forcible depredations upon the sea, *animo furandi*, is piracy.' He cites further a ruling of 'the judge of the vice-admiralty court at Charleston, S. C., in 1718, that piracy is a robbery committed on the sea, and a pirate is a sea-thief.' He shows also that the ruling of Dr. Lushington, in the case of the Magellan pitates (10 Jurist, 1165) was based, not on the position that the offenders in question were insurgents who had not been recognized as belligerents, but on the proof that their depredations were directed against others than their titular sovereign. '*I think it does not follow*,' he quotes Dr. Lushington, in giving his judgment in that case, as saying, that '*because persons who are rebels and insurgents may commit against the ruling powers of their country acts of violence, they may not be, as well as insurgents and rebels, pirates also; pirates for other acts committed against other persons.*'"

The same view, it is held, is taken by Perels. (Seerecht, § 127.)

"President Woolsey holds that the Confederate privateers, even from the standpoint of the United States, were not pirates (Int. Law App., 3, note 12 to 4th ed.); and in section 137 of the third edition President Woolsey defines piracy in such a way as expressly to exclude acts of war by insurgents against their parent state. The same position was maintained with great ability and learning by the late Mr. W. B. Lawrence, who was a master in this branch of jurisprudence. (Lawrence's Wheaton, 209, 246, 247, 248, 256, and note, furnished by Mr. Lawrence, to Whart. Cr. Law (8th and 9th ed.), § 1861.)

"The definitions of Mr. D. D. Field (Int. Code, 82) and of Sir J. F. Stephen (Dig. Cr. Law, art. 104) expressly exclude attacks by insurgent vessels on their titular sovereign."

"In Hall's International Law, page 223, the law is thus stated:

"'It is generally said that one of the conditions of the piratical character of an act is the absence of authority to do it derived from any sovereign state. Different language would no doubt have been employed if sufficient attention had been earlier given to societies actually independent, though not recognized as sovereign. Most acts which become piratical through being done without due authority are acts of war when done under the authority of a state, and, as societies to which belligerent rights have been granted have equal rights with permanently established states for the purposes of war, it need scarcely be said that all acts authorized by them are done under due authority. Whether the same can be said of acts done under the authority of politically organized societies, which are not yet recognized as belligerent, may appear more open to argument, though the conclusion can hardly be different. Such societies being unknown to international law, they have no power to give a legal character to acts of any kind.

At first sight, consequently, acts of war done under their authority must seem to be at least technically piratical. But it is by the performance of such acts that independence is established and its existence proved. When done with a certain amount of success, they justify the concession of belligerent privileges; when so done as to show that independence will be permanent, they compel recognition as a state. It is impossible to pretend that acts which are done for the purpose of setting up a legal state of things, and which may in fact have already succeeded in setting it up, are piratical for want of an external recognition of their validity, when the grant of that recognition is properly dependent in the main upon the existence of such a condition of affairs as can only be produced by the very acts in question. It would be absurd to require a claimant to justify his claim by doing acts for which he may be hanged. Besides, though the absence of the competent authority is the test of piracy, its essence consists in the pursuit of private as contrasted with public ends. Primarily the pirate is a man who satisfies his personal greed or his personal vengeance by robbery or murder in places beyond the jurisdiction of a state. The man who acts with a public object may do like acts to a certain extent, but his moral attitude is different, and the acts themselves will be kept within well-marked bounds. He is not only not the enemy of the human race, but he is the enemy solely of a particular state. * * * The true view, then, would seem to be that acts which are allowed in war when authorized by a politically organized society are not piratical. Whether a particular society is or is not politically organized is a question of fact which must be decided upon the circumstances of the case.' Hall's Int. Law, 233 *ff.*

"Under Mr. Wheaton's definition, to make cruisers of insurgent Governments pirates, they must be 'depredators.' That this is all he meant by his definition, is clear when we take in connection with it his reference to United States *v.* Klintock (5 Wheat., 153), where the court, according to Mr. Wheaton's own head-note, declined to decide whether the term 'piracy' applies to 'a person acting with good faith under such a commission,' *i. e.*, a commission from 'a republic whose existence is unknown and unacknowledged.' Nor can we exclude from considering, as construing Mr. Wheaton's statement in his text-book, the note on piracy (in 5 Wheat., 167), to which he refers us; a note which binds Mr. Wheaton, the ostensible author, none the less completely from the fact that it was written for him, as it is now known, by Judge Story. In this admirable note we have a long series of definitions, nearly thirty in number, in all of which the essential feature of piracy is declared to be robbery on the high seas. So, according to this note, speak Grotius, the old Roman jurists, Bynkershoek, Azuni, Bacon, Martens, Rutherforth, Woodeson, Burlamaqui, Calvinus, Bouchard, Bonnemont, Ferrier, the authors of the Encyclopedie des Sciences (who define pirates as "bandits" of the sea), Valin, Straccha, Beawes, Molloy, Marshall, the author of Viner's Abridgment, Comyn, Coke, Targa, Blackstone, and Hawkins. The definition of Hawkins I here copy, not only because it is the most accurate, but because it has been virtually adopted by Sir J. F. Stephen:

"'A pirate, at the common law, is a person who commits any of those acts of piracy, robbery, and depredation upon the high seas which if committed upon land would have amounted to felony there.' And to this the note adds this comment: 'The intention of Hawkins must have been to use the phrase "at common law" in its most comprehen-

sive sense; in which sense the law of nations itself is part of the common law.'

The conclusions given are as follows:

"1. We ought not, in cases of insurrections in foreign countries, to acknowledge insurgents as belligerents until the insurrection establishes itself on such a basis of apparent permanency to put it, at least for a time, on an apparent parity with the parent state. When such a condition of things is manifest, then a proclamation of neutrality should be issued, and the insurgent vessels admitted to the same rights in our ports as are those of the Government which they assail.

"2. We ought not, in any case, to interfere to suppress insurrections in foreign states by attacking either the land or the maritime forces of the insurgents. To do so would be to cast aside that policy of non-interference in foreign systems which we have heretofore followed with scrupulous conscientiousness, would render us in most cases the supporters of despotisms as atrocious as those of Yturbide, of Francia, or of King Bomba, and would, when the interference was attempted on behalf of the weaker Southern American Governments, throw such Governments permanently on our hands, and thus subject us to burdens our system could not bear. To this policy of interference there should be but two exceptions. We should interfere to prevent any European power from effecting a new lodgment on this continent. We should interfere also on the Isthmus when necessary to carry out our treaty guarantee of free transit. But beyond this our interference cannot go. No matter how vehement may be the decrees of foreign Governments declaring insurgents to be traitors and pirates, those decrees it should not be for us to execute."

Mr. Dana (Dana's Wheaton, 193, note) adds the following to Mr. Wheaton's definition of piracy:

"It must be admitted that the attempted definitions of piracy are unsatisfactory; some being too wide and some too narrow. The author's description, rather than definition, is perhaps the most adequate. Some writers, and even judges, seem to have treated the phrase '*hostis humani generis*,' as if it were a definition of piracy. Dr. Tindal (Howell's St. Tr., xii, 1271, 1272, note), in the case of the privateers of James II, reports this point as made and overruled, and says: 'It is neither a definition, nor as much as a description of a pirate, but a theoretical invective.' It is true, that a pirate, *jure gentium*, can be seized and tried by any nation, irrespective of his national character or that of the vessel on board which, against which, or from which the act was done. The reason of that must be that the act is one over which all nations have equal jurisdiction. This can result only from the fact that it is committed where all have a common, and no nation an exclusive, jurisdiction, *i. e.*, upon the high seas; and, if on board ship, and by her own crew, then the ship must be one in which no national authority reigns. The criminal may have committed but one crime, and intended but one, and that against a vessel of a particular nation; yet, if done on the high seas, under certain circumstances hereafter to be referred to, he may be seized and tried by any nation. In such a case it cannot be necessary to satisfy the court affirmatively, as a fact, that he had a purpose to plunder vessels of all nations, or vessels irrespective of nationality; nor would the court be driven to an artificial presumption of law contrary to the facts in the case, that such general hostile purpose existed.

"On the other hand, that is too wide a definition which would embrace all acts of plunder and violence, in degree sufficient to constitute piracy, simply because done on the high seas. As every crime may be committed at sea, piracy might thus be extended to the whole criminal code. If an act of robbery or murder were committed upon one of the passengers or crew by another in a vessel at sea, the vessel being at the time, and continuing, under lawful authority, and the offender were secured and confined by the master of the vessel to be taken home for trial—this state of things would not authorize seizure and trial by any nation that chose to interfere, or within whose limits the offender might afterwards be found."

In Mr. Fish's note to Admiral Polo de Bernabé, April 18, 1874 (MSS. Notes, Spain (For. Rel.), 1874), he adopts Mr. Dana's note, as given above, accepting that definition, and closing with the words, "in short, they must be in the predicament of outlaws." Hence, those concerned in the enterprise of the Virginius were not pirates at common law.

The case of the Huascar, which is sometimes referred to in this relation, is as follows:

The crew of a Peruvian monitor, the Huascar, anchored at Callao, revolted on May 6, 1877, and declared for the insurgent Government of Pierola. The Huascar proceeded to sea without opposition from other Peruvian vessels in the harbor. On May 8 the titular Government of Peru issued a decree calling the Huascar crew "rebels," and authorizing her capture. The Huascar then stopped several British vessels, taking out of one of them two officers who were going to Peru to enter Government service. The British admiral on those coasts being advised of these proceedings, and also of the seizure of certain lighters of coal belonging to British subjects, sent the Shah, a British cruiser, to sea to seize the Huascar. An engagement took place, which was only partially successful, the Huascar ultimately eluding her assailant. The Huascar subsequently surrendered to Peru, and Peru claimed indemnity from Great Britain for the conduct of the British admiral. The law officers of the Crown, on the question being referred to them, held that as the Huascar was sailing under no national flag, and was an irresponsible depredating cruiser, approved the conduct of the admiral. When the question came up before the House of Commons, the attorney-general maintained that the Huascar was a rover committing depredations on foreign shipping. It would have been otherwise, he conceded, if there had been an existing rebellion entitled to the rights of belligerency.

1 Halleck's Int. Law, note (Baker's ed.), 389. See criticism in 2 Calvo, 3d ed., 302.

As to *status* of United States citizens who enlist in the service of an insurgent power, see *supra*, § 69.

### II. *MUNICIPAL DEFINITIONS NOT EXTRATERRITORIAL.*

### § 382.

A municipal definition of piracy, expanding or contracting the definition of the law of nations, has no extraterritorial effect.

See *supra*, § 9, and cases cited in §§ 380, 381.

The British position that American citizens employed on French privateers in the war with revolutionary France were pirates, is in conflict with settled principles of international law.

Mr. Randolph, Sec. of State, to Mr. Hammond, Oct. 23, 1794. MSS. Notes, For. Leg.

No prosecutions for piracy were instituted against prisoners taken from such privateers.

For British statute, see *supra*, § 381.

The French decree of June 6, 1803, "importing that every privateer of which two-thirds of the crew should not be natives of England, or subjects of a power the enemy of France, shall be considered a pirate," is in contravention of the law of nations.

Mr. Madison, Sec. of State, report Jan. 25, 1806. MSS. Dom. Let.

### III. *PRIVATEERS.*

#### (1) WHO ARE.

§ 383.

As to arming of merchant vessels, see *supra*, § 40.

"The term privateer is understood not to extend to vessels armed for merchandise and war, commonly called with us *letters of marque*, nor, of course to vessels-of-war in the immediate service of the Government of either of the powers at war."

Mr. Hamilton's circular of Aug. 4, 1793. 1 Am. St. Pap. (For. Rel.), 140.

"Though a merchant vessel has arms to defend herself in time of war, in the course of her regular commerce, this no more makes her a privateer than a husbandman following his plow in time of war, with a knife or pistol in his pocket, is thereby made a soldier."

Mr. Jefferson, Sec. of State, to Mr. Morris, Aug. 16, 1793. MSS. Inst., Ministers. 1 Wait's St. Pap., 147; 1 Am. St. Pap. (For. Rel.), 167.

Under the general term "privateers" are enumerated the following: (1) Naval officers taking charge of merchant vessels and cruising under the direction of their sovereign in time of war. (2) Officers of merchant vessels, subjects of a belligerent state, cruising under commission from their sovereign in time of war. (3) Volunteer officers of merchant vessels cruising against the enemy of their sovereign, but without any commission from their sovereign. (4) Subjects of neutral states taking out, for the purpose of preying on the commerce of one belligerent, commissions for this purpose from the other belligerent.

Of these Nos. (1) and (2) do not technically fall under the head of "privateers" according to the position taken by the British Government in 1870, as stated in the text. If so, it is hard to see how officers of merchant ships, volunteering as cruisers for their sovereign, can be regarded as pirates by the law of nations. In the final uprising against Napoleon in Germany numberless parties of such volunteers took part; and in our own Revolutionary War, volunteer local troops, in periods of

great emergency, frequently took the field, and were recognized as belligerents, though without commission from the sovereign. "Privateers" falling under the head of No. (4), however, must be regarded as mere adventurers in search of plunder, and the recognition of such as belligerents, if not prohibited by the law of nations, is prohibited by the distinctive laws of the United States. This distinction is taken by Mr. Butler-Johnstone in his Handbook of Maritime Rights (London, 1876), 12. (See *infra*, § 384.)

By Swift, a privateer is defined to be an armed vessel, belonging to one or more private individuals, licensed by Government to take prizes from an enemy.

In Wilhelm's Military Dictionary, (Phil., 1881), the name "Partisan" is stated to be given to "small corps detached from the main body of an army, and acting independently against the enemy. In partisan warfare much liberty is allowed to partisans." But if so in military, why not in naval warfare? The objection is to the plunder of private property on the high seas, against which the United States have always remonstrated, not to the particular agency employed.

In McCulloch's Commercial Dictionary, London, 1882, privateers are defined to be "ships-of-war fitted out by private individuals to annoy and plunder the enemy. But before commencing their operations, it is indispensable that they obtain letters of marque and reprisal from the Government whose subjects they are, authorizing them to commit hostilities, and that they conform strictly to the rules laid down for the regulation of their conduct. All private individuals attacking others at sea, unless empowered by letters of marque, are to be considered pirates."

Whart. Com. Am. Law, § 201, note.

"A private armed vessel or privateer is a vessel owned and officered by private persons, but acting under a commission from the state, usually called letters of marque. It answers to a company on land raised and commanded by private persons, but acting under rules from the supreme authority, rather than to one raised and acting without license, which would resemble a privateer without commission. The commission, on both elements, alone gives a right to the thing captured, and insures good treatment from the enemy. A private vessel levying war without such license, although not engaged in a piratical act, would fare hardly in the enemy's hands."

Woolsey's Int. Law, § 121.

"By the laws of most of the nations of Europe, the owners of privateers are required to give bond and security, in amount from $8,000 to $12,000, to comply with the regulations concerning their cruising, and to prevent them from committing illegal acts."

1 De Bow's Rev., 517.

A privateer's commission fraudulently obtained is, as to vesting the interests of prize, utterly void. But a commission may be lawfully obtained, although the parties intended to use it as a cover for illegal purposes. If a commission is fairly obtained, without imposition or fraud upon the officers of Government, it is not void merely because the parties privately intend to violate, under its protection, the laws of

their country. A collusive capture conveys no title to the captors, not because the commission is thereby made void, but because the captors thereby forfeit all title to the prize property.

The Experiment, 8 Wheat., 261. See *supra*, § 381.

(2) NOT PIRATES BY LAW OF NATIONS.

§ 384.

Privateers of powers recognized as belligerents are not pirates by the law of nations.

Harlan, J., Ford *v.* Surget, 97 U. S. 619; citing Dole. *v.* Ins. Co., 6 Allen, 373; Planters' Bank *v.* Union Bank, 16 Wall., 483; S. P., U. S. *v.* Baker, 5 Blatch., 6; Fifield *v.* Ins. Co., 47 Pa. St., 166, and other cases.

"The right to resort to privateers is as clear as the right to use public armed ships, and as incontestable as any other right appertaining to to belligerents."

Mr. Marcy, Sec. of State, to Mr. Sartiges, July 28, 1856. MSS. Notes, France.

A privateer cannot be regarded as a pirate because she is manned and operates under an ordinance authorizing foreigners to fit out and take commissions as privateers from the state issuing the ordinance, and to take enemy's property out of neutral ships.

5 J. Q. Adams's Memoirs, 383–385.

"That two points in the declaration (of Paris) upon which, as already remarked, considerable light has been thrown during the Franco-German war of 1870, are the interpretation that is to be given to the term 'la course,' which occurs in the first resolution, and likewise the interpretation to be given to the term 'contraband of war,' which occurs in the second and third resolutions. The phrase 'la course' dates from a period when it was the practice of states, whenever there was occasion to have recourse to an armed expedition on the high seas against another state, to grant letters of marque to the commanders of private cruisers, authorizing them to make reprisals against the vessels and cargoes of the subjects of the other state. By-and-by commissions of war come to be issued by sovereign princes to private ships fitted out either by their own subjects or by the subjects of other powers, so that it was competent for a power which had no public ships-of-war of its own to harass the commerce of its enemy by issuing letters of marque and reprisals not merely to vessels of its own subjects, but to the vessels of the subjects of other powers, and when commissions of war came to be granted to both classes of such vessels in the sixteenth century, they had lawful authority to exercise belligerent rights against neutrals as well as against the enemy. It can well be imagined, as the crews of such ships were brought together by the prospect of plunder, and were under no naval discipline, that when a single corsair or privateer hove in sight on the high seas, it caused a greater terror to a neutral merchant ship than a fleet of public ships-of-war.

"In the present century, however, as the practice of states in intrusting their defense on land to regiments of foreign origin serving them for pay has generally been discarded, so the practice of granting

commissions of war to the subjects of foreign states serving for plunder has fallen into disrepute, to say nothing of the license of maritime warfare so conducted being intolerable to the civilization of the present age. That a main object, which the two allied powers in the war of 1854 against Russia had in view, was to put an end to the practice of belligerents issuing letters of marque and reprisals to the subjects of neutral states, is confirmed by the memoir of M. Drouyn de Lhuys, already mentioned.

"'What influenced especially the English Government was the fear of America inclining against us, and lending to our enemies the co-operation of her hardy volunteers. The maritime population of the United States, their enterprising marine, might furnish to Russia the elements of a fleet of privateers, which, attached to its service by letters of marque and covering the seas with a network, would harass and pursue our commerce even in the most remote waters. To prevent such a danger the Cabinet of London held it of importance to conciliate the favorable disposition of the Federal Government. It had conceived the idea of proposing to it at the same time as to the French Government and to all the maritime states, the conclusion of an arrangement, having for its object the suppression of privateering, and permitting to be treated as a pirate every one, who in time of war should be found furnished with letters of marque. This project, which was in the end abandoned, is evidence of the disquiet felt by England. We thought, as they did, respecting privateering, a barbarous practice which marked too often, under an appearance of patriotic devotion, violence excited by the allurement of lucre. At former epochs, justified by the fury of war, it was able in the midst of numerous iniquities, to give rise to some heroic action, to transmit even to history some glorious names. But we considered it to be incompatible henceforth with the usages of civilized nations, which cannot allow private persons to be armed with the rights of war, and which reserve their terrible application to the public power of established states.'

"Such was the object in view of the allied powers in the war against Russia, according to the highest authority. We find also a statement from the same authority, namely, the French minister for foreign affairs, in his report to the Emperor of the French, of 29th March, 1854, that the motive of the allied powers was to mitigate the disastrous effects of war upon the commerce of neutral nations and to relieve it from all unnecessary shackles, and accordingly the Emperor of the French published a declaration, at the conclusion of which he announced that he had no intention to deliver 'lettres de marque pour autoriser les armements en course.' On the other hand, the British Government issued a corresponding declaration on 28th March, 1854, announcing that it was not the intention of the Queen of the United Kingdom to issue letters of marque for the commissioning of privateers.

"No occasion for the interpretation of the first article of the declaration of Paris of 1856 arose in its application to a war, in which both the belligerent parties were signatories of that declaration, before the Franco-German war of 1870, when the Prussian Government issued a decree (24th July, 1870) relating to the constitution of a volunteer naval force. Under that decree the King of Prussia invited all German seamen and shipowners to place themselves and their forces and ships suitable thereto at the service of the fatherland. The officers and crews were to be enrolled by the owners of the ships and were to enter into the federal navy for the continuance of the war, and to wear

its uniform and badge of rank, to acknowledge its competence and to take an oath to the articles of war. The ships were to sail under the federal flag and to be armed and fitted out for the service allotted to them by the federal royal navy. The ships destroyed in the service of their country were to be paid for to their owners at a price taxed by a naval commission, and a sum was to be paid by the state as a deposit, when the ships were placed at the service of the state, which, at the end of the war, when the ships were restored to their owners, was to be reckoned as hire. The French Government, regarding the institution by Prussia of a volunteer naval force as the revival of privateering under a disguised form, lost no time in calling the attention of the British Government to the Royal Prussian decree, as instituting an auxiliary marine contrary to Prussia's engagements under the declaration of 1856. Earl Granville, on behalf of the British Government, referred the matter to the law officers of the Crown, and in accordance with their opinion returned for answer, 'that there was a substantial difference between the proposed naval volunteer force sanctioned by the Prussian Government and the system of privateering which, under the designation of "la course," the declaration of Paris was intended to suppress, inasmuch as the vessels referred to in the Royal Prussian decree would be for all intents and purposes in the service of the Prussian Government, and the crews would be under the same discipline as the crews on board vessels belonging permanently to the federal navy.' Upon these considerations the British Government could not object to the decree of the German Government as infringing the declaration of Paris. (Brit. and For. St. Pap., lxi, 692. Perels, Manuel de droit maritime international, 195; Paris, 1884.)

"There is not an unanimity of opinion amongst text writers on international law on the subject of this Prussian auxiliary marine, as to whether its institution was in conflict with the declaration of Paris or not. M. Charles Calvo, ancien ministre, considers that vessels equipped in accordance with the Prussian decree may be regarded as privateers of an aggravated character, seeing that the owners are not required to give security for their good conduct (Le droit international, 3me ed., tome iii, 303; Paris, 1880); and Mr. W. E. Hall, in his recent work on International Law, p. 455, observes that 'unless a volunteer navy could be brought into closer connection with the state than seems to have been the case in the Prussian project, it would be difficult to show that its establishment did not constitute an evasion of the declaration of Paris.' But neither of these eminent publicists seem to have given sufficient weight to the provisions of the Prussian decree, under which the officers and crew were required to enter into the federal navy for the continuance of the war, were to wear its uniform, and to take an oath to the articles of war. Further, the vessels were to be fitted out by the state, and were to sail under the public flag of the state.

"On the other hand, Professor Geffcken, in his recent edition of Heffter's Droit International de l'Europe (Paris, 1883), p. 278, and Dr. Charles de Boeck, in his masterly treatise on enemy's property under an enemy's flag, have recognized a broad distinction between such an auxiliary force, which under the Royal decree was intended to be employed solely against the enemy, and privateers, which may be of no matter what nationality, and whose main object it has always been to prey upon neutral commerce, keeping up the worst traditions of private warfare under cover of letters of marque. It should be observed that the Prussian Government never gave practical effect to the Royal decree on

this subject, and that no vessel of the 'seewehr,' as instituted in 1870, ever put to sea. (Staats Archiv., 4345, 4346.)"

Sir T. Twiss, Belligerent Rights, &c., London, 1884. See as to action of German Government, *infra*, § 385.

"On the sea all the subjects of one belligerent are the enemies of all the subjects of the other, and entitled to do all such acts as war justifies between the belligerent powers themselves. Hence, whilst there may be impediments in the way of a private uncommissioned ship retaining the captures it may make, or disposing of them in any way it may please, those impediments arise from the enactments of municipal law, and are not imposed by international law, which in no way affects this question. But, secondly, if a private ship belonging to one of the belligerents attack and capture the vessel of a neutral power, without a commission of war, the case is widely different. Here the attacking vessel may be treated as a pirate by the vessel attacked, or by any vessel coming to her aid."

Abdy's Kent (1878), 227.

(3) SUSTAINED BY POLICY OF THE UNITED STATES.

§ 385.

Under the construction adopted by General Washington's administration of the 19th article of the French-American treaty "*privateers* only of the enemies of France were absolutely excluded from our ports, except, as before, when compelled to enter through stress of weather, pursuant to the 22d article of the treaty, while the *national* ships of *any other nation* were entitled to an asylum in our ports, excepting those which should have made prize of the people or property of France *coming in with their prizes.*"

Mr. Pickering, Sec. of State, to Mr. Pinckney, Jan. 16, 1797. MSS. Inst., Ministers.

By the act of July 9, 1798, privateers were required to give security in $14,000, if the vessel carried more than one hundred and fifty men, and in half that sum if she carried less.

"The United States Government, in 1812, issued the following instructions to commanders of American privateers:

"'The high seas referred to in your commission you will understand generally to refer to low-water mark; but with the exception of the space within one league, or three miles, from the shore of countries at peace, both with Great Britain and the United States. You may, nevertheless, execute your commission within that distance of the shore of a nation at war with Great Britain, and even on the waters within the jurisdiction of such nation, if permitted so to do. You are to pay the strictest regard to the rights of neutral powers and the usages of civilized nations, and in all your proceedings toward neutral vessels you are to give them as little molestation or interruption as will consist with the right of ascertaining their neutral character, and of detaining and bringing them in for regular adjudication in the proper cases. You are particularly to avoid even the appearance of using force or seduction, with a view to deprive such vessels of their crew or of their passengers, other than persons in the military service of the enemy. Towards enemy's vessels and their crews you are to proceed, in exercising the

rights of war, with all the justice and humanity which characterize the nation of which you are members. The master and one or more of the principal persons belonging to the captured vessel are to be sent, as soon after the capture as may be, to the judge, or judges, of the proper court of the United States, to be examined upon oath touching the interest or property of the captured vessel and her lading; and at the same time are to be delivered to the judge or judges all passes, charter-parties, bills of lading, invoices, letters, and other documents and writings found on board; the said papers to be proved by affidavit of the commander of the capturing vessel, or some other person present at the capture, to be produced as they were received, without fraud, addition, subduction, or embezzlement.'"

2 Halleck's Int. Law (Baker's ed.), 13 *ff.* See, on instructions to privateers of the United States, the Mary and Susan, 1 Wheat., 46. See 2 Wheat., (App.) 80.

In Mr. Gallatin's speech of February 10, 1797, he advocates privateering as "our only mode of warfare against European nations at sea.'

Adams's Gallatin, 170.

"Privateers will find their own men and money. Let nothing be spared to encourage them. They are the dagger which strikes at the heart of the enemy—their commerce."

Mr. Jefferson to Mr. Monroe, Jan. 1, 1815. 6 Jeff. Works, 409.

"With regard to the ideas suggested in your note of 22d of March of a common agreement to be adopted by all Governments, or by several in amity with each other, to consider as a pirate every privateer with a commission delivered with blanks left for the names, unlimited in point of time, or whose captain, and at least half of its crew, should not be natives of the country under whose flag the privateer shall be navigated, I would submit to your enlightened consideration that, independently of the question whether all or any of the nations of Europe are prepared to agree upon such a mutual stipulation, there might be great difficulty to the admission of the principle in the code of the United States. By the laws of nations the punishment denounced against the crime of piracy is capital; a severity which, by the institutions of the United States, is confined to very few crimes of the most atrocious character. It would scarcely be compatible with the sentiments prevailing in this nation to extend that heaviest of all penalties to offenses the malignity of which might be so different in degree according to the various circumstances under which they might be perpetrated."

Mr. Adams, Sec. of State, to Mr. de Neuville, Apr. 15, 1819. MSS. Notes, For. Leg.

"The issuing of letters of marque and reprisal is an act of high sovereign authority. Under the Constitution of the United States this power is intrusted alone to Congress. A declaration of war, without a special provision for the purpose, contained in the act, does not confer upon the President this authority. Whenever civilized Govern-

ments resort to this expedient to annoy their enemies, they adopt the regulations and restrictions necessary to prevent or punish abuses almost necessarily arising from the grant to private individuals of the authority to make war upon the ocean. Responsible securities are required in such cases from the commanders of privateers, to prevent them from abusing their high trust. By means such as these the rights of the citizens and subjects of the power granting the commission, as well as those of neutrals, are maintained, and the rights of war, according to the practice of civilized nations, are secured even to the enemy. These precautions are necessary to prevent such commissions from falling into the hands of free-booters, slave-traders, and pirates prepared to violate all laws, human and divine, in the pursuit of plunder.

"What, then, must be thought of a Government, in the nineteenth century, which, disregarding all its high duties, sends its agents abroad with hundreds of blank commissions to privateers, to be sold to all the wretches upon earth, base enough to make the purchase? The high prerogatives of sovereign powers are thus transferred to the lowest agent, who is authorized to fill up the blank in the commission, by inserting the name of the commander of the privateer. Well did the President observe, in his last annual message to Congress, that, 'as the preliminaries required by the practice of civilized nations for commissioning privateers, and regulating their conduct, appear not to have been observed, and as these commissions are in blank, to be filled up with the names of citizens and subjects of all nations who may be willing to purchase them, the whole proceeding can only be construed as an invitation to all the freebooters upon earth, who are willing to pay for the privilege, to cruise against American commerce.' * * *

"This Government cannot recognize the lawful existence of Mexican privateers in the Mediterranean. Those assuming this name have not received their commissions in Mexico, but in friendly countries, where to grant or to accept them was a violation of neutral rights; they do not belong to Mexican citizens, and their crews are composed chiefly of Spanish subjects, who, by the act of accepting such commissions, become pirates. These corsairs take to the seas, under color of commissions issued in blank and filled up in a Spanish port by some inferior agent, from whom they have purchased the privilege to plunder American vessels. Among their crews will be found pirates, slave traders, and freebooters of almost every country, except Mexico herself, ready to prey upon the commerce of all nations, when this can be done with impunity. The character and the interests of all Christendom require that they should not receive the countenance of any civilized nation.

"Our vessels of war in the Mediterranean will be ordered to seize and send home for trial as pirates, under the treaty of 1795 and the act of March 3, 1847, all Spanish subjects who have accepted and acted under such Mexican commissions."

Mr. Buchanan, Sec. of State, to Mr. Saunders, June 13, 1847. MSS. Inst., Spain.

"*Thursday, March* 16, 1854.

"Called at the foreign office by the invitation of Lord Clarendon. He presented me a printed treaty in blank, which he proposed should be executed by Great Britain, France, and the United States. The chief object of it was that all captains of privateers and their crews should be considered and punished as pirates, who, being subjects or citizens of one of the three nations who were neutral, should cruise against either of the others when belligerent. The object undoubtedly was to prevent Americans from taking service in Russian privateers during the present war. We had much conversation on the subject, which I do not mean to repeat, this memorandum being merely intended to refresh my own memory. His lordship had before him a list of the different treaties between the United States and other nations on this subject.

"I was somewhat taken by surprise, though I stated my objections pretty clearly to such a treaty. Not having done justice to the subject, in my own opinion, I requested and obtained an interview for the next day, when I stated them more fully and clearly. The heads were as follows:

"1. It would be a violation of our neutrality in the war to agree with France and England that American citizens who served on board Russian privateers should be punished as pirates. To prevent this, Russia should become a party to the treaty, which, under existing circumstances, was impossible.

"2. Our treaties only embraced a person of either nation who should take commissions as privateers, and *did not extend to the crew*. Sailors were a thoughtless race, and it would be cruel and unjust to punish them as pirates for taking such service, when they often might do it from want and necessity.

"3. The British law claims all who are born as British subjects to be British subjects forever. We naturalize them and protect them as American citizens. If the treaty were concluded, and a British cruiser should capture a Russian privateer with a naturalized Irishman on board, what would be the consequence? The British law could not punish him as an American citizen under the treaty, because it would regard him as a British subject. It might hang him for high treason; and such an event would produce a collision between the two countries. The old and the dangerous question would then be presented in one of its worst aspects.

"4. Whilst such a treaty might be justly executed by such nations as Great Britain and the United States, would it be just, wise, or humane to agree that their sailors who took service on board a privateer should be summarily tried and executed as pirates by several powers which could be named?

"5. *Cui bono* should Great Britain make such a treaty with France during the existing war. If no neutral power should enter into it with them, it could have no effect during its continuance.

"6. The time might possibly come when Great Britain, in a war with the despotisms of Europe, might find it to be exceedingly to her interest to employ American sailors on board her privateers, and such a treaty would render this impossible. Why should she unnecessarily bind her hands?

"7. The objections of the United States to enter into entangling alliances with European nations.

"8. By the law of nations, as expounded both in British and American courts, a commission to a privateer, regularly issued by a belligerent

nation, protects both the captain and the crew from punishment as pirates. Would the different commercial nations of the earth be willing to change this law as you propose, especially in regard to the crew? Would it be proper to do so in regard to the latter?

"After I had stated these objections at some length on Friday, the 17th of March, Lord Clarendon observed that when some of them were stated the day before, they had struck him with so much force after reflection, that he had come to the office from the House of Lords at night and written them down and sent them to Sir James Graham. In his own opinion the treaty ought not to be concluded, and if the Cabinet came to this conclusion the affair should drop, and I agreed I would not write to the Department on the subject. If otherwise, and the treaty should be presented to the Government of the United States, then I was to report our conversation."

Memoranda of Mr. Buchanan, minister at London. 2 Curtis' Buchanan, 128.

"In answer (to Lord Clarendon) I admitted that the practice of privateering was subject to great abuses; but it did not seem to me possible, under existing circumstances, for the United States to agree to its suppression, unless the naval powers would go one step further, and consent that war against private property should be abolished altogether upon the ocean, as it had already been upon the land. There was nothing really different in principle or morality between the act of a regular cruiser and that of a privateer in robbing a merchant vessel upon the ocean, and confiscating the property of private individuals on board for the benefit of the captor. But how would the suppression of privateering, without going further, operate upon the United States? Suppose, for example, we should again unfortunately be engaged in a war with Great Britain, which I earnestly hope might never be the case, to what a situation must we be reduced if we should consent to abolish privateering? The navy of Great Britain was vastly superior to that of the United States in the number of vessels-of-war. * * * The only means which we would possess to counterbalance in some degree their far greater numerical strength would be to convert our merchant vessels cast out of employment by the war into privateers, and endeavor, by their assistance, to inflict as much injury on British as they would be able to inflict on American commerce."

Mr. Buchanan, minister at London, to Mr. Marcy, Mar. 24, 1854. MSS. Dispatches, Gr. Brit. House Ex. Doc. 103, 33d Cong., 1st sess.

"The King of Prussia entirely approves of the project of a treaty to the same effect (as to protection of private property at sea) submitted to him, but proposes an additional article providing for the renunciation of privateering. Such an article, for most obvious reasons, is much desired by nations having naval establishments, large in proportion to their foreign commerce. If it were adopted as an international rule, the commerce of a nation having comparatively a small naval force, would be very much at the mercy of its enemy, in case of war with a power of decided naval superiority. The bare statement of the condition in which the United States would be placed, after having surrendered the right to resort to privateers, in the event of war with a belligerent of naval supremacy, will show that this Government could never listen to such a proposition. The navy of the first maritime power in

Europe is at least ten times as large as that of the United States. The foreign commerce of the two countries is nearly equal, and about equally exposed to hostile depredations. In war between that power and the United States, without resort on our part to our mercantile marine, the means of our enemy to inflict injury upon our commerce would be tenfold greater than ours to retaliate. We could not extricate our country from this unequal condition, with such an enemy, unless we at once departed from our present peaceful policy, and became a great naval power. Nor would this country be better situated, in war with one of the secondary naval powers. Though the naval disparity would be less, the greater extent, and more exposed condition of our wide spread commerce, would give any of them a like advantage over us.

"The proposition to enter into engagements to forego resort to privateers, in case this country should be forced into war with a great naval power, is not entitled to more favorable consideration than would be a proposition to agree not to accept the services of volunteers for operations on land. When the honor or the rights of our country require it to assume a hostile attitude, it confidently relies upon the patriotism of its citizens, not ordinarily devoted to the military profession, to augment the Army and the Navy, so as to make them fully adequate to the emergency which calls them into action. The proposal to surrender the right to employ privateers is professedly founded upon the principle that private property of unoffending non-combatants, though enemies, should be exempt from the ravages of war; but the proposed surrender goes but little way in carrying out that principle, which equally requires that such private property should not be seized or molested by national ships-of-war. Should the leading powers of Europe concur in proposing, as a rule of international law, to exempt private property upon the ocean from seizure by public armed cruisers, as well as by privateers, the United States will readily meet them upon that broad ground."

President Pierce, Second Annual Message, 1854.

"Both Great Britain and France, as well as Russia, feel much concerned as to the course which our citizens will take in regard to privateering. The two former powers would at this time most readily enter into conventions stipulating that the subjects or citizens of the party being a neutral, who shall accept commissions or letters of marque, and engage in the privateer service, the other party being a belligerent, may be treated as pirates. A stipulation to this effect is contained in several of our treaties, but I do not think the President would permit it to be inserted in any new one. His objection to it does not arise from a desire to have our citizens embark in foreign belligerent service, but on the contrary, he would much regret to see them take such a course. Our laws go as far as those of any other nation, I think further, in laying restraints upon them in regard to going into foreign privateer service. This Government is not prepared to listen to any proposition for

a total suppression of privateering. It would not enter into any convention whereby it would preclude itself from resorting to the merchant marine of the country in case it should become a belligerent party."

Mr. Marcy, Sec. of State, to Mr. Buchanan, Apr. 13, 1854. MSS. Inst., Gr. Brit.

"The views of the President on the proposal by Prussia to add a provision against granting letters of marque to privateers, are briefly presented in his annual message to Congress of the 4th instant, a copy of which accompanies this note. Limited as that proposal is, the President is unwilling to accede to it.

"If a stipulation in regard to the individual property of the citizens or subjects of powers engaged in hostilities as comprehensive as that suggested in the message had any chance of being generally acceptable, he would agree to add it to those contained in the draft. As a provision in any form to renounce the right of granting letters of marque or of seizing private property on the high seas by public armed cruisers would undoubtedly embarrass and probably defeat the attempt to secure the general recognition of the essential neutral rights proposed by the convention, the President sincerely hoped that His Majesty the King of Prussia would agree to it in the form in which it has been presented to him by the United States."

Mr. Marcy, Sec. of State, to Baron Gerolt, Dec. 9, 1854. MSS. Notes, Prussia.

"Some of the powers which are parties to that 'declaration,' and many which are invited to concur in it, are under solemn treaty stipulations with the United States, and it is presumed they are with other nations, in which the right to resort to privateers is not only recognized, but the manner of employing them is regulated with great particularity. How the proposed new engagement can be reconciled with the faithful observance of existing treaty stipulations on the subject cannot be easily perceived.

"I shall not, in this dispatch, remark upon the incompatibility of these obligations, nor shall I now exhibit the views which this Government entertains of the fatal doctrine now attempted to be introduced into the maritime code, to most commercial nations, and especially to those which are not burdened, or may not choose to burden themselves, with large naval establishments.

"The right of a commercial state, when unhappily involved in war, to employ its mercantile marine for defense and aggression, has heretofore proved to be an essential aid in checking the domination of a belligerent possessed of a powerful navy. By the surrender of that uncontested right one legitimate mode of defense is parted with for a like surrender only in form by a strong naval power, but in effect the mutual surrender places the weaker nation more completely at the mercy of the stronger."

Mr. Marcy, Sec. of State, to Mr. Gadsden, July 14, 1856. MSS. Inst., Mex.; Mr. Marcy, Sec. of State, to Mr. Seibels, July 14, 1856. MSS. Inst., Belgium.

"The policy of the law which allows a resort to privateers has been questioned for reasons which do not command the assent of this Government. Without entering into a full discussion on this point, the undersigned will confront the ordinary and chief objection to that policy by an authority which will be regarded with profound respect, particularly in France. In a commentary on the French ordonnance of 1668, Valin says:

"'However lawful and time-honored this mode of warfare may be, it is nevertheless disapproved of by some pretended philosophers. According to their notions such is not the way in which the state and the sovereign are to be served; whilst the profits which individuals may derive from the pursuit are illicit, or at least disgraceful. But this is the language of bad citizens, who, under the stately mask of a spurious wisdom and of a craftily sensitive conscience, seek to mislead the judgment by a concealment of the secret motive which gives birth to their indifference for the welfare and advantage of the state. Such are as worthy of blame as are those entitled to praise who generously expose their property and their lives to the dangers of privateering.'

"In a work of much repute, published in France almost simultaneously with the proceedings of the congress at Paris, it is declared that 'the issuing of letters of marque, therefore, is a constantly customary belligerent act. Privateers are *bona fide* war vessels, manned by volunteers, to whom, by way of reward, the sovereign resigns such prizes as they make, in the same manner as he sometimes assigns to the land forces a portion of the war contributions levied on the conquered enemy.' (Pistoye et Duverdy, des Prises Maritimes.) * * *

"No nation which has a due sense of self-respect will allow any other belligerent or neutral to determine the character of the force which it may deem proper to use in prosecuting hostilities; nor will it act wisely if it voluntarily surrenders the right to resort to any means sanctioned by international law which under any circumstances may be advantageously used for defense or aggression.

"The United States consider powerful navies and large standing armies, as permanent establishments, to be detrimental to national prosperity and dangerous to civil liberty. The expense of keeping them up is burdensome to the people; they are in some degree a menace to peace among nations. A large force ever ready to be devoted to the purposes of war is a temptation to rush into it. The policy of the United States has ever been, and never more than now, adverse to such establishments, and they can never be brought to acquiesce in any change in international law which may render it necessary for them to maintain a powerful navy or large standing army in time of peace. If forced to vindicate their rights by arms they are content, in the present aspect of international relations, to rely, in military operations on land, mainly upon volunteer troops, and for the protection of their commerce, in no inconsiderable degree upon their mercantile marine. If this country

were deprived of these resources it would be obliged to change its policy and assume a military attitude before the world. In resisting an attempt to change the existing maritime law that may produce such a result, it looks beyond its own interest, and embraces in its view the interest of all nations as are not likely to be dominant naval powers. Their situation in this respect is similar to that of the United States, and to them the protection of commerce and the maintenance of international relations of peace appeal as strongly as to this country to withstand the proposed change in the settled law of nations. To such nations the surrender of the right to resort to privateers would be attended with consequences most adverse to their commercial prosperity without any compensating advantages. * * *

"It certainly ought not to excite the least surprise that strong naval powers should be willing to forego the practice, comparatively useless to them, of employing privateers upon condition that weaker powers agree to part with their most effective means of defending their maritime rights. It is in the opinion of this Government to be seriously apprehended that if the use of privateers be abandoned the dominion over the seas will be surrendered to those powers which adopt the policy and have the means of keeping up large navies. The one which has a decided naval superiority would be potentially the mistress of the ocean, and by the abolition of privateering that domination would be more firmly secured. Such a power engaged in a war with a nation inferior in naval strength would have nothing to do for the security and protection of its commerce but to look after the ships of the regular navy of its enemy. These might be held in check by one-half or less of its naval force, and the other might sweep the commerce of its enemy from the ocean. Nor would the injurious effect of a vast naval superiority to weaker states be much diminished if that superiority was shared among three or four great powers. It is unquestionably the interest of such weaker states to discountenance and resist a measure which fosters the growth of regular naval establishments."

Mr. Marcy, Sec. of State, to Mr. Sartiges, July 28, 1856. MSS. Notes, France.

The President "finds himself unable to agree to the first principle in the 'declaration' contained in Protocol No. 23, which proposes to abolish privateering, or to the proposition in the Protocol No. 24, which declared the indivisibility of the four principles of the declaration, and surrenders the liberty to negotiate in regard to neutral rights except on inadmissible conditions. It cannot have been the object of the Governments represented in the congress at Paris to obstruct the adoption of principles which all approve and are willing to observe, unless they are encumbered by an unrelated principle to which some Governments cannot accede without a more extended application of it than that which is proposed by the Paris congress."

Mr. Marcy, Sec. of State, to Mr. Mason, July 29, 1856. MSS. Inst., France.

"Though the President does not seriously apprehend that the rights of the United States in regard to the employment of privateers will be affected directly or indirectly by the new state of things which may arise out of the proceedings of the congress at Paris, yet it would be gratifying to him to be assured by the Government of Sardinia that no new complications in our relations with it are likely to spring from those proceedings. He trusts that, so long as Sardinia is, and he anxiously desires that she should ever be, a friendly power, her ports will be, as they heretofore have been, a refuge from the dangers of the sea and from attack as well for our own privateers as for our merchant vessels and national ships-of-war in the event of hostilities between any other European power and this country."

Mr. Marcy, Sec. of State, to Mr. Daniel, July 29, 1856. MSS. Inst., Italy.

"You will see by the inclosed slip just cut from the Globe newspaper that Mr. Cobden anticipates for your conditional surrender of privateering an almost unanimous decision in the House of Commons in its favor. This is a sincere, and, I believe, a sound opinion, viewing the question as *an English one*. They will gain everything, first, for the security of their commerce, and, second, in the concentrative efficacy of their prodigious naval armament. War will not endanger their merchant ships or their manufactures, and thus, relieved from all care about these vital interests, they may send their fleets to bully and thunder where they please. Opposite results may be drawn from *an American view*. Losing the right of privateering, in other words, of assailing the vital interests of our adversary, our means of aggression are nil. Our Navy must be docked, and we must be content with whatever terms the adversary in this national duel may prescribe for a peace, if indeed a peace would ever be desirable or attainable. You see, I have my misgivings on your great measure of change in the rights of nations at war. If our Navy approached anywhere near to the power of the one displayed off Portsmouth last spring, I should be quite willing to let it take its chance in defending our coast, but as it now is, and, as I am afraid, by an unwise economy, it may long be kept, it is impossible to say at how many points of landing along our coast a war would rapidly become one of invasion."

Mr. Dallas to Mr. Marcy, Sec. of State, Dec. 12, 1856. 1 Letters from London, 119.

Mr. Seward's circular of April 24, 1861, proposing to abolish privateering, shows on its face that the proposition was a mere temporary expedient induced by the exigencies of the civil war. He recites the propositions of the Paris congress: (1) that privateering be abolished; (2) that neutral flags should cover enemy's goods; (3) that neutral goods should not be liable to capture under enemy's flag; and (4) that blockades must be effective. He then calls attention to the fact that when the President (Mr. Pierce), on July 14, 1856, declined to accede to these propositions, Mr. Marcy, then Secretary of State, said that the United States were willing to accept the abolition of privateering "with an amendment which should exempt the private property of individuals, though belonging to belligerent states, from seizure, or confiscation by national vessels in maritime war." This, however, was not acceded to by England, and the proposition, in Mr. Buchanan's administration, was

withdrawn. Since then, however, things have changed. "Europe seems once more on the verge of quite general wars. On the other hand, a portion of the American people have raised the standard of insurrection, and proclaimed a provisional Government, and, through their organs, have taken the bad resolution to invite privateers to prey upon the peaceful commerce of the United States. Prudence and humanity combine in persuading the President, under the circumstances, that it is wise to secure the lesser good offered by the Paris congress, without waiting indefinitely in hope to obtain the greater one offered to the maritime nations by the President of the United States." This proposition was not entertained by England and France, and that it was a mere transient impulse of Mr. Seward, and was speedily withdrawn, if not forgotten, is illustrated by his letter of July 12, 1862, to Mr. Adams, in which he says: "This transaction will furnish you a suitable occasion for informing Earl Russel that since the Oreto and other gunboats are being received by the insurgents from Europe to renew demonstrations on national commere, Congress is about to authorize the issue of letters of marque and reprisal, and that if we find it necessary to suppress that piracy, we shall bring privateers into service for that purpose, and, of course, for that purpose only." Congress did not authorize the issuing of letters of marque and reprisal, it not being "necessary;" but that such a step should be held by Mr. Seward to be the duty and right of the Government shows that his circular of April 24, 1861, must have been regarded by him, if regarded at all, as recalled. It certainly was never acted on by any European power.

The 2d section of the act of August 5, 1861, to protect commerce and punish piracy, authorized the President to direct the commanders of "armed vessels sailing under the authority of any letters of marque or reprisal granted by the Congress of the United States, or the commanders of any other suitable vessels," to seize and capture vessels intended for piratical aggressions; no act, however, authorizing the issue of letters of marque during the civil war was passed (see Stat. L., 1861, 315), though, as will be seen, Mr. Seward reserved the right so to do if it were necessary. But the Secretary of the Navy, in a note of October 1, 1861, to the Secretary of State said:

"In relation to the communication of R. B. Forbes, esq., a copy of which was sent by you to this Department on the 16th ultimo, inquiring whether letters of marque cannot be furnished for the propeller Pembroke, which is about to be dispatched to China, I have the honor to state that it appears to me there are objections to, and no authority for, granting letters of marque in the present contest. I am not aware that Congress, which has the exclusive power of granting letters of marque and reprisal, has authorized such letters to be issued against the insurgents, and were there such authorization I am not prepared to advise its exercise, because it would, in my view, be a recognition of the assumption of the insurgents that they are a distinct and independent nationality.

"Under the act of August 5, 1861, 'supplementary to an act entitled an act to protect the commerce of the United States, and to punish the crime of piracy,' the President is authorized to instruct the commanders of 'armed vessels sailing under the authority of any letters of marque and reprisal granted by the Congress of the United States, or the commanders of any other suitable vessels, to subdue, seize, take, and, if on the high seas, to send into any port of the United States any vessel or boat built, purchased, fitted out, or held,' etc.

"This allusion to letters of marque does not authorize such letters to be issued, nor do I find any other act containing such authorization. But the same act, in the 2d section, as above quoted, gives the President power to authorize the 'commanders of any suitable vessels to subdue, seize,' etc. Under this clause, letters permissive, under proper restrictions and guards against abuse, might be granted to the propeller Pembroke, so as to meet the views expressed by Mr. Forbes. This would seem to be lawful and perhaps not liable to the objections of granting letters of marque against our own citizens, and that, too, without law or authority from the only constituted power that can grant it."

Mr. Welles, Sec. of the Navy, to Mr. Seward, Sec. of State, Oct. 1, 1861. MSS. Dept. of State.

Mr. Seward, on March 9, 1863, wrote to Mr. Adams (MSS. Inst., Gr. Brit.) that "Congress has conferred upon the President ample power for the execution of the latter measure (issue of letters of marque and reprisal) and the necessary arrangements for it are now engaging the attention of the proper Departments."

He subsequently instructed Mr. Dayton as follows:

"The unrestrained issue of piratical vessels from Europe to destroy our commerce, break our blockade of insurrectionary ports, and invade our loyal coast, would practically be a European war against the United States, none the less real or dangerous for wanting the sanction of a formal declaration. Congress has committed to the President, as a weapon of national defense, the authority to issue letters of marque. We know that it is a weapon that cannot be handled without great danger of annoyance to neutral and friendly commercial powers. But even that hazard must be incurred rather than quietly submit to the apprehended greater evil."

Mr. Seward, Sec. of State, to Mr. Dayton, Apr. 24, 1863. MSS. Inst., France.

"Thoughtful and hopeful minds generally favor the proposition to exempt private persons and property on the high seas from the inflictions of war. So far as I have learned, this opinion has, however, been by no means universally accepted. There is a large class of persons who habitually regard foreign war as always a probable contingency, besides many who are continually accepting a conflict with some particular state or states. These persons regard privateering not only as the strongest arm of naval defense, but as one which the United States could use with greater advantage than any foreign enemy. Those persons are so jealous on the subject of privateering that they are always unwilling to consent to waive the right in any one treaty for fear that the treaty may become a precedent for the entire abandonment of that form of public war. Certainly this latter class very strongly prevailed throughout the entire period of our civil war. I have not recently made any careful inquiry to ascertain how far that popular sentiment has been modified by the return of peace."

Mr. Seward, Sec. of State, to Mr. Bancroft, Feb. 19, 1868. MSS. Inst., Prussia; Dip. Corr., 1868.

"A bill to authorize the President, during the continuance of the civil war, to grant letters of marque and reprisal, was introduced at the session of 1861–'62, but failed in consequence of the position taken in opposition, that letters of marque could only be granted against an independent state, and that their issue might be regarded as a recognition of the Confederate States. It was also objected that the billif passed would be regarded as an admission of weakness on the part of the Federal Navy, and as conflicting with the position that privateering, as conducted by the Confederate States, was piracy."

Congressional Globe, 1861–'62, 3325, 3335. See Lawrence's Wheaton (ed. 1863), 643.

As to encouragement of privateers by Congress and their efficiency in the Revolutionary War, see 2 John Adams' Works, 504; 3 *ibid.*, 37, 207; 7 *ibid.*, 21, 23, 159, 176, 189, 273, 299, 312, 356; 10 *ibid.*, 27, 31.

As to their encouragement by France, see 7 John Adams' Works, 21, 23.

As to policy and lawfulness of privateering, see 9 John Adams' Works, 607; and see 13 Hunt's Merchants' Mag., 450, 456; 8 Edin. Rev., 13; 2 N. Am. Rev. (N. S.), 166.

As to French privateers, see 8 John Adams' Works, 551; 9 *ibid.*, 16, 155.

Mr. Jefferson's message of Jan. 21, 1805, on American privateers, with the accompanying papers, is given in 2 Am. St. Pap. (For. Rel.), 607.

The papers and correspondence connected with President Monroe's instructions as to private armed vessels are given in President Pierce's message of June 12, 1854; House Ex. Doc. 111, 33d Cong., 1st sess.

As to refusal of France to concur in a convention with the United States so far as to abolish privateering during the civil war, see Mr. Seward, Sec. of State, to Mr. Dayton, Sept. 10, 1861. MSS. Inst., France.

Further correspondence relating to privateering will be found in Brit. and For. St. Pap. for 1860–'61; vol. 51; *ibid.*, 1864–'65, vol. 55.

Mr. Sumner's views in opposition to letters of marque and reprisal are in 7 Sumner's Works, 278, 313.

The position of the United States in reference to the proposition of the Paris conference for the abolition of privateering is further discussed *supra*, § 342. See also 3 Phill. Int. Law (3d ed.), 534.

The United States Government surrendered at the close of the late civil war the position that Confederate privateers were pirates.

Mr. Bolles, Solicitor of the Navy, in Atlantic Monthly for July and August, 1871. See these articles noticed in Sir A. Cockburn's Review of the Geneva Arbitration, and Bullock's Secret Service of Confederate States, ii, 116; *supra*, § 381.

The status of Confederate privateers in foreign ports is considered in a report with accompanying papers of Mr. Seward, Sec. of State, Apr. 26, 1862; House Ex. Doc. 104, 37th Cong., 2d sess.

As to the Chesapeake pirates, see *supra*, § 27.

"Were the claims of the great naval powers to seize private property on the high seas abandoned, this monopoly would be less prejudicial. But, directed as it is to the appropriation of such spoils, it is virtually, if conceded, a monopoly to powers of a particular class to seize whatever is afloat on the waters which their prize courts may condemn. The suppression of privateering, therefore, is not called for in the interests of peace. Such suppression would only add another stimulus to the increase of naval armaments already bearing so oppressively on the Old World; and the effect would be to force on this continent a competition

in the ruinous race for naval supremacy in which at present the maritime powers of Europe are engaged. And it should also be observed that a privateer navy is the militia of the seas, consistent as is the militia of the land with industrial pursuits, adding to the wealth and comfort of the community when war does not exist. When the calamity of war does come, then there will be enough shipping and sailors disengaged from their prior employments to man such militia fleets. It is no doubt a choice of evils. But as long as the seizure of belligerent private property on the high seas is countenanced by the European marine powers, so long it is better for the United States to hold the right to turn their merchant service into naval service in case of war, than for them to overburden the country by an enormous navy in times of peace."

Whart. Com. Am. Law, § 201.

To the objection that privateers may appropriate their booty, the answer is (1) that ships-of-war appropriate large parts of such booty as prize-money, and (2) that privateers may be placed on the same footing as to prize-money with ships-of-war. This difficulty being removed, and privateers being subjected to naval control, it is hard to see what greater objections exist to the commissioning of the commanders of privateers than to the issuing of commissions to particular officers to raise troops for local defense. In this way, in fact, as is remarked by Perels, an author of eminence already cited, the necessity of large navies is avoided, as a sovereign with a mercantile marine can readily, by issuing privateering commissions, so harass his enemy's commerce as to equalize the conflict with such enemy, though possessing a far superior naval force. The retention of resources which would punish an assailant is one of the best ways of preventing an assault. The United States Government having elected, wisely or unwisely, not to maintain a large navy, can only keep its position on the high seas by holding in reserve the right to commission privateers when necessary.

*Ibid.*

Mr. Jefferson, in a paper dated July 4, 1812, vindicating privateering, says: "What is war? It is simply a contest between nations, of trying which can do the other the most harm. Who carries on the war? Armies are formed and navies manned by individuals. How is a battle gained? By the death of individuals. What produces peace? The distress of individuals. What difference to the sufferer is it that his property is taken by a national or private armed vessel? Did our merchants, who have lost nine hundred and seventeen vessels by British captures feel any gratification that the most of them were taken by His Majesty's men-of-war? Were the spoils less rigidly exacted by a seventy-four gun ship than by a privateer of four guns; and were not all equally condemned? War, whether on land or sea, is constituted of acts of violence on the persons and property of individuals; and excess of violence is the grand cause that brings about a peace. One man fights for wages paid him by the Government, or a patriotic zeal for the defense of his country; another, duly authorized, and giving the proper pledges for his good conduct, undertakes to pay himself at the expense of the foe, and serves his country as effectually as the former, andGovernment drawing all its supplies from the people, is, in reality, as much affected by the losses of the one as the other, the efficacy of its measures depending upon the energies and resources of the whole. In the

United States, every possible encouragement should be given to privateering in time of war with a commercial nation. We have tens of thousand of seamen that without it would be destitute of the means of support, and useless to their country. Our national ships are too few in number to give employment to a twentieth part of them, or to retaliate the acts of the enemy. But by licensing private armed vessels, the whole naval force of the nation is truly brought to bear on the foe, and while the contest lasts, that it may have the speedier termination, let every individual contribute his mite, in the best way he can, to distress and harass the enemy, and compel him to peace."

Coggeshall's Hist. Am. Privateers, introduction, p. 43.

"We have been worsted in most of our naval encounters, and baffled in most of our enterprises by land. With a naval force on their coast exceeding that of the enemy in the proportion of two to one, we have lost two out of three of all the sea-fights in which we have been engaged, and at least three times as many men as our opponents; while their privateers swarm unchecked round all our settlements, and even on the coasts of Europe, and have already made prize of more than seventeen hundred of our merchant vessels."

24 Edinb. Rev., 250, Nov., 1814.

"In 1814, during the war between the United States and Great Britain, the legislature of New York passed an act to constitute every association of five or more persons, embarking in the trade of privateering, a body politic and corporate, with corporate powers, on their complying with certain formalities."

2 Halleck's Int. Law (Baker's ed.), 13.

At the close of the Crimean war an agreement was made, as part of the Treaty of Paris, by the parties to the war who joined in that treaty, pronouncing privateering to be piracy. The several questions proposed by this treaty are considered together *supra*, § 342. Construed as was the prohibition of the Treaty of Paris by both Germany and Great Britain, during the Franco-German war of 1870, it is not inconsistent with the use of privateering under the limitations above given. "She" (Germany) "invited ship-owners to lend their ships for the war for a remuneration. The crews were to be hired by the owners, but were 'to enter the federal navy for the continuance of the war, wear its uniform, acknowledge its competency, and take oath to the articles of war.' In case these ships destroyed or captured ships of the enemy, certain premiums were to be paid to the owners for distribution among the crews. The French Government complained to Lord Granville about this decree, alleging that it was, under a disguised form, the re-establishment of privateering; but Lord Granville, after consulting the then law officers, Sir Travers Twiss, Sir R. Collier, and Sir John Coleridge, replied: 'They advised me that there are, in their opinion, substantial differences between the proposed naval volunteer force sanctioned by the Prussian Government, and the system of privateering which, under the designation of "la course," the declaration of Paris was intended to suppress, and that Her Majesty's Government cannot object to the decree of the Prussian Government as infringing the declaration of Paris.'" (Mr. Lawrence in North Amer. Rev. for July, 1878, 32; citing 22 Solicitors' Journal, 523.) To the same effect is the opinion of Bluntschli. "Nothing," declares that eminent publicist, "prevents a state from forming a body of volunteers to be employed as a part of the

auxiliary force of its army; so a maritime nation may, with entire propriety, reinforce its fleet by adding vessels previously employed in commerce. An appeal may even be made to all the forces of the nation—to a sort of naval Landsturm—to combat the enemy." (9 Revue de droit int., 552.)

See, also, Twiss, Duties in Time of War, 423, and more fully Sir T. Twiss' statement, *supra*, § 384.

It is stated that the late "Confederate Government," owing "to the disabilities to which their privateers were exposed in foreign ports," discontinued privateering, and its cruisers "claimed the right of public ships-of-war, and were commanded by officers commissioned by the Confederate States."

North Amer. Rev., *ut supra*, 31.

Citizens of the United States are forbidden by statute to take part in the equipment or manning of privateers to act against nations at peace with the United States. (Act of June 14, 1797, and April 24, 1816.) Treaties making privateering under such circumstances piracy have been negotiated with England, France, Prussia, Holland, Spain, and Sweden. (See letter of Mr. Marcy, of April 28, 1854, and President's declaration of neutrality of April 20, 1818.)

The policy of privateering is thus discussed by President Woolsey:

"The right to employ this kind of extraordinary naval force is unquestioned, nor is it at all against the usage of nations in times past to grant commissions even to privateers owned by aliens. The advantages of employing privateers are (1) that seamen thrown out of work by war can thus gain a livelihood and be of use to their country. (2) A nation which maintains no great navy is thus enabled to call into activity a temporary force on brief notice and at small cost. Thus an inferior state, with a large commercial marine, can approach on the sea nearer to an equality with a larger rival having a powerful fleet at its disposal. And as aggressions are likely to come from large powers, privateering may be a means, and perhaps the only effectual means, of obtaining justice to which a small commercial state can resort."

Woolsey's Int. Law, § 121.

"On the other hand, the system of privateering is attended with very great evils. (1) The motive is plunder. It is nearly impossible that the feeling of honor and regard for professional reputation should act upon the privateersman's mind. And when his occupation on the sea is ended, he returns with something of the spirit of a robber to infest society. (2) The control over such crews is slight, while they need great control. They are made up of bold, lawless men, and are where no superior authority can watch or direct them. The responsibility at the best can only be remote. The officers will not be apt to be men of the same training with the commanders of public ships, and cannot govern their crews as easily as the masters of commercial vessels can govern theirs. (3) The evils are heightened when privateers are employed in the execution of belligerent rights against neutrals, where a high degree of character and forbearance in the commanding officer is of especial importance.

"Hence many have felt it to be desirable that privateering should be placed under the ban of international law, and the feeling is on the increase, in our age of humanity, that the system ought to come to an end."

*Ibid.*, § 122.

But the objections above stated may be removed by placing privateering under the restrictions above proposed.

A belligerent cannot send out privateers from neutral ports.

Talbot *v.* Janson, 3 Dall., 133.

The commission of a privateer must be considered as qualified and limited by the laws under which it issues, and as subordinate to the instructions of the President, issued under the same act.

The Thomas Gibbons, 8 Cranch, 421.

An enemy's vessel, captured by a privateer, recaptured by another enemy's vessel, and again recaptured by another privateer and brought in for adjudication, was adjudged as prize to the last captors.

The Astrea, 1 Wheat., 125.

The district courts of the United States, by virtue of their general admiralty and maritime jurisdiction, have jurisdiction of questions of marine trespass by privateers independent of the special provisions of the prize act of the 26th of June, 1812. (2 Stat. L., 259.)

The Amiable Nancy, 3 Wheat., 546.

The fact that a vessel cruising under the commission of a new Government not acknowledged by the United States is employed by such Government may be established by parol evidence, without proving the seal to such commission.

The Estrella, 4 Wheat., 298.

War having been recognized by the Government of the United States to exist between Spain and her colonies, a capture of a Spanish vessel and cargo by a privateer commissioned by the province of Carthagena, while it had an organized Government and was at war with Spain, was held not to be within the jurisdiction of the courts of the United States, either by the general law of nations or by the treaty with Spain, which stipulated for restitution in cases of piracy and captures in violation of our neutrality, this being neither.

The Neustra Señora de la Caridad, 4 Wheat,, 497.

A commission to a privateer by a belligerent is a defense to an indictment for piracy.

U. S. *v.* Baker, 5 Blatch., 13.

Where an American vessel commissioned with a letter of marque and reprisal has been sold to foreigners, and the new owners are found cruising with the same commander, with the same letter and under the American flag, and there is good reason to suppose that the commission of the letter of marque has been intentionally transferred, it is such an abuse of the commission as will warrant a suit on the bond.

1 Op., 179, Rush, 1814.

# CHAPTER XXI.

## NEUTRALITY.


I. RIGHTS OF NEUTRAL.
- (1) May trade with either belligerent, and herein as to trade with colonies not open in peace, § 388.
- (2) May permit free discussion as to foreign sovereigns, § 389.
- (3) May permit subjects to furnish funds or supplies to belligerents, § 390
- (4) Or munitions of war, § 391.
- (5) Or to enlist in service of belligerent, § 392.
- (6) Or to sell or purchase ships, § 393.
- (7) Or may give asylum to belligerent ships or troops, § 394.

II. RESTRICTIONS OF NEUTRAL.
- (1) Bound to restrain enlistments by belligerent, § 395.
- (2) Or issuing of armed expeditions, § 395*a*.
- (3) Bound to restrain fitting out of and sailing of armed cruisers of belligerent, § 396.
- (4) Or passage of belligerent's troops over soil, § 397.
- (5) Bound not to permit territory to be made the base of belligerent operations, § 398.
- (6) Nor to permit belligerent naval operations in territorial waters, § 399.
- (7) Nor to permit sale of prize in ports, § 400.
- (8) Bound to redress damages done to belligerent by its connivance or negligence, § 401.

III. DEGREE OF VIGILANCE TO BE EXERCISED.
- (1) Not perfect vigilance, but such as is reasonable under the circumstances, § 402.
- (2) Rules of 1871, and Geneva tribunal, § 402*a*.

IV. MUNICIPAL STATUTES NOT EXTRATERRITORIAL, § 403.

V. PERSONS VIOLATING MUNICIPAL STATUTE MAY BE PROCEEDED AGAINST MUNICIPALLY, § 404.

VI. POLICY OF THE UNITED STATES IS MAINTENANCE OF NEUTRAL RIGHTS, § 405.


### I. *RIGHTS OF NEUTRAL.*

#### (1) MAY TRADE WITH EITHER BELLIGERENT, AND HEREIN AS TO TRADE WITH COLONIES NOT OPEN IN PEACE.

§ 388.

"With respect to the general principle which disallows to neutral nations, in time of war, a trade not allowed to them in time of peace, it may be observed:

"First. That the principle is of modern date; that it is maintained, as is believed, by no other nation but Great Britain; and that it was assumed by her under the auspices of a maritime ascendency, which

rendered such a principle subservient to her particular interest. The history of her regulations on this subject shows that they have been constantly modified under the influence of that consideration. The course of these modifications will be seen in an appendix to the fourth volume of Robinson's Admiralty Reports.

"Secondly. That the principle is manifestly contrary to the general interest of commercial nations, as well as to the law of nations settled by the most approved authorities, which recognize no restraints on the trade of nations not at war, with nations at war, other than that it shall be impartial between the latter, that it shall not extend to certain military articles, nor to the transportation of persons in military service, nor to places actually blockaded or besieged.

"Thirdly. That the principle is the more contrary to reason and to right inasmuch as the admission of neutrals into a colonial trade shut against them in times of peace, may, and often does, result from considerations which open to neutrals direct channels of trade with the parent state shut to them in times of peace, the legality of which latter relaxation is not known to have been contested; and inasmuch as commerce may be, and frequently is, opened in time of war between a colony and other countries, from considerations which are not incident to the war, and which would produce the same effect in a time of peace, such, for example, as a failure or diminution of the ordinary sources of supplies, or new turns in the course of profitable interchanges.

"Fourthly. That it is not only contrary to the principles and practice of other nations, but to the practice of Great Britain herself. It is well known to be her invariable practice in time of war, by relaxations in her navigation laws, to admit neutrals to trade in channels forbidden to them in times of peace, and particularly to open her colonial trade both to neutral vessels and supplies to which it is shut in times of peace, and that one at least of her objects in these relaxations is to give to her trade an immunity from capture, to which in her own hands it would be subjected by the war.

"Fifthly. The practice, which has prevailed in the British dominions, sanctioned by orders of council and an act of Parliament [39 G. 3, ch. 98] authorizing for British subjects a direct trade with the enemy, still further diminishes the force of her pretensions for depriving us of the colonial trade. Thus we see in Robinson's Admiralty Reports, *passim*, that during the last war a licensed commercial intercourse prevailed between Great Britain and her enemies, France, Spain, and Holland, because it comprehended articles necessary for her manufactures and agriculture, notwithstanding the effect it had in opening a vent to the surplus productions of the others. In this manner she assumes to suspend the war itself as to particular objects of trade beneficial to herself, while she denies the right of the other belligerents to suspend their accustomed commercial restrictions in favor of neutrals. But the injustice and inconsistency of her attempt to press a strict rule on neutrals

is more forcibly displayed by the nature of the trade which is openly carried on between the colonies of Great Britain and Spain in the West Indies. The mode of it is detailed in the inclosed copy of a letter from a Mr. Billings, wherein it will be seen that American vessels and cargoes, after being condemned in British courts under pretense of illicit commerce, are sent on British account to the enemies of Great Britain, if not to the very port of the destination interrupted when they were American property. What respect can be claimed from others to a doctrine not only of so recent an origin and enforced with so little uniformity, but which is so conspicuously disregarded in practice by the nation itself which stands alone in contending for it.

"Sixthly. It is particularly worthy of attention that the board of commissioners jointly constituted by the British and American Governments under the 7th article of the treaty of 1794, by reversing condemnations of the British courts founded on the British instructions of November, 1793, condemned the principle that a trade forbidden to neutrals in time of peace could not be opened to them in time of war, on which precise principle these instructions were founded. And as the reversal could be justified by no other authority than the law of nations, by which they were to be guided, the law of nations, according to that tribunal, condemns the principle here combatted. Whether the British commissioners concurred in these reversals does not appear; but whether they did or did not, the decision was equally binding, and affords a precedent which could not be disrespected by a like succeeding tribunal, and ought not to be without great weight with both nations in like questions recurring between them.

"On these grounds the United States may justly regard the British captures and condemnations of neutral trade with colonies of the enemies of Great Britain as violations of right; and if reason, consistency, or that sound policy which cannot be at variance with either, be allowed the weight which they ought to have, the British Government will feel sufficient motives to repair the wrongs done in such cases by its cruisers and courts."

Mr. Madison, Sec. of State, to Mr. Monroe, Apr. 12, 1805. MSS. Inst., Ministers, 3 Am. St. Pap. (For. Rel.), 101.

The principle that "a trade opened to neutrals by a nation at war, on account of the war, is unlawful," has no foundation in the law of nations.

Mr. Madison, Sec. of State, report of Jan. 25, 1806. MSS. Dom. Let. See *supra*, § 359 *ff.*

Mr. Monroe, in a dispatch to Mr. Madison, August 20, 1805, states that the British position is declared by Lord Mulgrave to be "that a neutral power had no right to a commerce with the colonies of an enemy in time of war which it had not in time of peace, and that every extension of it in the former state, beyond the limit of the latter, was due to the concession of Great Britain, not to the right of the neutral

power." (See 3 Am. St. Pap., 105, for a conference with Mr. Fox on this subject. See Mr. Monroe to Mr. Madison, April 28, 1806. 3 Am. St. Pap. (For. Rel.), 118.

"The rights of a neutral to carry on a commercial intercourse with every part of the dominions of a belligerent, permitted by the laws of the country (with the exception of blockaded ports and contraband of war) was believed to have been decided between Great Britain and the United States by the sentence of the commissioners mutually appointed to decide on that and other questions of difference between the two nations, and by the actual payment of damages awarded by them against Great Britain for the infractions of that right. When, therefore, it was perceived that the same principle was revived with others more novel, and extending the injury, instructions were given to the minister plenipotentiary of the United States at the court of London, and remonstrances duly made by him on this subject, as will appear by documents transmitted herewith. These were followed by a partial and temporary suspension only, without any disavowal of the principle. He has, therefore, been instructed to urge this subject anew, to bring it more fully to the bar of reason, and to insist on rights too evident and too important to be surrendered. In the mean time the evil is proceeding under adjudications founded on the principle which is denied. Under these circumstances the subject presents itself for the consideration of Congress."

President Jefferson, Special Message, Jan. 17, 1806.

The correspondence of Mr. Pinkney, United States minister at London, in 1806–'08, with Mr. Canning, British foreign secretary, in reference to the British order of council affecting the trade of the United States is found in 3 Am. St. Pap. (For. Rel.), 203 *ff*, 222 *ff*.

"To former violations (by Great Britain) of maritime rights, another is now added of very extensive effect. The Government of that nation has issued an order interdicting all trade by neutrals between ports not in amity with them, and being at war with every nation on the Atlantic and Mediterranean seas, our vessels are required to sacrifice their cargoes at the first ports they touch, or to return home without the benefit of returning to any other market. Under this new law of the ocean, our trade to the Mediterranean has been swept away by seizures and condemnations, and that in other seas has been threatened with the same fate."

President Jefferson's message of Oct. 27, 1807; 3 Am. St. Pap. (For. Rel.), 5.

"The declaration which Her Britannic Majesty's Government proposes to issue is distinct in interdicting to neutrals the coasting and colonial trade with the belligerent, if not enjoyed by them previous to the war. In regard to this trade, you are aware that Great Britain asserted principles, in the wars resulting from the French revolution, before she issued her obnoxious orders in council, which this country held

to be in violation of the law of nations. Should she still adhere to those principles in the coming conflict in Europe, and have occasion to apply them to our commerce, they will be seriously controverted by the United States, and may disturb our friendly relations with her and her allied belligerents. The liberal spirit she has indicated in respect to the cargoes under a neutral flag, and neutral property which may be found on board of enemy's ships, gives an implied assurance that she will not attempt again to assert belligerent rights which are not well sustained by the well-settled principles of international law."

Mr. Marcy, Sec. of State, to Mr. Buchanan, Apr. 13, 1854. MSS. Inst., Gr. Brit. House Ex. Doc. 103, 33d Cong., 1st sess.

The British rule, proclaimed in 1756, by which "direct trade with the enemies' colonies was made subject to restrictions," is discussed in a work under the title of "An examination of the British doctrine which subjects to capture a neutral trade, not open in time of peace," written by Mr. Madison. (See 2 Madison's Works, 229 *ff.*) The British view of the question is stated in a pamphlet, by Mr. James Stephen, entitled "War in Disguise." The object of the British Government, in which it was zealously supported by Sir W. Scott, was to stamp with illegality voyages from French or Dutch colonies to the United States and from thence to France or Holland. To sustain this the doctrine of "continuity of voyages" was invented, a doctrine which was caught up and applied in the case of the Springbok, criticised at large in another section. (*Supra*, § 362.) The doctrine, as applied by the British admiralty courts in 1801, was that unless a ship from a French colony landed her goods and paid her duties in the port of the United States to which she intermediately resorted on her way to France, her voyage to the United States was to be held to be continuous with that from the United States to France. In 1805, however, it was held in the case of the Essex, that if the duties were not actually paid, but were provided for by means of debentures, the importation into the United States was not *bona fide*, and the voyage was held to be continuous, notwithstanding the goods were disembarked in New York. But aside from the technical difficulties attending the doctrine of continuous voyages, as thus stated, and the ruin to which it subjects neutral interests, it is repugnant to those principles of sovereignty which are at the basis of international law. A sovereign has a right to regulate his trade as he chooses. He may impose tariffs, embargoes, non-intercourse, as he deems best. He may say, "At peace no one shall trade with my colonies but myself." If he has power to impose one kind of limitation in peace, he can impose another kind of limitation in war. Since no one disputes a neutral's right to trade between ports of the mother country, it is difficult to see on what ground rests the denial of a neutral's right to trade between the port of a colony and that of the mother country. War necessarily greatly abridges neutral commerce by exposing it to confiscation for contraband and for blockade-running. To permit one belligerent to shut out neutrals from a commerce which the other belligerent may open to them, such commerce not being in contraband of war or in evasion of blockade, would impose upon neutrality burdens so intolerable as to make war, on its part, preferable to peace. The doctrine of "continuous voyages," also, as thus interpreted, is open to all the objections of a paper blockade; it enables a belligerent cruiser to seize all neutrals going to a belligerent port if they hold produce of the colonies

of that belligerent, though there be no pretense of a blockade of either colony or the mother state. Great Britain, also, it was urged, had no right to complain of this relaxation by a hostile sovereign of his colonial regulations, since she had repeatedly varied in war her colonial policy of trade, relaxing it so as to enable her colonies to have the advantage of neutral commerce.

2 Lyman's Diplomacy of the United States, chap. i. The Springbok case is criticised at large, *supra*, § 362. The defects in Sir W. Scott's reasoning as to continuous voyages, and the want of present authoritativeness in his conclusions, are discussed *supra*, §§ 238, 329*a*.

"The doctrine of continued or continuous voyages," says Dr. Woolsey (Int. Law, app. iii, n. 27), "which Sir W. Scott, afterwards Lord Stowell, originated, deserves to be noticed, and may be noticed here, although it first arose in reference to colonial trade with another country carried on by neutrals. As the English courts condemned such trade, the neutrals in the first part of this century, especially shippers and captains belonging to the United States, tried to evade the rule by stopping at a neutral port and seeming to pay duties, and then, perhaps, after landing and relading the cargoes, carried them to the mother-country of the colony. The motive for this was, that if the goods in question were *bona fide* imported from the neutral country, the transaction was a regular one. The courts held, that if an original intention could be proved of carrying the goods from the colony to the mother country, the proceedings in the neutral territory, even if they amounted to landing goods and paying duties, could not overcome the evidence of such intention; the voyage was really a continued one artfully interrupted, and the penalties of law had to take effect. Evidence therefore, of original intention and destination was the turning-point in such cases. (See, especially, the case of the Polly, Robinson's Rep., ii, 361–372; the cases of the Maria and the William, *ibid.*, v, 365–372, and 385–406, and the cases there mentioned.)

"The principle of continued voyages will apply when cases of contraband, attempt to break blockade, etc., come up before courts which accept this English doctrine. In our late war many British vessels went to Nassau, and either landed their cargoes destined for Confederate ports there to be carried forward in some other vessel, or stopped at that port as a convenient place for a new start towards Charleston or some other harbor. If an intention to enter a blockaded port can be shown, the vessel and the cargo, as is said in the text, are subject to capture according to English and American doctrine from the time of setting sail. Now the doctrine of continued voyages has been so applied by our Supreme Court that it matters not if the vessel stops at a neutral port, or unlades its cargo and another vessel conveys it onward, or if formalities of consignment to a person at the neutral port, or the payment even of duties are used to cover the transaction, provided destination to the blockaded port, or, in the case of contraband, to the hostile country, can be established, the ship on any part of its voyage, and the cargo before and after being landed, are held to be liable to confiscation. Or, again, if the master of the vessel was ordered to stop at the neutral port to ascertain what the danger was of continuing the voyage to the blockaded harbor, still guilt rested on the parties to the transaction as before. All this seems a natural extension of the English principle of continued voyages, as at first given out; but there is danger that courts will infer intention on insufficient grounds. A still bolder

extension was given to it by our courts in the case of vessels and goods bound to the Rio Grande, the goods being then carried up by lighters to Matamoras. We could not prohibit neutrals from sending goods to the Mexican side of that river; but if it could be made to appear that the goods were destined for the side belonging to the United States, that was held to be sufficient ground for condemnation of them; although, in order to reach their destination, they would need overland carriage over neutral territory. (See Prof. Bernard's Brit. Neutral., 307–317, and comp. Dana's note 231 on Wheaton, § 508.)"

The advantages claimed to be derived by Great Britain from the adoption of the rule of continuity, and the injury inflicted on neutrals by the application of this restriction, are thus stated in the London Quarterly Review for March, 1812 (vol. 7, p. 5): "It will be sufficient for our purpose to observe that so far was the rule of 1756 relaxed that the ports of the United States of America became so many *entrepôts* for the manufactures and commodities of France, Spain, and Holland, from whence they were re-exported, under the American flag, to their respective colonies; they brought back the produce of those colonies to the ports of America; they reshipped them for the enemies' ports in Europe; they entered freely all the ports of the United Kingdom with cargoes brought directly from the hostile colonies; thus, in fact, not only carrying on the whole trade of one of the belligerents which that belligerent would have carried on in time of peace, but superadding their own and a considerable part of ours. Valuable cargoes of bullion and specie and spices were nominally purchased by Americans, in the eastern colonies of the enemy, and wafted under the American flag to the real hostile proprietors. One single American house contracted for the whole of the merchandise of the Dutch East India Company at Batavia, amounting to no less a sum than one million seven hundred thousand pounds sterling. The consequence was that, while not a single merchant ship belonging to the enemy crossed the Atlantic, or doubled the Cape of Good Hope, the produce of the eastern and western worlds sold cheaper in the markets of France and Holland than in our own. * * * The commerce of England became every month more languid and prostrate, till reduced, as justly observed by a member of the House of Commons, 'to a state of suspended animation.'"

In discussing the controversy in 1810–'11 between Great Britain and the United States in respect to the orders of council, the Edinburgh Review for November, 1812 (vol. 20, p. 453), thus speaks:

"It was long the anxious business of the American minister, as appears from the documents before us, to procure by persuasion an abandonment of the measures hostile to the American trade. He urged his case on views of justice and general policy; he calmly combatted the pretexts by which he was met; he boldly and pointedly asserted that the claims of this country must, sooner or later, be abandoned; and he added, what ought never to be forgotten, that they were unjust, and that time, therefore, could do nothing for them. His representations were met by declarations of 'what His Majesty owed to the honor, dignity, and essential rights of his crown,' and by all the other sounding commonplaces used on such occasions. These sentiments were afterwards explained at greater length, and promulgated to the world in the deliberate record of a state paper. But in spite of the honor of His Majesty thus pledged to these obnoxious measures, they were repealed. A laborious investigation into their merits ended in their unqualified rep-

robation and abandonment; their authors were unable to look in the face the scenes of beggary, disorder, and wretchedness which their policy had brought on the country; they were borne down by the cries of suffering millions, and they yielded to necessity what they had formerly refused to justice. This was clearly, therefore, an act of unwilling submission. It bore not the stamp of conciliation; and the only inference to be drawn from it was that the plotters of mischief, being fairly caught in their own snare, were glad to escape, on any terms, from the effect of their ill-considered measures. * * * There is not a man in the Kingdom who can doubt that if the orders in council had been rescinded six months sooner, the war might have been entirely avoided, and all other points of difference between the countries adjusted on an amicable footing."

See same Review, vol. 11, 24 Oct., 1807.

As to licenses by one belligerent authorizing the party licensed to trade with the other, the following distinctions are taken:

"A *license* is a sort of safe-conduct, granted by a belligerent state to its own subjects, to those of its enemy, or to neutrals, to carry on a trade which is interdicted by the laws of war, and it operates as a dispensation from the penalties of those laws, with respect to the state granting it, and so far as its terms can be fairly construed to extend. The officers and tribunals of the state under whose authority they are issued are bound to respect such documents as lawful relaxations of the ordinary state of war; but the adverse belligerent may justly consider them as *per se* a ground of capture and confiscation. Licenses are necessarily *stricti juris*, and cannot be carried beyond the evident intention of those by whom they are granted; nevertheless, they are not construed with pedantic accuracy, nor will their fair effect be vitiated by every slight deviation from their terms and conditions. Much, however, will depend upon the nature of the terms which are not complied with. Thus a variation in the *quality* or *character* of the goods will often lead to more dangerous consequences than an excess of *quantity*. Again, a license to trade, though safe in the hands of one person, might become dangerous in those of another; so, also, with respect to the limitations of *time* and *place* specified in a license. Such restrictions are often of material importance, and cannot be deviated from with safety. * * * In the United States, as a general rule, licenses are issued under the authority of an act of Congress, but in special cases and for purposes immediately connected with the prosecution of a war, they may be granted by the authority of the President, as Commander-in-Chief of the military and naval forces of the United States."

2 Halleck's Int. Law (Baker's ed.), 364. See further as to licenses, *supra*, § 337.

The objections to the accepting of licenses from an enemy are thus stated by Judge Story in the Julia (1 Gall., 233; 8 Cranch, 181). The principle, he states, is that "in war all intercourse between the subjects and citizens of the belligerent countries is illegal, unless sanctioned by the authority of the Government or in the exercise of the rights of humanity." He insists that a license from an enemy must be regarded as an agreement with such enemy that the licensee will conduct himself in a neutral manner, and avoid any hostile acts toward such enemy, and he holds, therefore, that acting under such a license is a violation of the laws of war, and of a citizen's duties to his own Government. "Can an American citizen," he asks, "be permitted in this manner to carve

out for himself a neutrality upon the ocean when his country is at war? Can he justify himself in refusing to aid his countrymen, who have fallen into the hands of the enemy on the ocean, or decline their rescue? Can he withdraw his personal services when the necessities of the nation require them? Can an engagement be legal which imposes upon him the temptation or necessity of deeming his personal interests at variance with the legitimate objects of his Government?" He declares that incompleteness of a voyage, under license from the enemy, is no defense, for the vessel is liable to capture at the instant the voyage under such license is commenced. Wherever the object of the voyage is prohibited, its inception with the illegal intent completes the offense to which the legal penalty attaches. This case of illegal trading, under a license from the enemy, is only a particular application of a universal rule. Nor can it be a defense that the trade is not subservient to the enemy's interest, as the condemnation of such licensed vessel and cargo rests upon the broad ground of the illegality of such voyage.

See 2 Halleck's Int. Law (Baker's ed.), 169 *ff.*

Neutrals may establish themselves, for the purposes of trade, in ports convenient to either belligerent; and may sell or transport to either such articles as they may wish to buy, subject to risks of capture for violation of blockade or for the conveyance of contraband to belligerent ports.

The Bermuda, 3 Wall., 514.

Voyages from neutral ports to belligerent ports are not protected in respect of seizure, either of ship or cargo, by an intention, real or pretended, to touch at intermediate neutral ports.

*Ibid.*

(2) MAY PERMIT FREE DISCUSSION AS TO FOREIGN SOVEREIGNS.

§ 389.

The topic of sympathy with foreign political struggles is considered *supra*, § 47*a*; that of non-prohibition of documents assailing foreign Governments *supra*, § 56.

On July 4, 1816, at "a public feast at Baltimore," Mr. Skinner, the postmaster at that city, gave a "festive" toast supposed to reflect on the character of the then French Government. The French minister at Washington called upon Mr. Monroe, then Secretary of State, to cause the postmaster to be dismissed, and to apologize for the alleged insult. This was refused by Mr. Monroe, who stated in reply that on matters of this character the Government of the United States exercised no control.

Mr. Monroe, Sec. of State, to Mr. Gallatin, Sept. 10, 1816. MSS. Inst., Ministers.

Subsequently, in retaliation for the "toast," the functions of the French consul at Baltimore were suspended by the French minister, who had taken additional offense on account of a toast given at a New York dinner to "Marshal Grouchy," who, the French minister said, was not a "marshal."

See letter of Mr. Monroe to Mr. J. Q. Adams, Nov. 2, 1816.

The French Government having asked for the dismissal of Mr. Skinner in consequence of his "disrespectful" conduct, the Duke of Richelieu, minister of foreign affairs, in an interview with Mr. Gallatin, minister of the United States at Paris, said that "in asking for the dismission of Mr. Skinner there was no intention of giving offense; it was only stating the kind of reparation which appeared most natural, and which would be satisfactory. * * * I am sorry to say that no explanation I could give appeared to make any impression on him. * * * He said that they would not preserve any public agent in the town where His Majesty had been publicly insulted."

Mr. Gallatin to Mr. Monroe, Nov. 21, 1816. 2 Gallatin's Writings, 9.

The Duke of Richelieu subsequently told Mr. Gallatin that "the refusal to dismiss the postmaster at Baltimore," would indispose the Government of Louis XVIII to take steps towards paying for Napoleon's spoliations.

Same to same, Jan. 20, 1817; *ibid.*, 22.

The Government of the United States, when called upon by the Minister of Russia to explain certain newspaper "calumnies" on his Government, to which the Government of the United States was intimated to have "directly or indirectly given its support," answered, through the Secretary of State, that no further explanations could be given "until an imputation so injurious to the reputation of this Government, and so inconsistent with its sincere professions of amity for Russia and respect for its sovereign, shall be withdrawn."

Mr. Livingston, Sec. of State, to Mr. de Sacken, Dec. 4, 1832. MSS. Notes, For. Leg.

The United States Government has no power, under our Constitution and laws, to interfere with publications in the States critising foreign Governments, or encouraging revolt against such Governments.

Mr. Cass, Sec. of State, to Mr. Molina, Nov. 26, 1860. MSS. Notes, Cent. Am.

"Whatever be their purpose, it is not alleged or even understood that they have instigated any insurrection in Ireland, or sent out from the United States for such a purpose to that country or elsewhere any money, men, or arms, or that any sedition or rebellion actually exists in Ireland. Should they attempt to violate the neutrality laws in regard to Great Britain, the laws of the United States and regulations already sanctioned by the President are ample to prevent the commission of that crime. It is thus seen that a case has not arisen in which this Government could with right, or ought to, interfere with the meetings of the Fenian Brotherhood. I may properly add that this Government has no sufficient grounds to apprehend that any such case will occur, unless renewed and systematic aggressions from the British ports and provinces should defeat all the efforts of this Government to maintain and preserve peace with Great Britain. Under these circumstances any attempt to visit the Fenian Brotherhood with official censures is unnecessary, and, therefore, in the belief of this Government, would be unwise, as it would be manifestly unconstitutional. The attorney-general of

the State of Louisiana is responsible to the State Government, and the people of that State, exclusively of this Government."

Mr. Seward, Sec. of State, to Mr. Burnley, Mar. 20, 1865. MSS. Notes, Gr. Brit.

"The Fenian agitation is a British and not an American movement. A movement for which the agitators have secured to themselves the benefits of refuge, which the Constitution and laws of the United States afford to exiles and immigrants from foreign lands.

"The only question for this Government is, not whether the motives or designs of the agitators in regard to Ireland are just, wise, beneficent, or humane, or the reverse, but whether, in seeking to promote their designs, they commit any violation of the laws of the United States which have been adopted to prevent military or naval aggression by persons who are amenable to those laws, against nations whom the United States maintain relations of peace and friendship.

"Thus far no such violation of positive law has been brought to the knowledge of this Government by either its own agents, who are believed to be vigilant, or through any complaint from the British legation. No restraint has been put upon British agents of observation, and no obstacles placed in their way.

"Neither the character of the agitation, nor the condition of our international relations is such as to render it wise for this Government to denounce the proceedings of the agitators as long as they confine themselves within those limits of moral agitation which are recognized as legitimate equally by the laws of the United States and by those of Great Britain."

Mr. Seward, Sec. of State, to Mr. Adams, Mar. 10, 1866. MSS. Inst., Gr. Brit. As to expression of sympathy with Ireland, see Mr. Banks' report, July 25, 1866; House Rep. 100, 39th Cong., 1st sess.

"The Executive of the United States * * * is incompetent to pass on the subversive character of utterances alleged to contravene the laws of another land."

Mr. Bayard, Sec. of State, to Mr. Valera, July 31, 1885. MSS. Notes, Spain; For. Rel., 1885. For remainder of note, see *infra*, § 402.

It has been already noticed that foreign Governments, in their intercourse with this Government, are to hold the Department of State to be the sole organ of the Executive, and will not be permitted to comment on the domestic politics of the nation.

*Supra*, §§ 79 *ff.*

(3) MAY PERMIT SUBJECTS TO FURNISH FUNDS OR SUPPLIES TO BELLIGERENTS.

§ 390.

Mr. Pickering's instructions of March 2, 1798, to Messrs. Pinckney, Marshall, and Gerry, are cited by Chancellor Kent, as maintaining that "a loan of money to one of the belligerent parties is considered to

be a violation of neutrality." But the loan proposed in this case was to be from the political representatives of a neutral state to a belligerent.

"I have the honor to acknowledge the receipt of your note of the 21st instant, in which you call the attention of the Department to the means employed, as alleged, by persons in this country who plot against the peace of Cuba, for the accomplishment of their designs, and more especially to the method of acquisition through the sale of lottery tickets in the United States.

"I cannot refrain from expressing the appreciation felt by the Government, of your assurances, so frankly and courteously given, touching the energy and sincerity with which the United States has endeavored to prevent the forwarding of aid from our shores to parties engaged in promoting insurrection in Cuba, while at the same time, as regards the special communication of your note, I beg to observe that so far as concerns furnishing funds to support Cuban insurrections, this Government can do no more than to recur to the often announced intention to prosecute all persons concerned in disturbing the peace of a friendly foreign state, so far as permitted by the neutrality and cognate statute of the United States.

"So far as concerns the sale of lottery tickets in particular States, the matter is for State legislation. There is no Federal statute prohibiting sales either of lottery tickets or any other article of traffic, on the ground that the proceeds are to be applied to aid insurgents in a foreign land, nor is it a principle of international law that a sovereign is bound in any sense to prohibit sales of any kind on the ground that the proceeds might go to unlawful objects.

"There are, however, in most of the States in the Union statutes providing for the punishment of those concerned in lottery tickets, without reference to the object to which their proceeds may be applied. To secure the prosecution and conviction of the offenders in such cases the proper course is to apply to the authorities of the State where the lottery tickets complained of are sold, bringing the matter to their attention by an oath, made by a proper presentation to a State magistrate."

Mr. Bayard, Sec. of State, to Mr. Valera, Mar. 31, 1885. MSS. Inst., Spain; For. Rel., 1885.

The furnishing funds by subjects of a neutral state to relieve suffering in a belligerent state is not a breach of neutrality. During the Franco-German war large sums of money were sent from Germans in this country to their friends in Germany, for the relief of sufferers in the hospitals, and large sums were also sent by persons in this country sympathizing with France to the French hospitals; but neither in respect to such contributions nor in respect to meetings called to express sympathy with the one or the other belligerent was it maintained that such action constituted a breach of neutrality. The English Government has even gone further than this. In 1860 a revolt took place in Naples which was, if not instigated, at least materially aided by the King of Sar-

dinia. The liberal English press took an active part in encouraging the insurgents; they also received from England important material aid.

Whart. Com. Am. Law, § 245. See Hall, Int. Law, § 216.

It is remarkable that a contrary view should be taken by Bluntschli (§ 768), Calvo (§ 1060), and Phillimore (iii, 147). Mr. Hall mentions that during the Franco-German war the French Morgan loan and part of the North German Confederation loan were issued in England. On the other hand, it has been held that a suit cannot be maintained on a loan made expressly to affect a belligerent object (Kennett *v.* Chambers, 14 How., 38), or to aid in an insurrection in a foreign state against a Government at peace with the state of the lender. De Wütz *v.* Hendricks, 9 Moore C. P., 586; 2 Bing., 314.

In De Wütz *v.* Hendricks, above cited, it was held that British courts of justice will not take notice of or afford any assistance to persons who, in Great Britain, make or undertake to make loans to a belligerents at war with a nation at peace with Great Britain. On June 17 and June 19, 1823, the King's advocate (Robinson), the attorney-general (Gifford), and the solicitor-general (Copley), gave an opinion to Mr. Canning to the effect that "reasoning on general principles, we should be inclined to say that such subscriptions in favor of one of two belligerent states, being inconsistent with the neutrality declared by the government of the country and with the law of nations, would be illegal and subject the parties concerned in them to prosecution for a misdemeanor, on account of their obvious tendency to interrupt the friendship subsisting between this country and the other belligerent, and to involve the state in dispute, and possibly in the calamities of war. It is proper, however, to add that subscriptions of a similar nature have formerly been entered into (particularly the subscription in favor of the people of Poland in 1792 and 1793), without any notice having been taken of them by the public authorities of the country, and without any complaint having, as far as we can learn, been made by the powers whose interests might be supposed to have been affected by such subscriptions. Neither can we find any instance of a prosecution having been instituted for an offense of this nature, or any hint at such a proceeding in any period of our history. We think, therefore, even if it could be proved that the money had been actually sent in pursuance of the subscription, it is not likely that a prosecution against the individuals concerned in such a measure would be successful.

"But until the money be actually sent, the only mode of proceeding, as we conceive, would be for counseling or conspiring to assist with money one of the belligerents in the contest with the other, a prosecution attended with still greater difficulty."

2 Halleck's Int. Law (Baker's ed.), 197.

### (4) Or munitions of war.

### § 391.

"Our citizens have always been free to make, vend, and export arms. It is the constant occupation and livelihood of some of them. To suppress their callings, the only means, perhaps, of their subsistence, because a war exists in foreign and distant countries, in which we have no concern, would scarcely be expected. It would be hard in principle and

impossible in practice. The law of nations, therefore, respecting the rights of those at peace, does not require from them such an internal derangement in their occupations. It is satisfied with the external penalty pronounced in the President's proclamation, that of confiscation of such portion of these arms as shall fall into the hands of the belligerent powers on their way to the ports of their enemies."

Mr. Jefferson, Sec. of State, to minister of Great Britain, May 15, 1793; 3 Jeff. Works, 558. See 1 Am. St. Pap. (For. Rel.), 69,147. A similar note was addressed on the same day to the minister of France. See 3 Jeff. Works. 560.

"The purchasing within and exporting from the United States, *by way of merchandise*, articles commonly called contraband, being generally warlike instruments and military stores, is free to all the parties at war, and is not to be interfered with.

Mr. Hamilton's Treasury circular of Aug. 4, 1793. 1 Am. St. Pap. (For. Rel.), 140.

"In both the sections cited" (from Vattel) "the right of neutrals to trade in articles contraband of war is clearly established; in the first, by selling to the warring powers who come to the neutral country to buy them; in the second, by the neutral subjects or citizens carrying them to the countries of the powers at war, and there selling them."

Mr. Pickering, Sec. of State, to the minister of France, May 15, 1796. Cited from 1 Am. St. Pap., 649, by Mr. Carpenter, June 3, 1872, in the Senate of the United States, when sustaining the report of the Senate committee holding that the sale of refuse ordnance stores in 1871 by the Government of the United States to parties who were agents of the French Government was not in contravention of international law.

"In pursuance of this policy, the laws of the United States do not forbid their citizens to sell to either of the belligerent powers articles contraband of war, or take munitions of war or soldiers on board their private ships for transportation, and although in so doing the individual citizen exposes his property or person to some of the hazards of war, his acts do not involve any breach of national neutrality, nor of themselves implicate the Government. Thus, during the progress of the present war in Europe, our citizens have, without national responsibility therefor, sold gunpowder and arms to all buyers, regardless of the destination of those articles. Our merchantmen have been and still continue to be largely employed by Great Britain and by France in transporting troops, provisions, and munitions of war to the principal seat of military operations, and in bringing home their sick and wounded soldiers; but such use of our mercantile marine is not interdicted either by the international or by our municipal law, and therefore does not compromit our neutral relations with Russia."

President Pierce, Second Annual Message, 1854; adopted by Sir W. Harcourt, in Historicus, 132.

"The mere exportation of arms and munitions of war from the United States to a belligerent country has never, however, been considered as an offense against the act of Congress of the 20th of April, 1818. All belligerents enjoy this right equally, and a privilege which is open to all cannot justly be complained of by any one party to a war. Guatemala, however, has a right under the law of nations and under her treaty with the United States to seize contraband of war on its way to her enemy, and this Government will not complain if she should exercise this right in the manner which the treaty prescribes."

Mr. Marcy, Sec. of State, to Mr. Molina, Mar. 16, 1854. MSS. Notes, Cent. Am.

"It is certainly a novel doctrine of international law that traffic by citizens or subjects of a neutral power with belligerents, though it should be in arms, ammunition, and warlike stores compromits the neutrality of that power. That the enterprise of individuals, citizens of the United States, may have led them in some instances, and to a limited extent, to trade with Russia in some of the specified articles is not denied, nor is it necessary that it should be, for the purpose of vindicating this Government from the charge of having disregarded the duties of neutrality in the present war."

Mr. Marcy, Sec. of State, to Mr. Buchanan, Oct. 31, 1855. MSS. Inst., Gr. Brit.

"Private manufacturing establishments have been resorted to for powder, arms, and warlike stores, and immense quantities of provisions have been furnished to supply their armies in the Crimea. In the face of these facts, open and known to all the world, it certainly was not expected that the British Government would have alluded to the very limited traffic which some of our citizens may have had with Russia, as sustaining a solemn charge against this Government for violating neutral obligation towards the allies. Russia may have shared scantily, but the allies have undoubtedly partaken largely in the benefits derived from the capital, the industry, and the inventive genius of American citizens in the progress of the war; but as this Government has had no connection with these proceedings, neither belligerent has any just ground of complaint against it."

*Ibid.*

The action of the United States Government in forbidding clearances or shipments of arms to other countries during the civil war was not caused by the exigencies of the war, and gave no preference to either of the belligerents then at war in Mexico. This prohibition did not extend to the shipment of wagons; and the Mexican Government, on the general principles of international law, cannot complain of the shipment from New York of wagons purchased for the use of the French troops in Mexico.

Mr. Seward, Sec. of State, to Mr. Romero, Dec. 15. 1862. MSS. Notes. Mex. Same to same, Jan. 7, 1863; *ibid.*

Transportation of arms or money from the United States to either of the belligerents in Mexico is not a breach of neutrality, either under international law or the municipal law of the United States.

Same to same, Aug. 7, 1865; *ibid.*

Early in 1872 complaints were made to the Senate of the United States that certain "sales of ordnance stores" had been "made by the Government of the United States during the fiscal year ending the 30th of June, 1871, to parties who were agents of the French Government, such stores to be used by France in the war then pending with Germany. A committee was appointed to investigate the subject, and on June 30, 1871, this committee, through Mr. Carpenter, chairman, submitted a report, in which it was observed that the Government being in possession, at the close of the civil war, of a large quantity of "muskets and other military stores," for which it had no occasion, a statute was passed in 1868 (15 Stat. L., 250), authorizing the sale of such arms and stores as were "unsuitable" for use. Under this provision certain large sales were made "without" (as the report stated) "the least preference to purchasers as to opportunities or conditions of purchase, except that persons were excluded from the opportunity to purchase who were suspected of being agents of France, then at war with Germany."

On the question whether the sales were "made under such circumstances as to violate the obligations of the United States as a neutral power pending the war between France and Germany," the committee reported as follows:

"This subject involves two questions—one in regard to the law applicable to the transactions or the question what the Government *might* do under the circumstances, and the other a question of fact. *What was done?* As to the first question, it is the duty of a power desiring to respect the obligations of neutrality, to maintain strict impartiality in regard to the belligerent powers. This, however, is more a question of intention than of fact. If a nation be under treaty obligations with another, the treaty having been entered into when no war was existing or anticipated, to furnish such other nation ships or other supplies in the event of a future war, the obligations of such a treaty may be discharged during the existence of such war without impairing the position of the contracting nation as a neutral. So if a nation has a fund on hand which it is accustomed to loan, or is engaged in the manufacture and sale of arms and other military supplies, it may loan such money or prosecute such sale during the existence of war between other nations, provided it does so in the fair pursuit of its own interest, and without any intention of influencing the strife."

After quoting Vattel to sustain this position, the committee went on to say:

"Congress having, by the act of 1868, directed the Secretary of War to dispose of these arms and stores, and the Government being engaged in such sales prior to the war between France and Germany, had a right to continue the same during the war, and might, in the city of Washington, have sold and delivered any amount of such stores to Frederick William or Louis Napoleon in person, without violating the obligations of neutrality, providing such sales were made in good faith, not for the purpose of influencing the strife, but in execution of the lawful purpose of the Government to sell its surplus arms and stores."

It was then stated that *after* certain sales to Remington & Sons had been agreed on, but before delivery, the Secretary of War received a

telegram, which led him "to suspect that Remington & Sons might be purchasing as agents of the French Government," and he then gave orders that no further sales should be made to them. The sale already made, however, was not repudiated, and the articles were delivered subsequent to the reception of the telegram.

The committee, after an examination of the facts, reported as follows:

"Your committee, without hesitation, report that the sales of arms and military stores during the fiscal year ending June 30, 1871, were not made under such circumstances as to violate the obligations of our Government as a neutral power; and this, to recapitulate, for three reasons: (1) The Remingtons were not, in fact, agents of France during the time when sales were made to them; (2) if they were such agents, such fact was neither known nor suspected by our Government at the time the sales were made; and (3), if they had been such agents, and if that fact had been known to our Government, or if, instead of sending agents, Louis Napoleon or Frederick William had personally appeared at the War Department to purchase arms it would have been lawful for us to sell to either of them, in pursuance of a national policy adopted by us prior to the commencement of hostilities."

Report of the Senate Committee on the sale of arms by the Ordnance Department, May 11, 1872; 42d Cong., 2d sess., Rep. 183. See also House Rep. 46, 42d Cong., 2d sess.

The question of sale of munitions of war in the Franco-German war is discussed at large in 3 Fiore's droit int. (2d ed., trans. by Antoine, 1886), § 1561.

Perels, Int. Seerecht, 251, says that the Government of the United States sold in October, 1870, at public auction 500,000 muskets, 163 carbines, 35,000 revolvers, 40,000 sabers, 20,000 horse trappings, and 50 batteries with ammuuition; and that the export from New York to France from September to the middle of December of that year included 378,000 muskets, 45,000,000 *patronen*, 55 cannon, and 2,000 pistols. He adds that these facts do not require comment.

"Referring to Mr. Adee's Nos. 209, 214, and 216, it is presumed that before the receipt of this you will, under your general instructions, have asked an explanation of the letter of General Burriel to the editor of the Revue des deux Mondes.

"General Burriel founds his justification on the assertion that he acted under the decree of the captain-general of Cuba of March, 1869, in which it was said:

"'Vessels which may be captured in Spanish waters, or on the high seas near to the island, having on board men, arms, and munitions, or effects, that can in any manner contribute, promote, or foment the insurrection in this province, whatsoever their derivation and destination, after examination of their papers and register, shall be *de facto* considered as enemies of the integrity of our territory, and treated as pirates, in accordance with the ordinances of the navy. All persons captured in such vessels, without regard to their number, will be immediately executed.'

"Immediately on the receipt of this decree at this Department, I wrote to Mr. Lopez Roberts as follows respecting it:

"'It is to be regretted that so high a functionary as the captain-general of Cuba should, as this paper seems to indicate, have overlooked the obligations of his Government pursuant to the law of nations, and especially its promises in the treaty between

the United States and Spain of 1795. Under that law and treaty the United States expect for their citizens and vessels the privilege of carrying to the enemies of Spain, whether those enemies be claimed as Spanish subjects or citizens of other countries, subject only to the requirements of a legal blockade, all merchandise not contraband of war. Articles contraband of war, when destined for the enemies of Spain, are liable to seizure on the high seas, but the right of seizure is limited to such articles only, and no claim for its extension to other merchandise, or to persons not in the civil, military, or naval service of the enemies of Spain, will be acquiesced in by the United States.

"'This Government certainly cannot assent to the punishment by Spanish authorities of any citizen of the United States for the exercise of a privilege to which he may be entitled under public law and treaties.

"'It is consequently hoped that his excellency the captain-general of Cuba will either recall the proclamation referred to, or will give such instructions to the proper officers as will prevent its illegal application to citizens of the United States or their property. A contrary course might endanger those friendly and cordial relations between the two Governments, which it is the hearty desire of the President should be maintained.'

"It has been supposed at this Department that in consequence of these representations this highly objectionable decree was abrogated. It was therefore with no little surprise that information was received of the assertion that it is regarded as still in force. It is deemed important to have accurate information on this point.

"You are therefore instructed, as soon after the receipt of this as possible, to inquire whether it be true, as stated by General Burriel, that the decrees of March 24, 1869, had not been abrogated when the executions took place at Santiago de Cuba; also whether those decrees, or anything equivalent to them, respecting jurisdiction on the high seas, are regarded as still in force; also whether the executions by General Burriel's orders are regarded as having been made under authority of law.

"It is supposed that the neglect hitherto of the Government of Spain to institute steps for the punishment of General Burriel and his associates in the bloody deeds at Santiago de Cuba has been caused by the extraordinary political condition of the peninsula. If this supposition is incorrect it is important that we should know that fact. You will, therefore, also inquire whether proceedings are to be instituted against them and when and where the proceedings will probably take place. You will also inquire whether it is in contemplation to exhibit any marks of the displeasure of his Government by military degradation or otherwise."

Mr. Fish, Sec. of State, to Mr. Cushing, June 9, 1874. MSS. Inst., Spain; For. Rel., 1874.

"The exportation of arms and munitions of war of their own manufacture to foreign countries, is an important part of the commerce of the United States. In time of war their Government will expect those engaged in the business to beware of all the risks legally incident to it. No such expectation, however, can be indulged in a time of profound

peace; and indemnification will be asked of any nation which may unnecessarily or illegally obstruct such trade."

Mr. Fish, Sec. of State, to Mr. Cramer, July 28, 1874. MSS. Inst., Denmark. See also Mr. Fish, Sec. of State, to Mr. Russell, June 4, 1875. MSS. Inst., Venez.

"A torpedo launch, in five sections, ready to be set up," though contraband of war, may be exported from the United States without breach of neutrality.

Mr. Evarts, Sec. of State, to Mr. Sherman, Nov. 14, 1879. MSS. Dom. Let.

Such articles are "a legitimate element of commerce to the citizens of the United States, a neutral power, with either of the belligerents in time of war in the same manner and to the same extent as they would be in time of peace, and afford no ground for the interference of the executive officers of the United States."

*Ibid.*

That neutrals may sell arms to belligerents, see further Mr. Frelinghuysen, Sec. of State, to Mr. Dayton, Feb. 19, 1883. MSS. Inst., Netherlands.

Neutrals, in their own country, may sell to belligerents whatever belligerents choose to buy. The principal exceptions to this rule are, that neutrals must not sell to one belligerent what they refuse to sell to the other, and must not furnish soldiers or sailors to either; nor prepare, nor suffer to be prepared within their territory, armed ships or military or naval expeditions against the other.

The Bermuda, 3 Wall., 514.

Neutrals also may convey to belligerent ports not under blockade whatever belligerents may desire to take, except contraband of war, which is always subject to seizure when being conveyed to a belligerent destination, whether the voyage be direct or indirect; such seizure, however, is restricted to actual contraband, and does not extend to the ship or other cargo, except in cases of fraud or bad faith on the part of the owners, or of the master with their sanction.

*Ibid.*

The landing of a cargo contraband of war, on the shore of the country of one belligerent, at a point not blockaded, is not an act of hostility against the other belligerent.

The Florida, 4 Benedict, 452.

Belligerents may come into the territory of a neutral nation, and there purchase and remove any article whatsoever, even instruments of war, unless the right be denied by express statute. If, however, the object of such an act be to impede the operations of either belligerent power, and to favor the other, it is a violation of neutrality.

1 Op., 61 Lee, 1796.

Neutrals may sell munitions of war to belligerents, subject to the right of seizure *in transitu.*

11 Op., 408, Speed, 1865.

There is no law or regulation which forbids any person or Government, whether the political designation be real or assumed, from purchasing arms from citizens of the United States, and shipping them at the risk of the purchaser.

*Ibid.*, 451.

As to supply of arms to South American colonies when in insurrection against Spain, see 5 J. Q. Adams' Memoirs, 46.

For a criticism of the position of the United States in reference to the rights of neutrals to furnish contraband of war to belligerents, see 3 Phill. Int. Law (3d ed.), 250, 408; and as criticising Sir R. Phillimore and pointing out his mistakes in this relation, see Historicus, by Sir W. Harcourt, 130 *ff.*

If the sale of munitions of war is to be held a breach of neutrality, "instantly upon the declaration of war between two belligerents, not only the traffic by sea of all the rest of the neutral powers of the world would be exposed to the inconveniences of which they are already impatient, but the whole inland trade of every nation of the earth, which has hitherto been free, would be cast into the fetters. * * * It would give to the belligerent the right of interference in every act of neutral domestic commerce, till at last the burden would be so enormous that neutrality itself would become more intolerable than war, and the result of this assumed reform, professing to be founded on 'the principles of eternal justice,' would be nothing less than universal and interminable hostilities." (Sir W. Harcourt, Historicus, 134.) For, not only the vendor of the iron would have to be prevented from selling to the vendor of the gun, but the miner and machinist would have to be prevented from working for the vendor of the iron. A neutral sovereign, therefore, would have either to stop all machinery by which munitions of war could be produced for belligerent use, or expose himself to a call for whatever damages his failure so to do might have caused either belligerent. Under such circumstances it would be far more economical and politic to plunge into a war as a belligerent than to keep out of it as a neutral.

The mere act of furnishing by the subject of a neutral state a belligerent with munitions of war, does not involve such neutral state in a breach of neutrality. (1) Between selling arms to a man and indictable participation in an illegal act intended to be effected by the vendee through the instrumentality of such arms there is no causal connection. The miner or manufacturer, to appeal to an analogous case, may regard it not only as possible, but as probable, that his staples, when consisting of weapons or of the materials of weapons, may be used for guilty purposes, but neither miner nor manufacturer becomes thereby penally responsible. (2) To make the vendor of munitions of war punishable would make it necessary to impose like responsibility on the manufacturer; and if on the manufacturer, then on the producer of the raw material which the manufacturer works up. In each case the thing made or sold is one of the necessities of war. In each case the producer or vendor knows that the thing produced or sold will probably be used for warlike purposes. Hence, in times of war, not only would neutral sales of munitions of war become penal, but penal responsibility might be attached to the production of any of the materials from which such

weapons are manufactured. (3) Nor would this paralysis be limited to periods of war. A prudent Government, long foreseeing a rupture, or preparing in secret to surprise an unprepared foe, might take an unfair advantage of its adversary, were this permitted, by purchasing in advance of the attack all munitions which neutral states might have in the market; but, on the theory before us, a neutral state could not permit this without breach of neutrality, since to permit such a sale would be to give a peculiarly unfair advantage to the purchasing belligerent. Hence, if such sales are indictable in times of war, they are *à fortiori* indictable in times of peace. Why would a foreign nation, it might well be argued, want in times of peace to buy Armstrong guns, or iron-clads, unless to pounce suddenly down on an unprepared foe? No munitions of war, therefore, could be sold in any country unless to its own subjects and for its own use; and countries which cannot produce the iron or coal necessary for the manufacture of artillery or iron-clads, would, if no nation can furnish munitions of war to another, have to do without artillery or iron-clads. (4) To establish a national police which could prevent the sale of such staples would impose on neutral states a burden, not only intolerable, but incompatible with constitutional traditions. It might be possible in a land-locked province like Switzerland; it might even be possible in islands of the size of Great Britain; but in a country so vast as the United States, and with an ocean frontier so extended, it would be impossible to establish a police that could preclude such exportation without vesting in the National Government powers and patronage inconsistent with republican institutions, and so enormously expensive as to make it more economical to interpose in a war as a belligerent than to watch such war as a neutral. For these and other reasons the United States Government has insisted on the right of a neutral to send munitions of war to a belligerent; and this position was taken by President Grant in his proclamation of August 22, 1870. The right was stoutly contested, however, by Germany, while it was maintained by both England and the United States. (See authorities cited in Whart. Crim. Law, 9th ed., § 1903; 1 Kent Com., 142; 6 Webster's Works, 452.) See also notes of this action in beginning of this section.

"It was contended," says Chancellor Kent (1 Com., 142), "on the part of the French nation in 1796, that neutral Governments were bound to restrain their subjects from selling or exporting articles contraband of war to the belligerent powers. But it was successfully shown, on the part of the United States, that neutrals may lawfully sell at home to a belligerent purchaser, or carry themselves to the belligerent powers, contraband articles subject to the right of seizure *in transitu*. This right has since been explicitly declared by the judicial authorities of this country. (Richardson *v.* Ins. Co., 6 Mass., 113; The Santissima Trinidad, 7 Wheat., 283.) The right of the neutral to transport, and of the hostile power to seize, are conflicting rights, and neither party can charge the other with a criminal act." In a note it is added: "This passage is cited and approved by Lord Westbury in Ex parte Chavasse *re* Grazebrook, 34 L. J. N. S. By., 17. (See Historicus, Int. Law, 119, 129; Hobbs *v.* Henning, 17 C. B. N. S. 794; The Helen, L. R. 1 Ad. & Ec., 1.)" Mr. Abby (Abby's Kent (ed. 1878), 301) maintains that the English authorities cited by Chancellor Kent do not sustain his position.

"As an illustration of the difficulties that would arise in this country from an extension of neutral liability, may be mentioned the fact that

in 1882–83, munitions of war, approximating in value to $5,000,000, were forwarded from San Francisco to China. 'The ammunition cases had the brand U. S. Government, 45 caliber, and all the cases were from Springfield, Mass.' 'During that period 240,000 Springfield rifles, and 25,000,000 cartridges in all have been forwarded, besides from 500 to 800 bales of cotton duck suitable for tents, by express by each steamer for China.' (Philadelphia Inquirer, Aug. 8, 1883.) The United States Government could not, except by measures which would involve not only enormous expense, but a vast and perilous increase of police force, prevent parties from buying up ammunition at public or private sale, and sending it to China. Yet, if the non-prevention of such exportations imposed liability for the damage thereby produced, the United States would be obliged to pay for all the injury done to English or French property by such ammunition in case of a war between China and France or England."

Whart. Com. Am. Law, § 246.

(5) Or to enlist in service of belligerent.

§ 392.

"Vessels of either of the parties not armed, or armed previous to their coming into the ports of the United States, which shall not have infringed any of the foregoing terms, may lawfully engage or enlist therein their own subjects or citizens, not being inhabitants (domiciled ?) of the United States."

Mr. Hamilton's Treasury circular of Aug. 4, 1793. 1 Am. St. Pap. (For Rel.), 140.

That a citizen of the United States enlisted in service of a foreign belligerent cannot claim the interposition of his own Government for redress for injuries suffered by him in such service, see Mr. Fish, Sec. of State, to Mr. Williams, July 29, 1874, quoted *supra*, § 225.

"A telegram concerning the service of citizens of the United States as pilots on French vessels of war in Chinese waters was received from you on the 9th instant in the following words:

"'Chinese object American pilots French men-of-war. Shall I forbid such service ?
"'YOUNG.'

"To this the following reply was sent March 10:

"'Although well disposed, we cannot forbid our citizens serving under private contract at their own risk. Not prohibited by statutes or cognizable by consuls.'

"The obligation of a neutral Government to prevent its citizens from joining in hostile movements against a foreign state is limited by the extent to which such citizens are under its jurisdiction, and by the municipal laws applicable to their actions. Hence, a citizen outside of such jurisdiction may not be controlled in his free acts, but what he does is at his own risk and peril. If he offer his service to a combatant, that is a matter of private contract, which it may be equally improper for his own Government to forbid or protect, and such service in legitimate war is not contrary to international law.

"In China, however, foreign powers have an extraterritorial jurisdiction, conferred by treaty. This jurisdiction is in no wise arbitrary, but is limited by laws, and is not preventive, but punitory. If a citizen of the United States in China commit an offense against the peace of China, it is triable in the consular courts. Section 4102 of the Revised Statutes provides that 'insurrection or rebellion against the Government of either of those countries [*i. e.*, the countries named in section 4083, whereof China is one] with intent to subvert the same, and murder, shall be capital offenses, punishable with death,' etc., the consular court and the minister to concur in awarding the penalty. But the simple act of entering into a private contract to serve either combatant in open warfare would not appear to be triable under this section; and, even if it were, this Government would have no rightful power to forbid such service.

"It is, of course, understood that this reasoning does not apply to persons in the employ of the Government of the United States. For such persons, while so employed, to perform hostile service for either party would be a breach alike of discipline and neutral good faith which the rules of the service would be competent to prevent.

"In the interest of good will between nations, it is desirable that citizens of the United States should not take part with either belligerent, or, if they do so, that it should be distinctly known that they thereby act beyond all effective responsibility of their own Government. Your discretion will doubtless show you how far it may be opportune to go in the direction of dissuading any citizen of the United States from taking sides in the present contest, but whatever you may do should be marked with the most obvious impartiality."

Mr. Bayard, Sec. of State, to Mr. Young, Mar. 11, 1885. MSS. Inst., China; For. Rel., 1885.

An American citizen may enter either the land or naval service of a foreign Government without compromising the neutrality of his own.

The Santissima Trinidad, 1 Brock., 478.

Nor is it a crime, under the neutrality law, to leave this country with intent to enlist in foreign military service; nor to transport persons out of the country with their own consent who have an intention of so enlisting.

To constitute a crime under the statute, such person must be hired or retained to go abroad with the intent to be so enlisted.

U. S. *v.* Louis Kazinski, 2 Sprague, 7.

It is, however, a breach of neutrality for one sovereign to recruit soldiers in another's territory.

*Infra*, § 395.

Mariners may be said to be citizens of the world; and it is usual for them of all countries to serve on board of any merchant ship that will

take them into pay, and this practice, from the manner of their livelihood, seems, for obvious reasons, founded on convenience and, in many instances, on necessity.

1 Op., 61, Lee, 1796.

If foreign sovereigns purchase ships in the United States, and load them with provisions for the use of their fleets or armies, those ships are to be considered as commercially employed; and if they be not *attached* to the naval or military expeditions, as part thereof, in accompanying the fleet, or closely following the army from place to place, for the purpose of furnishing them with supplies, there can be no pretext for restraining American sailors from hiring on board of them for the purpose of gaining a support in their customary way of occupation.

*Ibid.*

A citizen of a neutral nation has a right to render his personal service as a sailor on board of any vessel whatever employed in mere commerce, though owned by either of the belligerent powers, or the subjects or citizens of either, and nothing hostile can be imputed to such conduct.

*Ibid.*

To same general effect see 4 Op., 336; U. S. *v.* Skinner, 2 Wheel., C. C., 232; Stoughton *v.* Taylor, 2 Paine, 655.

(6) OR TO SELL OR PURCHASE SHIPS.

§ 393.

"If vessels have been built in the United States and afterwards sold to one of the belligerents and converted into vessels-of-war, our citizens engaged in that species of manufacture have been equally ready to build and sell vessels to the other belligerent. In point of fact both belligerents have occasionally supplied themselves with vessels-of-war from citizens of the United States. And the very singular case has occurred of the same ship-builder having sold two vessels, one to the King of Spain and the other to one of the southern republics, which vessels afterwards met and encountered each other at sea.

"During a state of war between two nations the commercial industry and pursuits of a neutral nation are often materially injured. If the neutral finds some compensation in a new species of industry, which the necessities of the belligerents stimulate or bring into activity, it cannot be deemed very unreasonable that he should avail himself of that compensation, provided he confines himself within the line of entire impartiality, and violates no rule of public law."

Mr. Clay, Sec. of State, to Mr. Rivas y Salmon, June 9, 1827. MSS. Notes, For. Leg.

"Ship-building is a great branch of American manufactures, in which the citizens of the United States may lawfully employ their capital and industry. When built they may seek a market for the article in for-

eign ports as well as their own. The Government adopts the necessary precaution to prevent any private American vessel from leaving our ports equipped and prepared for hostile action, or, if it allow, in any instance, a partial or imperfect armament, it subjects the owner of the vessel to the performance of the duty of giving bond, with adequate security, that she shall not be employed to cruise or commit hostilities against a friend of the United States.

"It may possibly be deemed a violation of strict neutrality to sell to a belligerent vessels-of-war completely equipped and armed for battle, and yet the Emperor of Russia could not have entertained that opinion, or he would not have sold to Spain during the present war, to which he was a neutral, a whole fleet of ships-of-war, including some of the line.

"But if it be forbidden by the law of neutrality to sell to a belligerent an armed vessel completely equipped and ready for action, it is believed not to be contrary to that law to sell to a belligerent a vessel in any other state, although it may be convertible into a ship of war.

"To require the citizens of a neutral power to abstain from the exercise of their incontestable right to dispose of the property, which they must have in an unarmed ship, to a belligerent, would in effect be to demand that they should cease to have any commerce, or to employ any navigation in their intercourse with the belligerent. It would require more—it would be necessary to lay a general embargo, and to put an entire stop to the total commerce of the neutral with all nations; for, if a ship or any other article of manufacture or commerce, applicable to the purpose of war, went to sea at all, it might directly or indirectly find its way into the ports, and subsequently become the property of a belligerent.

"The neutral is always seriously affected in the pursuit of his lawful commerce by a state of war between other powers. It can hardly be expected that he should submit to a universal cessation of his trade, because by possibility some of the subjects of it may be acquired in a regular course of business by a belligerent, and may aid him in his efforts against an enemy. If the neutral show no partiality; if he is as ready to sell to one belligerent as the other; and if he take, himself, no part in the war, he cannot be justly accused of any violation of his neutral obligations."

Mr. Clay, Sec. of State, to Mr. Tacon, Oct. 31, 1827. MSS. Notes, For. Leg.

"The principle, therefore, that the neutral has a perfect right to purchase the merchant vessels of the belligerents has been maintained by England, by Russia, and by the United States, and it is inconsistent with these historical facts to say that the contrary doctrine avowed by France has had the sanction of the chief maritime nations, or that 'it forms a part of the whole doctrine of maritime law.'"

Mr. Marcy, Sec. of State, to Mr. Mason, Feb. 19, 1856. MSS. Inst., France. See also 11 Wait's St. Pap., 203 *ff.*

Mr. Marcy's position, as above stated, is in harmony with the English rule, but is stoutly contested in France, where it is held, under the regulations of July 26, 1778, that enemy-built vessels cannot be made neutral by a sale to a neutral after hostilities break out. (See 2 De Pistoye et Duverdy, Prises Maritime, 1, 502.) In Russia the French rule is said to be applied. (See Courier des Etats Unis, Oct. 27, 1855, cited Lawrence's Wheaton (ed. 1863), 581, 582.) The English rule, like that adopted by Mr. Marcy, requires that the sale should be *bona fide*. (The Sechs Geschwistern (4 Robin, Adm., 100; see 2 Wildman's Int. Law, 90.) As sustaining Mr. Marcy's position, see Mr. Evarts, Secretary of State, to Mr. Christiancy, May 8, 1879; MSS. Inst., Peru; For. Rel., 1879. Same to same, December 26, 1879.

In 1883, during the war between France and China, many Chinese vessels were sold to citizens of the United States, and after the war was over were resold to Chinese. The validity of this transaction does not seem to have been tested by France. (See President Arthur's Fourth Annual Message, 1884.)

"I have received Mr. Young's No. 650, of February 14 last, and have to approve his instruction to Mr. Wingate, consul at Foo-Chow, intimating that in view of our friendly relations with both China and France a consular officer should be careful to avoid doing anything, even in an informal manner, that might be regarded as a violation of the strictest neutrality.

"As illustrating further our position in such cases, I herewith inclose for your information a copy of an instruction lately addressed to our consul-general at Shanghai touching the sale of vessels by American citizens in China."

Mr. Bayard, Sec. of State, to Mr. Smithers, Apr. 20, 1885. MSS. Inst., China; For. Rel., 1885.

The following is the inclosure above referred to:

"On the 19th ultimo you telegraphed to the Department inquiring 'Can Americans sell steamers to Chinese?' You were answered to the effect that the inquiry was too vague to admit of intelligent examination.

"On March 20 you repeated the inquiry in a modified form, 'Can American steamers here be sold to Chinese?'

"The question is still too obscurely presented to admit of a reply by telegraph covering the different cases which it presents. There are alternative aspects to each fundamental point covered by your inquiry, thus:

"(1) Are the steamers in question registered vessels of the United States plying between our ports and those of China, or are they foreign-built vessels in Chinese waters which have become the property of citizens of the United States through *bona fide* purchase?

"(2) Are the owners of the steamers residing within or without the jurisdiction of China?

"(3) Is it proposed to sell them to the Chinese Government, or to individual subjects of China?

"(4) Are they to be employed as regularly enrolled vessels-of-war or as privateers under Chinese commission issued to individuals, or as Government transports, or as merchant vessels in legitimate trade with unblockaded ports, or as blockade-runners?

"Any given combination of these points would involve a distinct application of international law thereto.

"Assuming that the owners of the steamers are within Chinese jurisdiction, as the steamers appear to be, judging from your second telegram, the intervention of the consular officers of the United States would be required, in case of sale to aliens, to cancel the papers under which the steamers now bear our flag. If they are regularly registered vessels, the registry is to be destroyed and one-half of it sent to this Department. If they are foreign built and owned by American citizens, the certified bill of sale allowed under paragraph 340 of the Consular Regulations of 1881 should be canceled by the consul; and if the new transfer should take place at another consulate than that at which the original purchase of the vessel was recorded, official correspondence beween the two consulates would be needed to effect such cancellation.

"It would, however, be manifestly improper for any official of the United States to take part in the transfer of a steamer, or of any property whatever, for a warlike purpose, to a belligerent towards whom the United States maintained a position of neutrality.

"If, however, the proposed transaction should be clearly and positively determined to be wholly pacific, and not intended in any way directly or indirectly to favor the employment of the vessel for or in aid of any hostile purpose, the intervention of the consul to cancel the existing documents of the vessel would not violate any international obligation on the part of this Government. The utmost discretion and the most evident and positive proof of the legitimacy of the transfer would, however, be necessary, and in case of doubt, however remote, it would be the consul's duty to decline to intervene in the transaction.

"Your inquiry is susceptible of still another aspect, for you may have desired to know whether you were under any obligation to *prevent* the transfer of American-owned steamers to the flag of China, whether with pacific or with hostile intent. In any case where the ultimate object of the transfer is or may appear to be hostile, and where consular intervention is necessary to effect a valid transfer, the withholdment of such intervention would be the limit to which a consul could go to prevent such unlawful change of ownership. But if the legalization of the sale should be unnecessary, there would be no international obligation on the consul to prevent the seller from alienating his property, nor would any preventive means appear to be within the consul's reach, in such a manner as to impute responsibility to him for failure to employ them. The consul would have no more control, and consequently no more responsibility, in the case of transfer of the American vendor's property by private contract and simple delivery within Chinese jurisdiction,

than in the case of a private contract on the part of the same vendor to lend his personal aid to either belligerent. In either case, the party alienating his property or his services does so at his own risk and peril.

"This instruction, although covering only a part of the hypothetical field embraced in your inquiries, may serve to guide you in whatever specific case may be presented; but if you should be in doubt on any point involved, precise instructions will be given to you thereon."

Mr. Bayard, Sec. of State, to Mr. Stahel, Apr. 14, 1885. MSS. Inst., Consuls; For. Rel., 1885.

These vessels had been previously sold to citizens of the United States by Chinese.

See President Arthur's annual message of 1884, quoted *infra*, § 410.

It is not a violation of the neutrality laws of the United States to sell to a foreigner a vessel built in this country, though suited to be a privateer, and having some equipments calculated for war but frequently used by merchant ships.

Moodie *v.* The Ship Alfred, 3 Dall., 307.

Sending armed vessels and munitions of war to the ports of a belligerent for sale as articles of commerce is not prohibited by the law of nations or by the laws of the United States, though it may render the property liable to confiscation.

The Santissima Trinidad, 7 Wheat., 283.

While the sale of a vessel armed or unarmed to a belligerent is not forbidden by international law, such a vessel, even on its way to the vendee, is liable to be seized as contraband on the high seas by the opposing belligerent.

Story, J., Santissima Trinidad, 7 Wheat., 340; The Bermuda, 3 Wall., 514; The Florida, 4 Ben., 452; see Crawford *v.* Wm. Penn, Pet. C. C., 106; U. S. *v.* The Etta, 13 Am. Law. Reg., 38; The Lilla, 2 Sprague, 177; 2 Cliff., 169; Dana's Wheaton, note 215.

The case of the sale of the Meteor is examined *infra*, § 396. See, on this point 5 Am. Law Rev., 263.

A *bona fide* purchase for a commercial purpose by a neutral, in his own home port, of a ship-of-war of a belligerent that had fled to such port in order to escape from enemy vessels in pursuit, but which was *bona fide* dismantled prior to the sale, and afterward fitted up for the merchant service, does not pass a title above the right of capture by the other belligerent.

The Georgia, 7 Wall., 32.

A sale in a neutral port of a war ship by a belligerent to a neutral is invalid.

The Georgia, 1 Lowell, 98.

It is not a violation of the neutrality laws of the United States for a merchant or ship owner to sell his vessel and cargo (should the latter

even consist of warlike stores) to a citizen or inhabitant of Buenos Ayres (then an insurgent belligerent). Nor will it make any difference whether such sale be made directly in a port of the United States, with immediate transfer and possession thereupon, or under a contract entered into here, with delivery to take place in a port of South America.

1 Op., 190, Rush, 1816.

There is nothing in the law of nations which requires that a ship, in order that she may enjoy all the benefits of nationality, should have been constructed in a particular country, or which negatives the general right of a nation to purchase and naturalize the ships of another nation.

6 Op., 638, Cushing, 1854.

Each nation, however, has the right to prescribe convenient rules on this subject.

*Ibid.*

No Government has the right to contest the validity of the sale of a ship on the pretense of its having been, at one time, belligerent property, *i. e.*, the property of its enemy.

*Ibid.*

The only question that can be investigated in the case of a neutral ship purchased from a belligerent is the *bona fides* of the transaction. The state of war interrupts no contract of purchase and sale, or of transportation, as between neutral and belligerent, except in articles contraband of war. The registry of a ship is not a document required by the law of nations, as expressive of the ship's national character.

*Ibid.* See *infra*, §§ 408, *ff.*

A citizen of the United States may purchase a ship of a belligerent power, at home or abroad, in a belligerent port, or on the high seas, provided the purchase be made *bona fide*, and the property be passed absolutely and without reserve; and the ship so purchased becomes entitled to bear the flag and receive the protection of the United States.

Neutrals have a right to purchase ships of belligerents.

7 Op., 538, Cushing, 1855. See *infra*, § 399.

The distinction between fitting out and arming ships-of-war for the service of a belligerent, which is not permissible, and selling to such belligerent ships to be converted into men-of-war and munitions of war, which is permissible, may be thus explained: It is not indictable for a gunsmith to sell a pistol to a party who may use it unlawfully, even though the vendor may have reasons to suspect the object of the purchase. It would, however, be unlawful for the gunsmith to join in arranging a machine by which a specific unlawful purpose is to be achieved. It is not unlawful, in other words, to be concerned in preparations which will not, unless diverted by an independent force, produce a violation of law. It is, however, unlawful to be concerned in putting in actual operation dangerous machines. He who is concerned in fitting out and

arming a man-of-war for the purpose of preying on the commerce of a friendly state, or of attacking its armed ships or ports, is as much concerned in the attack as he who takes part in manufacturing and planting a torpedo in a frequented channel is responsible for the mischief done by the torpedo. This distinction has been already asserted in the cases which rule that it is an indictable offense to be concerned in counseling and aiding a specific attack, but not an indictable offense to be concerned in selling arms by which such attack is to be made.

See The Gran Para, 7 Wheat., 471.

(7) OR MAY GIVE ASYLUM TO BELLIGERENT SHIPS OR TROOPS.

§ 394.

The fact that by treaty with France we were bound to receive her public armed vessels in our ports was held, in 1793, no reason why we should not extend a similar asylum to Great Britain, with whom we had no such treaty.

Mr. Jefferson, Sec. of State, to Mr. Hammond, Sept. 9, 1793. MSS. Notes, For. Leg. 1 Am. St. Pap. (For. Rel.), 176; 1 Wait's St. Pap., 170. See as to French and British treaties, *supra*, §§ 148 *ff.*, 150 *ff.*

The correspondence as to "la Petite Democrate, heretofore la Petite Sarah," to adopt Genet's description, is given in 1 Am. St. Pap. (For. Rel.), 163 *ff.*

"The doctrine as to the admission of prizes maintained by the Government from the commencement of the war between England, France, etc., to this day has been this: The treaties give a right to armed vessels, *with their prizes*, to go where they please (consequently into our ports), and that those prizes shall not be detained, seized, nor adjudicated, but that the armed vessel may depart as *speedily as may be*, with *her prize*, to the place of her commission, and that we are not to suffer their enemies to sell in our ports the prizes taken by their privateers. Before the British treaty no stipulation stood in the way of permitting France to sell her prizes here, and we did permit it, but expressly as a favor, not as a right. * * * These stipulations admit the prizes to put into our ports in cases of necessity, or perhaps of convenience, but no right to remain if disagreeable to us, and absolutely not to be sold."

Mr. Jefferson, President, to Mr. Gallatin, Aug. 28, 1801. 1 Gallatin's Writings, 42. See further as to this treaty, *supra*, § 148.

Misconduct by belligerent cruisers in neutral waters will justify the sovereign of such waters in requiring the departure of such cruisers from such waters. This ground was taken by President Jefferson November 19, 1807, when ordering the departure of the British squadron from the waters of the United States.

See *supra*, §§ 315*b*, 319, 331. This proclamation is given in 3 Am. St. Pap. (For. Rel.), 23.

After the South American insurgents were recognized as belligerents in 1816, their public vessels were received in the ports of the United

States on the same basis as those of Spain. Sympathy with the insurgents also, if not desire for plunder, led to the fitting out in Baltimore of numerous privateers to prey on Spanish commerce under insurgent flags. This led to the act of 1816, imposing fine, imprisonment, and forfeiture in such cases.

"The Government of the United States has been sincerely disposed to perform toward both belligerents all the offices of hospitality enjoined by humanity and the public law and consistent with their friendship to both; but it can permit neither, under allegations of distress, whether feigned or real, to perform acts incompatible with a strict and impartial neutrality."

Mr. Clay, Sec. of State, to Mr. Obregon, May 1, 1828. MSS. Notes, For. Leg,

The following correspondence is here inserted at large in consequence of the elaborate exposition it gives of the right of asylum:

"The department of the colonies has just communicated to me the information, transmitted by the governor of Curaçoa, concerning the affair of the ship Sumter, and I hasten to bring to your notice the following observations, by way of sequence to the preliminary reply which I had the honor to address to you on the 2d of this month. According to the principles of the law of nations, all nations without exception may admit vessels-of-war belonging to a belligerent state to their ports, and accord to them all the favors which constitute an asylum. Conditions are imposed on said vessels during their stay in the port or roadstead. For example, they must keep perfect peace with all vessels that may be there; they may not augment their crews, nor the number of their guns, nor be on the lookout in the ports or roadsteads for the purpose of watching after hostile vessels arriving or departing, etc. Besides, every state has the right to interdict foreign vessels of-war from entrance to ports which are purely military. Thus it was that Sweden and Denmark, in 1854, at the time of the Crimean war, reserved the right to exclude vessels-of-war from such or such ports of their dominions.

"The neutral power has also the right to act like France, who, by her declaration of neutrality in the war between the United States and the Confederate States, under date of 9th June last (Moniteur of 11th June), does not permit any vessel-of-war, or privateer, of one or the other of the belligerents, to enter and remain with their prizes in French ports longer than twenty-four hours, unless in case of refuge under stress.

"In the proclamation of the month of June last, which was communicated to you with my dispatch of the 13th, the Government of the Netherlands has not excluded vessels-of-war from her ports.

"As to privateers, the greatest number of the maritime nations allows them the privilege of asylum upon the same conditions nearly as to vessels-of-war.

"According to a highly esteemed author on the law of nations (Hautefeuille, Droits et Devoirs des Nations Neutres, i, 139), privateers may claim entrance into the ports of nations which have consented to accord asylum to them, not only in cases of pressing danger, but even in cases in which they may deem it advantageous, or even only agreeable, and for obtaining rest or articles of secondary necessity, such as the refreshments they may have need of.

"The terms of the proclamation of the Netherlands Government, which admits privateers into Netherlands ports only in cases of distress, harmonize with this doctrine.

"Moreover, according to the information received from the governor of Curaçoa, the Sumter was actually in distress, and that functionary could not, therefore, refuse to allow the said vessel to enter the port.

"Strong in its amicable intentions, the King's Government does not believe itself bound to confine itself to the defense of the conduct of one of its agents in the particular case under discussion. It is not ignorant that it can or may hereafter be a contested question in such cases as to the reality of the distress in which such vessel or other would be, and that thus the subject of the admission generally of the Confederate States vessels would rest untouched. I, therefore, sir, think it opportune to look into the question to determine whether the Sumter should have been admitted to Curaçoa outside of the condition of well-assured distress.

"It is evident that the reply to be made is dependent on another question—that is to say, was this vessel a man-of-war or a privateer?

"In the latter case, the Netherlands Government could not, except in case of a putting in compelled by distress (*relâche forcée*) admit the Sumter into the ports of its territories.

"It is not sufficient to dispose of the difficulty by the declaration that the Sumter is, as is stated in your dispatches, 'a vessel fitted out for, and actually engaged in, piratical expeditions,' or 'a privateer steamer.' Such an assertion should be clearly proved, in accordance with the rule of law, '*affirmanti incumbit probatio.*'

"After having poised, with all the attention which comports with the weightiness of the matter, the facts and circumstances which characterize the dissensions which now are laying desolate the United States, and of which no Government more desires the prompt termination than does that of the Netherlands, I think I may express the conviction that the Sumter is not a privateer, but a man-of-war—grounding myself on the following considerations:

"In the first place, the declaration of the commander of the vessel given in writing to the governor of Curaçoa, who had made known that he would not allow a privateer to come into the port, and had then demanded explanations as to the character of the vessel. This declaration purported 'the Sumter is a ship-of-war duly commissioned by the Government of the Confederate States.'

"The Netherlands governor had to be contented with the word of the commander couched in writing. Mr. Ortolan (Diplomatie de la Mer, i, 217), in speaking of the evidence of nationality of vessels of-war, thus expresses himself:

"'The flag and the pennant are visible indications, but we are not bound to give faith to them until they are sustained by a cannon shot.'

"The attestation of the commander may be exigible, but other proofs must be presumed; and, whether on the high seas or elsewhere, no foreign power has the right to obtain the exhibition of them.

"Therefore the colonial council has unanimously concluded that the word of the commanding officer was sufficient.

"In the second place, the vessel armed for war by *private persons* is called 'privateer.' The character of such vessel is settled precisely, and, like her English name (privateer), indicates sufficiently under this circumstance that she is a *private* armed vessel—name which Mr. Wheaton gives them. (Elements of International Law, ii, 19.)

"Privateering is the maritime warfare which privateers are authorized to make, *for their own account*, against merchant vessels of the enemy by virtue of letters of marque which are issued to them by the state.

"The Sumter is not a private vessel; is not the private property of unconnected individuals—of private ship-owners. She, therefore, cannot be a privateer; she can only be a ship-of-war or ship of the state armed for cruising. Thus the Sumter is designated, in the extract annexed from Harpers Weekly, under the name of 'rebel ship-of-war.'

"Thirdly. It cannot be held, as you propose in your dispatch of the 9th of this month, that all vessels carrying the Confederate flag are, without distinction, to be considered as privateers, because the principles of the law of nations, as well as the examples of history, require that the rights of war be accorded to those States.

"The Government of the United States holds that it should consider the States of the South as rebels.

"It does not pertain to the King's Government to pronounce upon the subject of a question which is entirely within the domain of the internal regulation of the United States; neither has it to inquire whether, in virtue of the Constitution which rules that Republic, the States of the South can separate from the central Government, and whether they ought, then, aye or no, to be reputed as rebels during the first period of the difficulties.

"But I deem it my duty to observe to you, sir, that, according to the doctrines of the best publicists, such as Vattel (iii, c. 18, § 292), and Mr. de Rayneval (Droit de la Nation et des Gens, i, 161), there is a notable difference between rebellion and civil war. 'When,' says Vattel, 'a party is formed in the state which no longer obeys its sovereign and is strong enough to make head against him, or, in a Republic, when the nation divides into two opposing parties and on one side and the other take up arms, then it is civil war.' It is, therefore, the latter which now agitates the great American Republic.

"But, in this case, the rights of war must be accorded to the two parties.

"Let me be allowed to cite here only two passages; the one from Vattel (ii, c. 4, § 56), which reads: 'Whenever affairs reach to civil war the ties of political association are broken, or at least suspended, between the sovereign and his people. They may be considered as two distinct powers; and, since one and the other are independent of any foreign authority, no one has the right to judge between them. Each of them may be right. It follows, then, that the two parties may act as having equal right.' The other passage is taken from the work of a former minister, himself belonging to the United States, Mr. Wheaton, who (in his Elements of International Law, c. i, 35, Am. ed., part 1, p. 32), thus expresses himself: 'If the foreign state would observe absolute neutrality in the face of dissensions which disturb another state, it must accord to both belligerent parties all the rights which war accords to public enemies, such as the right of blockade and the right of intercepting merchandise contraband of war.'

"As for historic evidence, it will suffice to call to mind from ancient times the struggle of the United Provinces with Spain, and from modern date the war between the Hispano-American colonies and the mother country since 1810, the war of independence of Greece from Turkey since 1821, etc.

"It will doubtless be useless to recollect, on this occasion, that the principle to see only insurgents in the States of the South, having

neither sovereignty nor rights of war, nor of peace, was put forward by England, at the breaking out of the war of independence of the Anglo American colonies, in the vindicatory memoir published by the British Court in 1778 in answer to the exposition of the motives for the conduct of France, which had lately signed, on the 6th day of February of that year, a treaty with the United States, in which they were regarded as an independent nation.

"But the Court of Versailles set out from other principles, which she developed in 'Observations on the Vindicatory Memoir of the Court of London,' saying, among other things: 'It is sufficient to the justification of His Majesty that the colonies had established their independence not merely by a solemn declaration, but also in fact, and had maintained it against the efforts of the mother country.'

"Existing circumstances seem to present the same characteristics; and if it is desired to treat the States of the South as rebels, and accuse them of felony there might here be cited as applicable to the actual conduct of the United States towards the Confederates the following remark of the Court of Versailles: 'In advancing this proposition (that the possession of independence, of which the French Cabinet said the Americans were in the enjoyment in 1778, was a veritable felony), the English minister had, without doubt, forgotten the course he had himself taken towards the Americans from the publication of the Declaration of Independence. It is remembered that the creatures of the court constantly called upon the rebellion vengeance and destruction. However, notwithstanding all their clamors, the English minister abstained, after the Declaration of Independence, from prosecuting the Americans as rebels; he observed, and still observes towards them, the rules of war usual among independent nations. American prisoners have been exchanged through cartels,' etc.

"The rights of war cannot, then, in the opinion of the King's Government, be refused to the Confederate States; but I hasten to add that the recognition of these rights does not import in favor of such States recognition of their sovereignty.

"'Foreign nations,' says Mr. Martens (Précis du Droit des Gens, l. viii, c. 3, § 264), 'cannot refuse to consider as lawful enemies those who are empowered by their actual Government, whatever that may be. *This is not recognition of its legitimacy.*'

"This last recognition can only spring from express and official declaration, which no one of the Cabinets of Europe has thus far made.

"Finally, and in the last place, I permit myself here to cite the example of the American privateer Paul Jones.

"This vessel, considered as a pirate by England, had captured two of His Britannic Majesty's ships in October, 1779. She took them into the Texel, and remained there more than two months, notwithstanding the representations of Mr. York, ambassador of Great Britain at The Hague, who considered the asylum accorded to such privateer (pirate as he called it in his memoir to the States General of 21st March, 1780) as directly contrary to treaties, and even to the ordinances of the Government of the Republic.

"Mr. York demanded that the English vessels should be released.

"The States General refused the restitution of the prizes.

"The United States, whose belligerent rights were not recognized by England, enjoyed at that period the same treatment in the ports of the Republic of the United Provinces as the Netherlands authorities have now accorded to the Confederate States.

"If the Cabinet of The Hague cannot, therefore, by force of the preceding, class all vessels of the Confederate States armed for war in the category of privateers, much less can it treat them as pirates (as you call them in your dispatch of the 12th of this month), or consider the Sumter as engaged in a filibustering expedition—'engaged in a piratical expedition against the commerce of the United States'—as it reads in your communication of the 2d of September.

"Here again historic antecedents militate in favor of the opinion of the Netherlands Government.

"Is there need, in fact, to remind you that at the outset of the War of American Independence, in 1778, the English refused to recognize American privateers as lawful enemies, under the pretense that the letters of marque which they bore did not emanate from a sovereign, but from revolted subjects?

"But Great Britain soon had to desist from this pretension, and to accord international treatment to the colonists in arms against the mother country.

"The frankness with which the King's Government has expressed its convictions in relation to the course to be taken towards the States of the South will, without doubt, be estimated at its just value by the Government of the United States.

"It will perceive therein the well-settled intention to preserve in safety the rights of neutrality; to lay down for itself and to follow a line of conduct equally distant from feebleness as from too great adventurousness, but suitable for maintaining intact the dignity of the state.

"The Government of the Netherlands desires to observe, on the occasion of existing affairs in America, a perfect and absolute neutrality, and to abstain therefore from the slightest act of partiality.

"According to Hubner (Saisie de Bâtiments Neutres), 'neutrality consists in absolute inaction relative to war, and in exact and perfect impartiality manifested by facts in regard to the belligerents, as far as this impartiality has relation to the war, and to the direct and immediate measures for its prosecution.'

"'Neutrality,' says Azuni (Droits Maritimes), 'is the continuation in a state of peace of a power which, when war is kindled between two or more nations, absolutely abstains from taking any part in the contest.'

"But if the proposition be admitted that all the vessels of the Confederate States armed for war should be considered *prima facie* as privateers, would there not be a flagrant inequality between the treatment and the favors accorded to vessels-of-war of the United States and the vessels of the Confederate States, which have not for the moment a navy properly so called?

"This, evidently, would be giving proof of partiality incompatible with real duties of neutrality. The only question is to determine with exactitude the distinctive characteristics between a privateer and a ship-of-war, although this may be difficult of execution. Thus is ignored that which Count Reventlon, envoy of the King of Denmark at Madrid, drew attention to in 1782, that there exists among the maritime powers regulations or conventions between sovereigns, which oblige them to equip their vessels in a certain manner, that they may be held veritably armed for war.

"You express also, in your dispatch of September 2, the hope that the Netherlands Government will do justice to your reclamation, grounding yourself on the tenor of treaties existing between the Netherlands and the United States, on the principles of the law of nations, and,

finally, upon the assurances you have received from the King's Government.

"Amidst all the European powers there are few who have better defended the rights of neutrals, and have suffered more in this noble cause than Denmark; and one of her greatest statesmen of the close of the last century, Count Bernstorff, has been able to declare with justice, in his memoir of July 28, 1793, a document that will long continue to be celebrated: 'A neutral power fulfills all its duties by never departing from the most strict impartiality, nor from the avowed meaning of its treaties.'

"I have endeavored, sir, to show, in what precedes, that the Government of the Netherlands has fulfilled conscientiously its first duty and will adhere faithfully thereto.

"The Cabinet of The Hague does not observe and will not observe less religiously the tenor of treaties.

"The treaty of the 19th of January, 1839, and the additional convention of the 26th of August, 1852, only relate to commerce and navigation; the only treaties that can be invoked in the present case are those of the 8th of October, 1782.

"I do not think it my duty to enter here upon a discussion of principles on the question of deciding whether these treaties can still be considered as actually in force, and I will not take advantage of the circumstance that the Cabinet of Washington has implicitly recognized, by the very reclamation which is the object of your dispatches, that the treaties of 1782 cannot any longer be invoked as the basis of international relations between the Netherlands and the United States.

"I will only take the liberty of observing to you, sir, that the execution of the stipulations included in those diplomatic acts would be far, in the present circumstances, from being favorable to the Government of the Republic.

"In fact we should, in this case, admit to our ports privateers with their prizes, which could even be sold there by virtue of article 5 of the before-cited convention of 1782 on rescues.

"It would, perhaps, be objected that the treaty of 1782, having been concluded with the United States of America, could not be invoked by a part of the Union which had seceded from the central Government, and I do not dissent from the opinion that this thorny question of public law would give rise, should the case occur, to very serious difficulties.

"But we cannot lose sight of the fact that the treaty spoken of was concluded, even before the recognition of the United States by England in 1783, with the oldest members of the Republic, among others, to wit, with Virginia, North Carolina, South Carolina, and Georgia, and that those States actually figure among the secessionists.

"In 1782 the Republic of North America was only a simple confederation of States, remaining sovereign, united only for common defense (Staatenbund), and it is only since the establishment of the Constitution of the 17th of September, 1787, that the pact which binds together the United States received the character which is attributed to it by Mr. Wheaton, also (Elements of International Law), of a perfect union between all the members as one people under one Government, federal and supreme (Bundestaat), 'a commonwealth,' according to Mr. Motley in his pamphlet, Causes of the Civil War in America, p. 71.

"In view of this fundamental difference between the present character of the Government of the United States and that of the party con-

tracting the treaty of 1782, it would be difficult to refuse in equity the privilege of the secessionist States to avail themselves of it.

"It will, therefore, not escape your penetration that it is preferable, as well for the Netherlands as for the Cabinet of Washington, to leave the treaty above mentioned at rest, and that, in excluding privateers from its ports the Government of the Netherlands has acted only in the interests of the Government of the United States, to which it is bound by feelings of a friendship which dates even from the time of the existence of the Republic of the United Provinces, and which the King's Government will make every effort to maintain and consolidate more and more.

"According to the law of nations, the cases in which the neutrality of a power is more advantageous to one party than to the other do not affect or impair it; it suffices that the neutrality be perfect and strictly observed. The Government of the Netherlands has not departed from it, therefore, in denying admission to the ports of His Majesty's territories to privateers, although at first glance this determination is unfavorable to the Southern States.

"The difficulties which have actually arisen, and which may be renewed hereafter, the desire to avoid as much as possible everything that could compromise the good understanding between the Governments of the United States and the Netherlands, impose on the last the obligation to examine with scrupulous attention if the maintenance of the general principles which I have had the honor to develop might not in some particular cases impair the attitude of neutrality which the Cabinet of The Hague desires to observe. If, for example, we had room to believe that the Sumter, or any other vessel of one of the two belligerent parties, sought to make of Curaçoa, or any other port in His Majesty's dominions, the base of operations against the commerce of the adverse party, the Government of the Netherlands would be the first to perceive that such acts would be a real infraction, not merely of the neutrality we wish to observe, but also of the right of sovereignty over the territorial seas of the state; the duty of a neutral state being to take care that vessels of the belligerent parties commit no acts of hostility within the limits of its territory, and do not keep watch in the ports of its dominion to course from them after vessels of the adverse party.

"Instructions on this point will be addressed to the governors of the Netherlands colonial possessions.

"I flatter myself that the preceding explanations will suffice to convince the Federal Government of the unchangeable desire of that of the Netherlands to maintain a strict neutrality, and will cause the disappearance of the slightest trace of misunderstanding between the Cabinets of The Hague and of Washington."

Baron von Zuylen to Mr. Pike, Minister Resident of the United States at The Hague, Sept. 17, 1861. Dip. Corr., 1861.

"By some accident our foreign mail missed the steamer. It is only just now that I have received your dispatch of September 4 (No. 15). The proceeding at Curaçoa in regard to the Sumter was so extraordinary, and so entirely contrary to what this Government had expected from that of Holland, that I lose no time in instructing you to urge the consideration of the subject with as much earnestness as possible. I cannot believe that that Government will hesitate to disavow the con-

duct of the authorities if they have been correctly reported to this Department."

Mr. Seward, Sec. of State, to Mr. Pike, Sept. 28, 1861. MSS. Inst., Netherlands; Dip. Corr., 1861.

"I am just now informed by a dispatch from Henry Sawyer, esq., our consul at Paramaribo, that on the 19th day of August last the piratical steamer Sumter entered that port, and was allowed by the authorities there to approach the town, and to purchase and to receive coals, to stay during her pleasure, and to retire unmolested, all of which was done in opposition to the remonstrances of the consul.

"You will lose no time in soliciting the attention of His Majesty's Government to this violation of the rights of the United States. They will be well aware that it is the second instance of the same kind that has occurred in regard to the same vessel in Dutch colonies in the West Indies.

"It is some relief of the sense of injury which we feel that we do not certainly know that the authorities who have permitted these wrongs had received instructions from their home Government in regard to the rights of the United States in the present emergency. We therefore hope for satisfactory explanations. But, in any case, you will inform that Government that the United States will expect them to visit those authorities with a censure so unreserved as will prevent the repetition of such injuries hereafter. An early resolution of the subject is imperatively necessary, in order that this Government may determine what is required for the protection of its national rights in the Dutch American ports."

Same to same, Oct. 4, 1861; *ibid.*

"Since my last (under date of October 2) I have received a letter from the United States consul at Paramaribo, of which the following is a copy:

"'UNITED STATES CONSULATE,
"'*Port of Paramaribo, September* 4, 1861.

"'SIR: I have the honor (but with chagrin) to inform you that the rebel steamer Sumter arrived at this port on the 19th of August, and left on the 31st, having been allowed to coal and refit. I used my best endeavors to prevent it without avail.

"'I am, &c.,

"'HENRY SAWYER.'

"Immediately on the receipt of it I addressed the following note to the minister of foreign affairs:

"'THE HAGUE, *October* 8, 1861.

"'SIR: I have just received a communication from the American consul at Paramaribo under date of the 4th September last, which I lose no time in laying before your excellency.

"'The consul states'"—[see above].

"'The reappearance of the Sumter in a port of the Netherlands, after so brief an interval, seems to disclose a deliberate purpose on the part of the persons engaged in rebellion against the United States Govern-

ment to practice upon the presumed indifference, the expected favor, or the fancied weakness of the Dutch Government.

"'During a period of forty-six days, during which we have heard of this piratical vessel in the West Indies, it would appear that she had been twice entertained and supplied at Dutch ports, and spent eighteen days under their shelter.

"'This can be no accidental circumstance.

"'In the multitude of harbors with which the West India seas abound, the Sumter has had no occasion to confine her visits so entirely to the ports of one nation, especially one so scantily supplied with them as Holland. And the fact that she does so is, in my judgment, not fairly susceptible of any other interpretation than the one I have given.

"'I feel convinced that the Government of the Netherlands will see in this repeated visit of the Sumter (this time, it appears, without any pretext) a distinct violation of its neutrality according to its own views, as laid down in your excellency's communication to me of the 17th of September last, and a case which will call for the energetic assertion of its purpose expressed in the paper referred to, namely, not to allow its ports to be made the base of hostile operations against the United States. For that the Sumter is clearly making such use of the Dutch ports would seem to admit of no controversy.

"'In view of the existing state of the correspondence between the United States and the Netherlands on the general subject to which this case belongs, and of the questions and relations involved therein, I shall be excused for the brevity of this communication upon a topic of so much importance and so provocative of comment.

"'The undersigned avails himself,' etc.

"I called to-day upon Baron Von Zuyleu, but he was absent, and I shall not therefore be able to see him again before the close of the mail which takes this. And I do not know that an interview would in any way affect the existing state of things or give me any new information. This Government's intentions are good; and it desires to avoid all difficulty with the United States, and with everybody else.

"As I stated in my dispatch of the 25th September, I have confidence that orders have been given that will impede the operations of these vessels in Dutch ports hereafter, and probably drive them elsewhere."

Mr. Pike to Mr. Seward, Oct. 9, 1861; *ibid.*

"The delay of the Government of the Netherlands in disposing of the unpleasant questions which have arisen concerning the American pirates in the colonies of that country is a subject of deep concern; and you are instructed, if you find it necessary, to use such urgency as may be effectual to obtain the definitive decision of that Government thereon so early that it may be considered by the President before the meeting of Congress in December next."

Mr. Seward, Sec. of State, to Mr. Pike, Oct. 10, 1861; *ibid.*

"After reflection, upon the reappearance of the Sumter, and her prolonged stay in the port of Paramaribo (this time apparently without pretext of any kind), I have felt, in view of the position taken by the Dutch Government in their communication to me of the 17th of September, that we were entitled to be specially informed of the precise interpretation which this Government puts upon their general declaration in the communication referred to, namely that it will not permit

its ports to be made the base of hostile operations against the United States commerce.

"I have accordingly made the direct inquiry of Baron Van Zuylen, without waiting to hear what you have to say in response to that communication. In reply to my inquiry, Baron Van Zuylen has informed me that, previous to his receiving information of the appearance of the Sumter at Paramaribo, orders were issued by the department of the colonies, instructing the colonial authorities not to permit the repetition of the visits of the Sumter and other vessels of the so-called Confederate States; and if they did make their appearance in Dutch ports, to require them to leave within twenty-four hours, under penalty of being held to occupy a hostile attitude towards the Government of the Netherlands. And further, that those authorities have also been instructed to forbid the furnishing of such vessels with more than twenty-four hours' supply of fuel. These instructions, thus defined, are to the point. Whether they have been made general, and with that disregard of distinctions between the rights of mere belligerents and those of recognized nationalities, enjoying pacific relations and acting under treaties of amity and friendship, that mark the communication to which I have adverted, I did not deem it pertinent to inquire, nor do I consider the inquiry of any value as regards the practical bearings of this case.

"In compliance with my request, Baron Van Zuylen has promised to furnish me with a copy of the order referred to, which, when received, I shall transmit to you without delay.

"Although this order, as thus described to me by Mr. Van Zuylen, only sustains the expectations I have expressed to you on two former occasions as to what the action of this Government would be, yet, considering the present attitude of the question, it is a matter of some surprise to me that a copy of it should not have been tendered without waiting to have it asked for. * * *

"Taking it to be as herein described, I do not see that the position of this Government, so far as its action is concerned, is amenable to very grave censure, whatever may be said of its theoretic views, since the Dutch ports are now substantially shut to the vessels. The restriction in regard to supplying fuel, if adopted by other powers holding colonies in the West Indies, will put an end to rebel operations by steam in those seas.

"I take some gratification in reflecting that my persistent appeals to the Government to issue specific orders, on some ground, to their colonial authorities, looking to the exclusion of the piratical vessels of the seceding States from the Dutch ports, have not been wholly unavailing. That the Government has argued against it, and declined acting on any suggestion I could make, is of small consequence, so long as they have found out a way of their own of doing the thing that was needed.

"Baron Van Zuylen has renewedly expressed great regret that any questions should have arisen between the two Governments."

Mr. Pike to Mr. Seward, Oct. 12, 1861; *ibid.*

"I have the honor to inclose you the reply of the minister of foreign affairs to the communication I addressed to him on the 8th instant, in regard to the reappearance of the Sumter at Paramaribo. He states therein the character of the orders which have been sent to the colonial authorities, to which I referred in my last dispatch of October 12 (No. 22).

"The British minister here, Sir Andrew Buchanan, expressed incredulity and surprise when I informed him this Government had issued the order in question. He declared the British Government would not do it, and that the United States would not under similar circumstances. He said it was giving us an advantage, and was not therefore neutral conduct. He added that Russia asked Sweden to close her ports against both belligerents during the Crimean war, and England would not permit it, alleging that as Russia did not want to use them, and England did, it gave the former an advantage to which that power was not entitled. The British Government held that Sweden, as a neutral had no right to alter the natural situation unless it operated equally.

"You see herein how thoroughly English officials (and it seems to me all others) are imbued with the idea that the rights of a mere belligerent are the same as the rights of a nation, in cases like the one under consideration.

"I have received to day a letter from our consul at Paramaribo, dated September 20, in which he says the United States steamer Powhatan arrived there on the 14th in search of the Sumter, and left for Brazil the same day; also that the Keystone State arrived on the 18th on the same errand, and left on the 19th for the West India Islands."

Same to same, Oct. 16, 1861; *ibid.*

"By your dispatch of the 8th of this month you have fixed my attention on the arrival of the Sumter at Paramaribo, and you complain that on this occasion the said vessel was admitted into ports of the Netherlands during eighteen days out of the forty-six in which the Sumter had shown herself in the West Indian seas.

"You suppose that this is not a fortuitous case, and you demand that the Government of the Netherlands, in accordance with the intentions mentioned at the close of my communication of the 17th September last, may not permit its ports to serve as stations or as base of hostile operations against the United States.

"You have not deemed it your duty to enter for the moment on the discussion of the arguments contained in my above-mentioned communication, but you say that you wish to await preliminarily the reply of the Cabinet at Washington.

"I may, therefore, on my part, confine myself for the moment to referring, as to what regards the admission in general of the Sumter into the ports of the Netherlands and the character of this vessel, to the arguments contained in my communication of the 17th September, from which it follows that if we do not choose to consider *prima facie* all the ships of the seceding States as privateers, and if, in the present case, the Sumter could not be, in the opinion of the Government of the Netherlands, comprised among such, entrance to the ports of the Netherlands cannot be prohibited to that vessel without a departure from neutrality and from the express terms of the proclamation of the Royal Government.

"It has already been observed that the latter, in forbidding access to the ports of the Netherlands to privateers, favors the United States much more, among others, than the declaration of the 10th of June by the French Government, which, not permitting any vessel-of-war or privateer of the one or the other of the belligerents to sojourn *with prizes* in the ports of the Empire for longer time than twenty-four hours, except in case of shelter through stress (*relâche forcée*), admits them without distinction when they do not bring prizes with them. But, without

entering here into useless developments, I think I may observe to you, sir, that the Royal Government, whilst refusing to treat as pirates, or even to consider as privateers, all the vessels of the Southern States, has striven, as much as the duties of strict neutrality permit, to keep the Sumter away from our ports. When this vessel arrived at Paramaribo, the commanders of two ships of the French imperial marine which were there at the time, declared to the governor of Surinam that the Sumter was a regular vessel-of-war and not a privateer. The commander of the Sumter exhibited afterwards, to the same functionary, his commission as commandant in a regular navy.

"Although there was no reason, under such circumstances, to refuse to the Sumter the enjoyment of the law of hospitality in all its extent, the governor, before referred to, strove to limit it as much as possible. Thus, although pit coal is not reputed contraband, if not at most, and within a recent time only, contraband by accident, it was not supplied to the Sumter except in the very restricted quantity of 125 tons, at the most sufficient for four days' progress.

"However, the Government of the Netherlands, wishing to give a fresh proof of its desire [to avoid] all that could give the slightest subject for complaint to the United States, has just sent instructions to the colonial authorities, enjoining them not to admit, except in case of shelter from stress (*relâche forcée*), the vessels-of-war and privateers of the two belligerent parties, unless for twice twenty-four hours, and not to permit them, when they are steamers, to provided themselves with a quantity of coal more than sufficient for a run of twenty-four hours.

"It is needless to add that the Cabinet of The Hague will not depart from the principles mentioned at the close of my reply of the 17th September, of which you demand the application; it does know and will know how to act in conformity with the obligations of impartiality and of neutrality, without losing sight of the care for its own dignity.

"Called by the confidence of the King to maintain that dignity, to defend the rights of the Crown, and to direct the relations of the state with foreign powers, I know not how to conceal from you, sir, that certain expressions in your communications above mentioned, of the 23d and 25th September last have caused an unpleasant impression on the King's Government, and do not appear to me to correspond with the manner in which I have striven to treat the question now under discussion, or with the desire which actuates the Government of the Netherlands to seek for a solution perfectly in harmony with its sentiments of friendship towards the United States, and with the observance of treaties.

"The feeling of distrust which seems to have dictated your last dispatch of the 8th of this month, and which shows itself especially in some entirely erroneous appreciations of the conduct of the Government of the Netherlands, gives to the last, strong in its good faith and in its friendly intentions, just cause for astonishment. So, then, the Cabinet of which I have the honor to form part deems that it may dispense with undertaking a justification useless to all who examine impartially and without passion the events which have taken place.

"The news which has reached me from the royal legations at London and at Washington, relative to the conduct of the British Government in the affair of the Sumter, can only corroborate the views developed in my reply of the 17th September last, and in the present communication.

"It results from this, in effect, that not only has the British Government treated the Sumter exactly as was done at Curaçoa, since that

vessel sojourned six or seven days at the island of Trinidad, where she was received amicably and considered as a vessel-of-war, but that the Crown lawyers of England, having been consulted on the matter, have unanimously declared that the conduct of the governor of that colony of England had been in all points in conformity with the Queen's proclamation of neutrality.

"According to them the Sumter was not a privateer but a regular vessel-of-war (duly commissioned), belonging to a state possessing the rights of war (belligerent rights).

"The Sumter, then, has been treated as a vessel-of-war of the United States would have been, and that vessel had the same right to obtain supplies at Trinidad as any vessel belonging to the navy of the Northern States."

Baron Van Zuylen, to Mr. Pike, Oct. 15, 1861; *ibid.*

"Your dispatch of the 25th of September, No. 18, has been received. It is accompanied by a note which was addressed to you by Baron Van Zuylen, on the 17th day of September last, on the subject of the admission of the pirate steamer Sumter into the port of Curaçoa.

"I reproduce the account of that transaction, which was made by this Government a subject of complaint to the Government of the Netherlands. The steamer Sumter hove in sight of the port of Curaçoa on the evening of the 15th of July, and fired a gun for the pilot, who immediately took to sea. On his reaching the pirate vessel she hoisted what is called the Confederate flag, and the same being unknown in that port, the pilot told the captain that he had to report to the governor before taking the vessel into port. The pilot having made this report, the governor replied to the captain that, according to orders from the supreme Government, he could not admit privateers into the port, nor their prizes, but in the case of distress, and therefore the steamer could not be admitted before her character was perfectly known.

"In reply to this message the captain of the steamer remained outside of the port until the next morning, when he sent a dispatch to the governor, by an officer, stating that his vessel being a duly commissioned man-of-war of the Confederate States, he desired to enter the port for a few days. The colonial court assembled the same evening, and, on the ground of the declaration and assurance of the privateer captain that the vessel is not a privateer, it was decided that she should enter the port, and she entered accordingly.

"The consul of the United States thereupon informed the governor, by a note, that the steamer was, by the laws and express declaration of the United States, a pirate, and that on her way from New Orleans to Curaçoa she had taken and sent for sale to the Spanish island of Cuba several American merchant vessels, and on these grounds he asked upon what pretext and conditions the unlawful steamer had obtained admittance into Curaçoa.

"The governor answered that, according to the orders received from the supreme Government, neither privateers nor their prizes are to be

allowed admittance to the ports or bays of this colony, save only in cases of distress. But that this prohibition does not extend to vessels-of-war, and that the Sumter being a man-of-war, according to the rules of nations, could not be repelled from that port.

"The piratical vessel was then supplied, at Curaçoa, with 120 tons of coals, and departed at her own time and pleasure. On receiving this information you were instructed to call the attention of the Government of the Netherlands to the proceeding of the governor of Curaçoa, and to ask that the proceedings, if correctly reported, might be disavowed, and that the governor might be made to feel the displeasure of his Government.

"You performed this duty in due season by addressing a proper note to Baron Van Zuylen. On the 2d of September he acknowledged your note, and promised you an early reply on the merits of the subject.

"On the 17th of September he communicated this reply to you in the note which is now before me.

"I encounter difficulty in giving you instructions for your reply to that paper, because, first, since the correspondence was opened a similar case of violation of our national rights has occurred in the hospitalities extended to the same piratical vessel in the Dutch port of Pernambuco, and has been made a subject of similar complaint, which as yet, so far as I am advised, remains unanswered; and, secondly, the note of Baron Van Zuylen promises that special instructions shall be speedily given to the colonial authorities of the Netherlands in regard to conduct in cases similar to those which have induced the existing complaints. I cannot, of course, foresee how far those instructions, yet unknown to me, may modify the position assumed by the minister of foreign affairs in the paper under consideration.

"Under these circumstances, I must be content with setting forth, for the information of the Government of the Netherlands, just what the United States claim and expect in regard to the matter in debate.

"They have asked for an explanation of the case, presented by the admission of the Sumter by the governer of Curaçoa, if one can be satisfactorily given; and if not, then for a disavowal of that officer's proceedings, attended by a justly deserved rebuke.

"These demands have been made, not from irritation or any sensibility of national pride, but to make it sure that henceforth any piratical vessel fitted out by or under the agency of disloyal American citizens, and cruising in pursuit of merchant vessels of the United States, shall not be admitted into either the continental or the colonial ports of the Netherlands under any pretext whatever. If that assurance cannot be obtained in some way, we must provide for the protection of our rights in some other way. Thus, the subject is one of a purely practical character; it neither requires nor admits of debate or argument on the part of the United States. If what is thus desired shall be obtained by the United States in any way, they will be satisfied; if it fails to be ob-

tained through the disinclination of the Government of the Netherlands, its proceedings in this respect will be deemed unfriendly and injurious to the United States. The United States being thus disposed to treat the subject in a practical way, they are not tenacious about the manner or form in which the due respect to their rights is manifested by the Government of the Netherlands, and still less about the considerations or arguments upon which that Government regulates its own conduct in the matter. They regard the whole insurrection in this country as ephemeral; indeed, they believe that the attempt at piracy under the name of privateering, made by the insurgents, has already well nigh failed. While, therefore, they insist that shelter shall not be afforded to the pirates by nations in friendship with the United States, they, at the same time, are not unwilling to avoid grave debates concerning their rights that might survive the existing controversy. It remains only to say in this connection that the course which the United States are pursuing in their complaints to the Government of the Netherlands is not peculiar, but it is the same which has been and which will be pursued towards any other maritime power on the occurrence of similar grievances.

"With these remarks, I proceed to notice Baron Van Zuylen's communication. You will reply to him that the United States unreservedly claim to determine for themselves absolutely the character of the Sumter, she being a vessel fitted out, owned, armed, sailed, and directed by American citizens who owe allegiance to the United States, and who neither have nor can, in their piratical purposes and pursuits, have or claim any political authority from any lawful source whatever.

"The United States regard the vessel as piratical, and the persons by whom she is manned and navigated as pirates.

"The United States, therefore, cannot admit that the Sumter is a ship-of-war or a privateer, and so entitled to any privileges whatever, in either of those characters, in the port of Curaçoa; nor can they debate any such subject with the Government of the Netherlands. This will be all that you will need to say in reply to the whole of Baron Von Zuylen's note, except that portion of it which states, rather by way of argument than of assertion, that according to the information received from the governor of Curaçoa (by the Government of the Netherlands) the Sumter was actually in distress, and that functionary therefore could not refuse to allow the said vessel to enter the port.

"If this position shall be actually assumed by the Government of the Netherlands two questions will arise: first, whether the fact that the Sumter was in distress was true, or a belief of the truth of that fact was the real ground upon which she was admitted by the colonial governor into the port of Curaçoa; secondly, how far a piratical vessel, roving over the seas in pursuit of peaceful commercial vessels of the United States, and fleeing before their naval pursuit, but falling into

distress herself, is entitled to charity at the hands of a state friendly to the nation upon whose commerce her depredations are directed.

"It would hence be idle to occupy ourselves with a discussion of these questions until we know that the Government of the Netherlands determines to stand upon the main position from which they are derived.

"You will therefore ask the Baron Van Zuylen for an explicit statement on this subject.

"I cannot but hope, however, that the Government of the Netherlands will come to the conclusion that it is wisest and best, in view of the relations of the two countries, to give such directions to its agents as will render further prosecution of this discussion unnecessary, while it will prevent similar injuries in future to our national dignity and honor. Should it determine otherwise, and not be able to place the conduct of the governor-general at Curaçoa in a better light than it has already done, it will become necessary to consider what means we can take to protect, in the ports of the Netherlands, national rights which cannot be surrendered or compromised.

Mr. Seward, Sec. of State, to Mr. Pike, Oct. 17, 1861. MSS. Inst., Netherlands; *ibid.*

"I had the honor to transmit to you on the 16th instant, the last communication of this Government in respect to the Sumter case, referring to the orders recently given to its colonial authorities, by which the stay of such vessels in Dutch ports is limited to 24 hours, and by which they are also forbidden to take on board more than 24 hours' supply of coal.

"Considering these orders to be important, I have, in the following copy of my reply to the Dutch Government, ventured to express a qualified satisfaction at their issue. I am in hopes you will adopt a similar view of the case, as I conceive this Government to be well disposed towards the United States, and to consider that it has strained a point in our favor.

"I doubt if England or France will do anything of the sort; but the course of Holland will, at least, furnish excellent grounds for some pertinent questions in case they decline.

"I have informed Mr. Adams, and also Mr. Dayton and Mr. Schurz, of the final action of this Government in this case. The copy of my note follows (to Baron Van Zuylen):

"'*United States Legation, The Hague, October* 22, 1861.

"'SIR: In reply to your communication of the 15th instant, which I have had the honor to receive, I take pleasure in assuring your excellency that it has been far from my purpose to say anything at any time which should occasion painful impressions on the part of His Majesty's Government, or to use language marked by impatience or irritation at the course of the Government of the Netherlands. But while making this disclaimer, frankness compels me to add that I should not know in what more moderate terms to express my sentiments than those I have had the honor to employ in addressing His Majesty's Government.

"'I desire further to say, in respect to that part of your excellency's communication which refers to the recent orders given to the Dutch colonial authorities not to permit vessels engaged in pirating upon the

United States commerce to remain in their ports more than 24 hours, and, when steamers, not to be furnished with more than 24 hours' supply of fuel, that, while I receive the announcement with satisfaction, it is qualified by deep regrets at the position His Majesty's Government has thought proper to take in placing the misguided persons in rebellion against the United States on a footing of equality, in a most important respect, with the Government to which they owe obedience; for, though the orders in question deny shelter and aid to pirates, it is impossible to regard with complacency the fact that the exclusion operates equally against the vessels of the United States, denying to them that accustomed hospitality ever accorded by friendly nations.

"'Abstaining, however, now as heretofore, from any discussion on this topic while awaiting the reply of my Government to your communication of the 17th of September, I will only add that I feel assured the United States Government will fully share these regrets, and I can only hope will not impeach my expressions of satisfaction at the orders which you inform me have been given in accordance with the rule of action laid down in that paper, notwithstanding the position falls so far short of that which the United States have confidently expected Holland would occupy on this question.'"

Mr. Pike to Mr. Seward, Oct. 23, 1861; *ibid.*

"Your dispatch of October 9 (No. 20) has been received. We wait with much interest the result of your application to the Government of the Netherlands for explanations of the hospitalities extended by its colonial authorities to privateers."

Mr. Seward, Sec. of State, to Mr. Pike, Oct. 30, 1861. MSS. Inst., Netherlands; *ibid.*

"Your dispatch of October 12 (No. 22) has been received. I learn with much pleasure that you have assurances which, although informal, lead you to expect that a satisfactory course will be adopted by His Majesty's Government in regard to the exclusion of privateers from the ports of the Netherlands."

Mr. Seward, Sec. of State, to Mr. Pike, Nov. 2, 1861; *ibid.*

"I duly received your dispatch (No. 25) of the 10th of October, but have nothing by the last mail. I await your response to the communication of Mr. Van Zuylen of the 17th of September last.

"I have the honor to inclose you the reply of the minister of foreign affairs to my note of the 22d of last month, a copy of which I forwarded to you in my last.

Mr. Pike to Mr. Seward, Nov. 6, 1861; *ibid.*

"I have had the honor to receive your letter of the 22d of this month, relative to the affair of the Sumter, and it has been gratifying to me to learn from its tenor that you have received with satisfaction the information as to the measures adopted by the Government of the Low Countries to prevent the return or the prolonged stay in its ports of vessels which, like the Sumter, seemed to desire to use them as the base of their operations against the commerce of the adverse party.

"You regret only that the Government of the King should have adopted the same treatment towards the war vessels of the seceding States and those of the United States.

"Without entering here into an extended discussion, rendered, moreover, almost superfluous by my two preceding communications, I shall merely permit myself, sir, in referring to their contents, to cause you to observe that, agreeably to the doctrine of the best publicists, neutrality imposes upon those nations which desire to enjoy its benefits a complete abstention from all that could establish a difference of treatment between the belligerent parties, and that this principle applies as well to the cases of civil war, or even of rebellion, as to that of an ordinary war.

"Your Government having desired that measures should be taken to prevent a prolonged stay in our ports of the Sumter, or other vessels-of-war of the seceding States, we have admitted the justice of this claim. But these measures could not reach exclusively one of the two parties; they were to be general, and the consequence of it is that the new instructions given to the governors of Curaçoa and of Surinam neither permit the vessels-of-war of the United States, except in the case of being compelled to put into a port, to sojourn in the ports of the Netherlands, in the West Indies, for a longer time than twice 24 hours (and not for only 24 hours, as you seem to believe).

"Nevertheless, the privateers, with or without their prizes, are, as heretofore, excluded from the Netherland ports, and it is by an oversight, which I hasten to rectify, that the words 'and the privateers' have been introduced into that part of my communication of the 15th of this month which calls your attention to the instructions transmitted to the colonial authorities."

Baron Van Zuylen to Mr. Pike, Oct. 29, 1861; *ibid.*

"Your dispatch No. 24, dated October 23, has been received.

"I learn from it that the Government of the Netherlands has made an order which will, it is hoped, practically prevent the recurrence of such countenance and favor to pirates in the ports of that state as we have heretofore complained of. You will express to Baron Zuylen our satisfaction with this proceeding, viewed in that light, but you will be no less explicit in saying that this Government by no means assents to the qualifications affecting its claims as a sovereign power upon the Netherlands by which the proceeding is qualified.

"Not only are we not seeking occasions for difference with any foreign powers, but we are, on the other hand, endeavoring to preserve amity and friendship with them all, in a crisis which tries the magnanimity of our country. Influenced by these feelings, I can only hope that no new injury or disrespect to our flag may occur in the ports of the Netherlands, to bring the action of their Government again under review by us.

"I am directed by the President to express his approval of the diligence and discretion you have practiced in this important transaction."

Mr. Seward, Sec. of State, to Mr. Pike, Nov. 11, 1861. MSS. Inst., Netherlands; *ibid.*

"Your dispatch of October 16 (No. 23) has been received. It contains the reply of Mr. de Zuylen to the note you had addressed to him on the subject of the Sumter at Paramaribo,

"In another paper I have already communicated the President's views of the disposition of that subject made by the Government of the Netherlands, so that nothing remains to be said on the subject which you have had occasion to discuss in the dispatch now before me."

Same to same, Nov. 11, 1861; *ibid.*

"Your dispatch of November 6 (No. 25) has just been received. I have already anticipated and disposed of the principal subject which it presents.

"Felicitate the Government of the Netherlands as we felicitate ourselves on the renewed auguries of good and cordial relations between friends too old to be alienated thoughtlessly or from mere impatience."

Same to same, Nov. 23, 1861; *ibid.*

"I freely admit that it is no part of a neutral's duty to assist in making captures for a belligerent, but I maintain it to be equally clear that, so far from being neutrality, it is direct hostility for a stranger to intervene and rescue men who had been cast into the ocean in battle, and then carry them away from under the conqueror's guns."

Mr. Seward, Sec. of State, to Mr. Adams, July 15, 1864. MSS. Inst., Gr. Brit.

Under the nineteenth article of the treaty with France of 1778, a privateer has a right, on any urgent necessity, to make repairs in any ports of the United States. The replacement of her force is not an augmentation of it.

Moodie *v.* The Ship Phœbe Anne, 3 Dall., 319. See as to treaty of 1778 *supra*, § 148.

It is customary for neutral powers, either by treaty or by regulations when the exigency arises, to limit the right of asylum. Privateers are not held as equally entitled with ships-of-war to the right of asylum; and it is not uncommon for neutral nations wholly to exclude them from their ports.

7 Op., 122, Cushing, 1855.

As to prizes of war, the same right exists, either to wholly admit them or wholly exclude them.

*Ibid.*

Armed ships of a belligerent, whether men-of-war or private armed cruisers, are to be admitted, with their prizes, into the territorial waters of a neutral for refuge, whether from chase or from the perils of the sea. But it is a question of mere temporary asylum, accorded in obedience to the dictates of humanity, and to be regulated by specific exigency. The right of asylum is, nevertheless, presumed where it has not been previously denied.

*Ibid.*

Although a neutral must not lend his territory for purposes of war, he may receive a beaten army or individual fugitives, provided he disarms them and does not allow them again to engage in the war. But as he cannot be expected to provide for them himself, and as to require either belligerent to pay for their support would be indirectly aiding the other, "perhaps the equity of the case and the necessity of precaution might both be satisfied by the release of such fugitives under a convention between the neutral and belligerent states, by which the latter should undertake not to employ them during the continuance of the war."

Hall's Int. Law, § 230. *Infra*, § 398.

As to privileges of public armed ships in foreign ports, see *supra*, § 36.

### II. *RESTRICTIONS OF NEUTRAL.*

#### (1) Bound to restrain enlistments by belligerent.

### § 395.

"The granting military commissions within the United States by any other authority than their own is an infringement on their sovereignty, and particularly so when granted to their own citizens to lead them to commit acts contrary to the duties they owe their own country."

Mr. Jefferson, Sec. of State, to Mr. Genet, June 5, 1793; 1 Wait's St. Pap, 81; 1 Am. St. Pap. (For. Rel.), 150.

Mr. Jefferson's letter of May 15, 1793, to Mr. Ternant, forbidding French recruiting in the United States, is given in 1 Am. St. Pap. (For. Rel.), 148.

"Mr. Genet asserts his right of arming in our ports, and of enlisting our citizens, and that we have no right to restrain him or punish them. Examining this question under the law of nations, founded on the general sense and usage of mankind, we have produced proofs from the most enlightened and approved writers on the subject that a neutral nation must, in all things relating to the war, observe an exact impartiality towards the parties; that favors to one to the prejudice of the other would import a fraudulent neutrality, of which no nation would be the dupe; that no succor should be given to either, unless stipulated by treaty, in men, arms, or anything else directly serving for war; that the right of raising troops being one of the rights of sovereignty, and consequently appertaining exclusively to the nation itself, no foreign power or person can levy men within its territory without its consent; and he who does may be rightfully and severely punished; that if the United States have a right to refuse the permission to arm vessels and raise men within their ports and territories they are bound by the laws of neutrality to exercise that right, and to prohibit such armaments and enlistments. To these principles of the law of nations Mr. Genet answers by calling them 'diplomatic subtilties' and 'aphorisms of Vattel and others.' But something more than this is necessary to disprove them; and till they are disproved, we hold it certain that the law of

nations and the rules of neutrality forbid our permitting either party to arm in our ports."

Mr. Jefferson, Sec. of State, to Mr. Morris, Aug. 16, 1793. MSS. Inst., Ministers. 4 Jeff. Works, 34.

"While the laws of the Union are thus peremptory in their prohibition of the equipment or armament of belligerent cruisers in our ports, they provide not less absolutely that no person shall, within the territory or jurisdiction of the United States, enlist or enter himself, or hire or retain another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered, in the service of any foreign state, either as a soldier or as a marine or seaman on board of any vessel-of-war, letter of marque, or privateer. And these enactments are also in strict conformity with the law of nations, which declares that no state has the right to raise troops for land or sea service in another state without its consent, and that, whether forbidden by the municipal law or not, the very attempt to do it without such consent is an attack on the national sovereignty.

"Such being the public rights and the municipal law of the United States, no solicitude on the subject was entertained by this Government, when, a year since, the British Parliament passed an act to provide for the enlistment of foreigners in the military service of Great Britain. Nothing on the face of the act, or in its public history, indicated that the British Government proposed to attempt recruitment in the United States, nor did it ever give intimation of such intention to this Government. It was matter of surprise, therefore, to find, subsequently, that the engagement of persons within the United States to proceed to Halifax, in the British province of Nova Scotia, and there enlist in the service of Great Britain, was going on extensively, with little or no disguise. Ordinary legal steps were immediately taken to arrest and punish parties concerned, and so put an end to acts infringing the municipal law and derogatory to our sovereignty. Meanwhile suitable representations on the subject were addressed to the British Government.

"Thereupon it became known, by the admission of the British Government itself, that the attempt to draw recruits from this country originated with it, or at least had its approval and sanction; but it also appeared that the public agents engaged in it had 'stringent instructions' not to violate the municipal law of the United States.

"It is difficult to understand how it should have been supposed that troops could be raised here by Great Britain without violation of the municipal law. The unmistakable object of the law was to prevent every such act, which, if performed, must be either in violation of the law or in studied evasion of it; and in either alternative, the act done would be alike injurious to the sovereignty of the United States.

"In the mean time the matter acquired additional importance by the recruitments in the United States not being discontinued, and the disclosure of the fact that they were prosecuted upon a systematic plan devised by civil authority; that recruiting rendezvous had been opened in our principal cities, and depots for the reception of recruits established on our frontier; and the whole business conducted under the supervision and by the regular co-operation of British officers, civil and military, some in the North American provinces and some in the United States. The complicity of those officers in an undertaking which could only be accomplished by defying our laws, throwing suspicion over our attitude of neutrality, and disregarding our territorial rights, is conclusively proved by the evidence elicited on the trial of such of their agents as have been apprehended and convicted. Some of the officers thus implicated are of high official position, and many of them beyond our jurisdiction, so that legal proceedings could not reach the source of the mischief.

"These considerations, and the fact that the cause of complaint was not a mere casual occurrence, but a deliberate design, entered upon with full knowledge of our laws and national policy, and conducted by responsible public functionaries, impelled me to present the case to the British Government, in order to secure, not only a cessation of the wrong, but its reparation. The subject is still under discussion, the result of which will be communicated to you in due time."

President Pierce, Third Annual Message, 1855.

As to dismissal of British minister on this ground, see *supra*, § 84.

As to the right voluntarily to enlist, see *supra*, § 392.

If a public armed vessel of a belligerent violate our neutrality by unlawfully enlisting men in our ports, the property captured by her on the ensuing cruise will, if brought within the territorial limits of the United States, be restored to the original owners.

The Santissima Trinidad, 7 Wheat., 283.

A contract between citizens of the United States and an inhabitant of Texas, to enable him to raise men and procure arms to carry on the war with Mexico, the independence of Texas not having been acknowledged by the United States, was held contrary to our national obligations to Mexico, and violative of our public policy. It cannot, therefore, be specifically enforced by a court of the United States.

Kennett *v.* Chambers, 14 How., 38.

Colombian vessels are entitled, under articles 6 and 31 of the treaty with that Republic of 1824, to make repairs in our ports when forced into them by stress of weather, but not to enlist recruits there, either from our citizens or from foreigners, except such as may be transiently within the United States.

2 Op., 4, Wirt, 1825.

The enlistment at New York of seamen or others for service on war vessels of Mexico (she being at war with Texas), such persons not being Mexicans transiently within the United States, is a breach of the act of 1818.

4 Op., 336, Nelson, 1844.

The attempt by one Government to enlist troops in the territory of another, without the latter's consent, is just cause of war.

7 Op., 367, Cushing, 1855.

Foreign levies may not be allowed to one belligerent and refused to the other, consistently with the duties of neutrality.

*Ibid.*

A foreign minister who engages in the enlistment of troops here for his Government is subject to be summarily expelled from the country; or, after demand of recall, dismissed by the President.

*Ibid.* *Supra*, § 84.

If agents of the British Government, being instructed to enlist military recruits, succeed in evading the municipal law and so escape punishment as malefactors, "such successful evasion serves to increase the intensity of the international wrong done the United States."

8 Op., 468, Cushing, 1855. See *ibid.*, 476, Cushing, 1856. 34th Cong., 1st sess., House Ex. Doc. 107.

For dismissal of British minister and consul, see *supra*, § 84.

For indictment in U. S. *v.* Hertz, for illegal recruiting, see Whart. Prec., 1123.

(2) OR ISSUING OF ARMED EXPEDITIONS.

§ 395*a*.

"The aiding either party, then, with vessels, arms, or men, being unlawful by the law of nations, and not rendered lawful by the treaty, it is made a question whether our citizens, joining in these unlawful enterprises, may be punished. The United States being in a state of peace with most of the belligerent powers by treaty, and with all of them by the laws of nature, murders and robberies committed by our citizens, within our territory, or on the high seas, on those with whom we are so at peace, are punishable, equally as if committed on our own inhabitants. If I might venture to reason a little formally, without being charged with running into subtilties and aphorisms, I would say that if one citizen has a right to go to war of his own authority, every citizen has the same. If every citizen has that right, then the nation (which is composed of all its citizens) has a right to go to war, by the authority of its individual citizens. But this is not true either on the general principles of society, or by our Constitution, which gives that power to Congress alone and not to the citizens individually. Then the first position was not true, and no citizen has a right to go to war of his own

authority; and for what he does without right he ought to be punished. Indeed, nothing can be more obviously absurd than to say that all the citizens may be at war, and yet the nation at peace. It has been pretended, indeed, that the engagement of a citizen in an enterprise of this nature was a divestment of the character of citizen, and a transfer of jurisdiction over him to another sovereign. Our citizens are certainly free to divest themselves of that character, by emigration, and other acts manifesting their intention, and may then become the subjects of another power, and free to do whatever the subjects of that power may do. But the laws do not admit that the bare commission of a crime amounts of itself to a divestment of the character of citizen, and withdraws the criminal from their coercion."

Mr. Jefferson, Sec. of State, to Mr. Morris, Aug. 16, 1793. MSS. Inst., Ministers.

In 1806 an expedition was concocted in New York by Miranda, a Spanish adventurer, for the invasion of Spanish America. On the trial of Smith and Ogden at New York for participation in this enterprise, the defendants offered to prove that the President had approved of the enterprise after due notice to him of its character. The court held that the testimony was irrelevant, as prior approbation by the President of an illegal act would not condone it. "Although the charge of the judge was strongly against the defendants, and there was no question as to the law, the jury returned a verdict of not guilty."

Note by Mr. W. B. Lawrence in 2 Whart. Cr. Law, § 1908. See this case noticed in other relations, *infra*, § 404.

In instructions from Mr. Madison, Sec. of State, to Mr. Armstrong, Mar. 14, 1806, it is shown that prompt and rigorous measures were taken by the Government to suppress this expedition.

A report on petition of citizens alleging that they were ignorantly drawn into Miranda's expedition and were subsequently held in slavery by the Spanish Government is in Ex. Doc., June 9, 1809, 11th Cong., 1st sess.

"Miranda had the address to make certain persons of New York, among others Col. W. Smith, the surveyor, believe that on his visit to Washington he had enlisted the Executive in a secret sanction of his project. They fell into the snare, and in their testimony, when examined, rehearsed the representations of Miranda as to what passed between him and the Executive. Hence the outcry against the latter as violating the law of nations against a friendly power. The truth is the Government proceeded with the most delicate attention to its duty, on one hand keeping in view all its legal obligations to Spain, and on the other not making themselves, by going beyond them, a party against the people of South America. I do not believe a more unexceptionable course was ever pursued by any Government."

Mr. Madison, Sec. of State (unofficial), to Mr. Monroe, Mar. 10, 1806. 2 Madison's Writings, 220.

See Dana's Wheaton, § 439, note 218, for details as to Miranda's expedition. See, also, *infra*, § 404.

"What have been called expeditions organized within our limits for foreign service have been only the departure of unassociated individuals. Such a departure, though several may go at the same time, constitutes no infringement of our neutrality laws, no violation of neutral obligations, and furnishes no ground for the arraignment of this Government by any foreign power."

Mr. Marcy, Sec. of State, to Mr. Escalante, May 8, 1856. MSS. Notes, Spain.

"While any citizen of the United States is at liberty, under municipal and international law, to expatriate himself unarmed and to engage individually when abroad in any foreign service that he may choose, yet on the other hand the laws of the United States and the law of nations, as they are understood by us, forbid the Government from authorizing or permitting the enlistment or organization on American ground, or the departure from our territory, of armed military forces to carry on hostilities against any foreign state, except in a war against that state duly declared by Congress.

"The Prince Maximilian is either a principal or a subordinate belligerent in Mexico. The treaty which has been made between Austria and that belligerent by which the former authorizes the organization within the Austrian dominions of two thousand or more volunteers, manifestly to be engaged in war against the Republic of Mexico, is deemed by this Government inconsistent with the principle of neutrality and an engagement with Maximilian in his invasion of that Republic."

Mr. Seward, Sec. of State, to Mr. Motley, Apr. 30, 1866. MSS. Inst., Austria.

A mere preparation or plan of violation of neutrality, without overt acts, does not make the party amenable under section 6 of the neutrality act of 1818 (Rev. Stat., § 5286). If the means provided were procured to be used on the occurrence of a future contingent event, no liability is incurred under the statute. If, also, the intention is that the means provided shall only be used at a time and under circumstances when they could be used without a violation of law, no criminality attaches to the act.

U. S. *v.* Lumsden, 1 Bond, 5.

(3) BOUND TO RESTRAIN FITTING OUT OF AND SAILING OF ARMED CRUISERS OF BELLIGERENT.

§ 396.

"The practice of commissioning, equipping, and manning vessels in our ports to cruise on any of the belligerent parties, is equally and entirely disapproved, and the Government will take effectual measures to prevent a repetition of it."

Mr. Jefferson, Sec. of State, to the minister of Great Britain, May 15, 1793. MSS. Notes, For. Leg. 3 Jeff. Works, 105.

"Under the second point of view it appears to me wrong on the part of the United States (where not constrained by treaties) to permit one party in the present war to do what cannot be permitted to the other. We cannot permit the enemies of France to fit out privateers in our ports by the 22d article of our treaty. We ought not, therefore, to permit France to do it, the treaty leaving us free to refuse, and the refusal being necessary to preserve a fair neutrality. Yet, considering that the present is the first case which has arisen; that it has been in the first moment of the war, in one of the most distant ports of the United States, and before measures could be taken by the Government to meet all the cases which may flow from the infant state of our Government and novelty of our position, it ought to be placed by Great Britain among the accidents of loss to which a nation is exposed in a state of war, and by no means as a premeditated wrong on the part of the Government. In the last light it cannot be taken, because the act from which it results placed the United States with the offended, and not the offending, party. Her minister has seen that there could have been on our part neither permission nor connivance. A very moderate apology, then, from the United States ought to satisfy Great Britain."

Opinion of Mr. Jefferson, Sec. of State, on the restitution by the United States of prizes taken by French privateers fitted out in Charleston, May 15, 1793. 2 Randall's Life of Jefferson, 137.

"The President, * * * after mature consideration and deliberation, was (in the case of Citoyen Genet) of opinion that the arming and equipping of vessels in the ports of the United States to cruise against nations with whom they are at peace was incompatible with the territorial sovereignty of the United States, and makes them instrumental to the annoyance of those nations, and thereby tends to compromit their peace."

Mr. Jefferson Sec. of State, to Mr. Genet, June 5, 1793; affirmed by Mr. Randolph, Sec. of State, in letter to Mr. Fauchet, May 29, 1795. MSS. Notes, For. Leg. 1 Am. St. Pap. (For. Rel.), 150. Genet's answer, *ibid.*, 151.

"As it was apprehended by the President of the United States that attempts might be made by persons within the United States to arm and equip vessels for the purpose of cruising against some of the powers at this time engaged in war, whereby the peace of the United States might be committed, the governors of the several States were desired to be on the watch against such enterprises, and to seize such vessels found within the jurisdiction of their States."

Mr. Jefferson, Sec. of State, to U. S. district attorney for N. Y., June 12, 1793. MSS. Dom. Let.

In Mr. Jefferson's letter of June 17, 1793, to Mr. Genet, he stated that it being reported to the President that an armed French cruiser was fitting out, arming, and manning in the port of New York, for the

express purpose of cruising against certain other nations with whom we are at peace, that she had taken her guns and ammunition aboard, and was on the point of departure, "orders were immediately sent to deliver over the vessel and the persons concerned in the enterprise to the tribunals of the country, that if the act was of those forbidden by the law it might be punished; if it was not forbidden it might be so declared."

1 Wait's St. Pap., 90; 1 Am. St. Pap. (For. Rel.), 154.

Genet's notes of June 25, 1793, giving notice of arming of English vessels in United States harbors are given in 1 Am. St. Pap. (For. Rel.), 159, and in succeeding pages of the same volume other correspondence as to arming of vessels in such ports.

"RULES ADOPTED BY THE CABINET AS TO THE EQUIPMENT OF VESSELS IN THE PORTS OF THE UNITED STATES BY BELLIGERENT POWERS, AND PROCEEDINGS ON THE CONDUCT OF THE FRENCH MINISTER.

"AUGUST 3, 1793.

"1. The original arming and equipping of vessels in the ports of the United States by any of the belligerent parties for military service offensive or defensive is deemed unlawful.

"2. Equipments of merchant vessels by either of the belligerent parties, in the ports of the United States, purely for the accommodation of them as such, is deemed lawful.

"3. Equipments, in the ports of the United States, of vessels-of-war in the immediate service of the Government of any of the belligerent parties, which, if done to other vessels, would be of a doubtful nature, as being applicable either to commerce or war, are deemed lawful; except those which shall have made prize of the subjects, people, or property of France, coming with their prizes into the ports of the United States, pursuant to the seventeenth article of our treaty of amity and commerce with France.

"4. Equipments in the ports of the United States by any of the parties at war with France, of vessels fitted for merchandise and war, whether with or without commissions, which are doubtful in their nature as being applicable either to commerce or war, are deemed lawful, except those which shall be made prize, etc.

"5. Equipments of any of the vessels of France in the ports of the United States, which are doubtful in their nature as being applicable to commerce or war, are deemed lawful.

"6. Equipments of every kind in the ports of the United States, of privateers of the powers at war with France, are deemed unlawful.

"7. Equipments of vessels in the ports of the United States, which are of a nature solely adapted to war, are deemed unlawful; except those stranded or wrecked, as mentioned in the eighteenth article of our treaty with France, the sixteenth of our treaty with the United Netherlands, the ninth of our treaty with Prussia, and, except those mentioned in the nineteenth article of our treaty with France, the seventeenth of our treaty with the United Netherlands, the eighteenth of our treaty with Prussia.

"8. Vessels of either of the parties not armed, or armed previous to their coming into the ports of the United States, which shall not have infringed any of the foregoing rules, may lawfully engage or enlist their own subjects or citizens, not being inhabitants of the United States, except privateers of the powers at war with France, and except those vessels which shall have made prize, etc.

"The foregoing rules having been considered by us at several meetings, and being now unanimously approved, they are submitted to the President of the United States.

"THOMAS JEFFERSON.
"ALEXANDER HAMILTON.
"HENRY KNOX.
"EDMUND RANDOLPH."

The above, which is given in 10 Washington's Writings (by Sparks), 546, as a cabinet resolution, appears in 1 Am. St. Pap., For. Rel., 140, as an appendage to Mr. Hamilton's Treasury Circular of Aug. 4, 1793. In 10 Washington's Writings, 546, the serious mistake is made of putting "lawful" for "unlawful" at the end of clause "6."

"RESTITUTION OF PRIZES.

"AUGUST 5, 1793.

"That the minister of the French Republic be informed that the President considers the United States bound, pursuant to positive assurances given in conformity to the laws of neutrality, to effectuate the restoration of, or to make compensation for prizes, which shall have been made of any of the parties at war with France, subsequent to the 5th day of June last, by privateers fitted out of their ports.

"That it is consequently expected that he will cause restitution to be made of all prizes taken and brought into our ports subsequent to the above-mentioned day by such privateers, in defect of which, the President considers it as incumbent upon the United States to indemnify the owners of those prizes, the indemnification to be reimbursed by the French nation.

"That besides taking efficacious measures to prevent the future fitting out of privateers in the ports of the United States, they will not give asylum therein to any, which shall have been at any time so fitted out, and will cause restitution of all such prizes as shall be hereafter brought within their ports by any of the said privateers.

"That instructions be sent to the respective governors in conformity to the above communication.

"The foregoing having been duly considered, and being unanimously approved, they are submitted to the President of the United States.

"THOMAS JEFFERSON.
"ALEXANDER HAMILTON.
"HENRY KNOX.
"EDMUND RANDOLPH."

10 Washington's Writings, 546. See App., Vol. III, § 396.
As to construction of French treaty in this relation, see *supra*, § 148.

"The original arming and equipping of vessels in the ports of the United States by any of the belligerent parties for military service, offensive or defensive, is deemed unlawful.

"Equipments of merchant vessels by either of the belligerent parties in the ports of the United States, purely for the accommodation of them as such, is deemed lawful.

"Equipments in the ports of the United States of vessels-of-war in the immediate service of the Government of any of the belligerent parties, which, if done to other vessels would be of a doubtful nature as being applicable either to commerce or war, are deemed lawful.

"Equipments of vessels in the ports of the United States, which are of a nature solely adapted to war, are deemed unlawful, except those stranded or wrecked," etc.

Mr. Hamilton's Treasury circular of Aug. 4, 1793. 1 Am. St. Pap. (For Rel.), 140.

In Mr. Jefferson's letter, when Secretary of State, to Mr. Genet, of August 7, 1793, he states that "the President considers the United States as bound, pursuant to the laws of neutrality, to effectuate the restoration of, or to make compensation for prizes, which shall have been made of any of the parties at war with France, subsequent to the 5th day of June last, by privateers fitted out of our ports."

1 Wait's, St. Pap., 136; 1 Am. St. Pap. (For. Rel.), 167.

The opening in a neutral port of the port-holes of a belligerent cruiser, which had been previously closed, is "as much an augmentation of the force of the said vessel as if the port-holes were now to be cut for the first time."

Decision of President Washington as given by Mr. Randolph, Sec. of State, to Mr. Fauchet, June 13, 1795. MSS. Notes, For. Leg.

"We can never allow one belligerent to buy and fit out vessels here, to be manned with his own people, and probably act against the other."

Mr. Jefferson, President, to the Sec. of State, Aug. 12, 1808. 5 Jeff. Works, 339.

"Having communicated to you verbally the information asked for by your letter of the 1st instant, except so far as relates to the last inquiry it contains, I have now the honor to state that the provisions deemed necessary to make the laws effectual against fitting out armed vessels in our ports for the purpose of hostile cruising seem to be—

"1. That they should be laid under bond not to violate the treaties of the United States or the obligations of the United States under the law of nations in all cases where there is reason to suspect such a purpose on foot, including the cases of vessels taking on board arms and munitions of war, applicable to the equipment and armament of such vessels subsequent to their departure.

"2. To invest the collectors, or other revenue officers where there are no collectors, with power to seize and detain vessels under circumstances indicating strong presumption of an intended breach of the law; the detention to take place until the order of the Executive, on a full representation of the facts had thereupon, can be obtained. The statute book contains analogous powers to this above suggested. (See particularly the eleventh section of the act of Congress of April 25, 1808.)

"The existing laws do not go to this extent. They do not authorize the demand of security in any shape or any interposition on the part of the magistracy as a preventive where there is reason to suspect an intention to commit the offense. They rest upon the general footing of punishing the offense merely where if there be full evidence of the actual perpetration of the crime, the party is handed over, after the trial, to the penalty denounced."

Mr. Monroe, Sec. of State, to Mr. Forsyth, Jan. 6, 1817. 4 Am. St. Pap. (For. Rel.), 103.

Under the neutrality laws of the United States a belligerent will not be permitted to augment the force of his armed cruisers when in a port of the United States.

Mr. Clay, Sec. of State, to Mr. Rebello, Jan. 29, 1828. MSS. Notes, For. Leg. Same to same, Apr. 8, 1828; *ibid.*

As to vigilance that will be deemed sufficient in such cases, see letter last cited, and see *infra*, § 402.

"The Government of the United States has taken no new resolution to prevent vessels under their flag sailing from their ports in a warlike condition. The law on this subject has remained the same during the last ten years. According to the provisions of the act of Congress, every person is prohibited from fitting out and arming or augmenting the force of any vessel within the limits of the United States to cruise against the subjects, citizens, or property of any prince or state, colony, district, or people with whom the United States are at peace. In instances in which the sailing of armed vessels belonging wholly or in part to citizens of the United States, which is allowed in certain cases for self-protection against pirates or other unlawful aggressions, the owners are required to give bond with sufficient sureties in double the amount of the value of the vessel and cargo, prior to clearing, that it shall not be employed by such owners to cruise against powers with which the United States are at peace. And in other instances the proper officers are authorized to detain any vessel manifestly built for warlike purposes, and about to depart from the United States, the cargo of which vessel shall principally consist of arms and ammunition of war when the number of men shipped on board or other circumstances shall indicate that such vessel is intended to be employed by the owners to cruise or commit hostilities against friendly powers until the decision of the President thereon, or until the owners shall give bond and security as previously required."

Same to same, May 1, 1828; *ibid.*

For a neutral to permit a belligerent vessel to be fitted out in his ports to cruise against the other belligerent is a gross breach of neutrality.

Mr. Buchanan, Sec. of State, to Mr. Saunders, June 13, 1847. MSS. Inst., Spain.

The Government of the United States will, under its own neutrality acts, prevent war cruisers issuing from its ports to aid a belligerent contest with a friendly state.

Mr. Clayton, Sec. of State, to Baron von Roënne, Apr. 10, 1849. MSS. Notes, German States. Same to same, Apr. 29, 1849. *Ibid.*

And it makes no difference in such case that the vessel was meant for defensive and not offensive operations.

*Ibid.*, May 5, 1849.

"Shortly after I had entered upon the discharge of the executive duties, I was apprized that a war steamer belonging to the German Em-

pire was being fitted out in the harbor of New York, with the aid of some of our naval officers rendered under the permission of the late Secretary of the Navy. This permission was granted during an armistice between that Empire and the Kingdom of Denmark, which had been engaged in the Schleswig-Holstein war. Apprehensive that this act of intervention on our part might be viewed as a violation of our neutral obligations incurred by the treaty with Denmark and of the provisions of the act of Congress of the 20th of April, 1818, I directed that no further aid should be rendered by any agent or officer of the Navy, and I instructed the Secretary of State to apprize the minister of the German Empire accredited to this Government of my determination to execute the law of the United States and to maintain the faith of treaties with all nations. The correspondence which ensued between the Department of State and the minister of the German Empire is herewith laid before you. The execution of the law and the observance of the treaty were deemed by me to be due to the honor of the country, as well as to the sacred obligations of the Constitution. I shall not fail to pursue the same course, should a similar case arise, with any other nation. Having avowed the opinion, on taking the oath of office, that in disputes between conflicting foreign Governments it is our interest, not less than our duty, to remain strictly neutral, I shall not abandon it. You will perceive from the correspondence submitted to you in connection with this subject that the course adopted in this case has been properly regarded by the belligerent powers interested in the matter."

President Taylor, First Annual Message, 1849.

"But our municipal law, in accordance with the law of nations, peremptorily forbids not only foreigners but our own citizens to fit out within the United States a vessel to commit hostilities against any state with which the United States are at peace, or to increase the force of any foreign armed vessel intended for such hostilities against a friendly state.

"Whatever concern may have been felt by either of the belligerent powers lest private armed cruisers or other vessels in the service of one might be fitted out in the ports of this country to depredate on the property of the other, all such fears have proved to be utterly groundless. Our citizens have been withheld from any such act or purpose by good faith and by respect for the law."

President Pierce, Third Annual Message, 1855.
On the general question, see Brit. and For. St. Pap., 1864–'65, vol. 55.

The proper authorities in New York will be instructed to detain gunboats preparing to issue from that port, in violation of neutrality in the contest between Peru and Spain.

Mr. Fish, Sec. of State, to Mr. Freyre, Aug. 10, 1869. MSS. Notes, Peru.
As to withdrawal of this order on peace between Peru and Spain, see same to same, Dec. 8, 1869.

A vessel constructed in a United States port for a hostile attack on a friendly sovereign will be arrested, under our neutrality laws, even though she is not yet complete, and the intention is to send her to a foreign port for completion.

Mr. Evarts, Sec. of State, to Mr. Sullivan, Feb. 21, 1878. MSS. Dom. Let. See Mr. Evarts to Mr. Sherman, June 5, 1878; *ibid.*

As to rules of Treaty of Washington and Geneva tribunal, see *infra*, § 402*a*.

The capture of a vessel of a country at peace with the United States, made by a vessel fitted out in one of our ports, and commanded by one of our citizens, is illegal, and if the captured vessel is brought within our jurisdiction, the district courts, upon a libel for a tortious seizure, may inquire into the facts, and decree restitution. And if a privateer, duly commissioned by a belligerent, collude with a vessel so fitted out and commanded, to cover her prizes and share with her their proceeds, such collusion is a fraud on the law of nations, and the claim of the belligerent will be rejected.

Talbot *v.* Janson, 3 Dall., 133.

Under article 19 of the treaty with France of 1778 (*supra*, § 148) a French privateer has a right to make repairs in our ports. The replacement of her force is not an augmentation.

Moodie *v.* The Ship Phœbe Anne, *ibid.*, 319.

A neutral nation may, if so disposed, without a breach of her neutral character, grant permission to both belligerents to equip their vessels-of-war within her territory. But, without such permission, the subjects of such belligerent power have no right to equip vessels-of-war, or to increase or augment their force, either with arms or with men, within the territory of such neutral nation.

All captures made by means of such equipments are illegal in relation to such nation, and it is competent for her courts, in case the prizes so taken are brought *infra præsidia*, to order them to be restored.

Brig Alerta *v.* Blas Moran, 9 Cranch, 359.

If restitution be claimed on the ground that the capturing vessel has augmented her force in the United States by enlisting men, it rests upon the claimant to prove the enlistment; and, this being done, upon the captors to prove that the persons enlisted were subjects or citizens of the prince or state under whose flag the cruiser sails, transiently within the United States, and therefore subject to enlistment.

The Estrella, 4 Wheat., 298; S. P., La Amistad de Rues, 5 *ibid.*, 385.

An augmentation of the force of a foreign belligerent vessel in a port of the United States, we being neutral, by a substantial increase of her crew, is a breach of our neutrality.

Santissima Trinidad, 7 Wheat., 283,

Neither our municipal law nor the law of nations forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale.

*Ibid.*

A cruiser, armed and manned in a United States port (we being at the time neutral), and sailing from thence to a belligerent port with the intent to depart on a cruise with the armament and crew obtained here, violates our neutrality statutes by so departing and capturing belligerent property; and her prizes coming into our jurisdiction will be restored. While a *bona fide* determination of her cruise for which the illegal armament was here obtained puts an end to her disability, a mere colorable determination has no such effect.

The Gran Para, 7 Wheat., 471.

"If this were to be admitted in such a case as this, the laws for the preservation of our neutrality would be completely eluded, so far as this enforcement depends on the restitution of prizes made in violation of them. Vessels completely fitted in our ports for military operations need only sail to a belligerent port, and there, after obtaining a commission, go through the ceremony of discharging and re-enlisting their crew to become perfectly legitimate cruisers, purified from every taint contracted at the place where all their real force and capacity for annoyance was acquired. This would indeed be a fraudulent neutrality, disgraceful to our own Government, and of which no nation would be the dupe. It is impossible for a moment to disguise the facts, that the arms and ammunition taken on board the Irresistible at Baltimore were taken for the purpose of being used on a cruise, and that the men there enlisted, though engaged, in form, as for a commercial voyage, were not so engaged in fact. There was no commercial voyage, and no individual of the crew could believe that there was one."

Marshall, C. J., *ibid.*, 487.

If property captured in violation of our neutrality laws be found, within our jurisdiction, in the hands of the master of the capturing vessel, it will be restored, whether a condemnation or other change of title has intervened or not.

The Arrogante Barcelones, *ibid.*, 496; *supra*, § 329*a*.

Captures by vessels fitted out in the United States in violation of neutrality are held illegal when the property is brought within our jurisdiction.

The Fanny, 9 Wheat., 658.

Under the 3d section of the neutrality act of April 20, 1818, it is not necessary that the vessel should be armed or in a condition to commit hostilities, on leaving the United States, in order to convict a party concerned in the enterprise who is indicted for being concerned in fitting

out a vessel with intent that she should be employed in the service of a foreign province or state at peace with the United States. It is sufficient if the defendant was knowingly concerned in fitting out or arming the vessel with intent as aforesaid, though the intent should appear to have been defeated after the vessel sailed. But if the defendant had he no fixed intention when the vessel sailed to employ her as a privateer, but only a wish so to employ her if he could obtain funds on her arrival at a foreign port, for the purpose of arming her, he ought not to be convicted.

U. S. *v.* Quincy, 6 Pet., 445.

An American built vessel, the Hector, having been fitted out and commissioned at Charleston by Genet as the French privateer Vainqueur de la Bastille, went to sea and then returned to the United States, and was detained and dismantled by the United States Government at Wilmington, N. C. She then sailed thence unarmed as a foreign vessel, but was equipped and commissioned at Hayti by the French authorities. She went again to sea, and brought a prize, the Betsey, into Charleston in 1795. It was held, that, under the circumstances, the fitting out by aid of which the capture was made, was not in contravention of law.

The Betsey, Bee, 67.

A French privateer having come to Charleston unarmed, leave to arm her was asked and refused. She returned, after a cruise, with guns mounted and a prize. The court restored the prize, the ground being that she did take on board the guns at Charleston to be used as her armament, and that the act was an illegal augmentation of force.

The Nancy, *ibid.*, 73.

It was held that the repairing the waist, and cutting two ports in it for guns at a port of the United States, of a vessel fitted out and commissioned as a vessel-of-war when she entered, does not by itself constitute an augmenting of her force within the meaning of the act of 5th June, 1794.

The Brothers, *ibid.*, 76.

A prize was restored on the ground that the French privateer which took it had before the capture augmented her force by taking in additional guns at a port of the United States.

The Betsey Cathcart, Bee, 292; Dana's Wheaton, § 439, note 215.

Frequent complaints were made in 1815–'17, by Abbé Correa, the Portuguese minister at Washington, of infractions of neutrality in the contest then raging between Portugal and her South American colonies. (See Mr. Correa to Mr. Monroe, Dec. 20, 1816. MSS. Notes, Portuguese Legation.) President Madison sent a special message on the subject to Congress, and the result was the passage, on March 3, 1817, of an act limited to two years, which was made permanent by the act of 20th April, 1818, which act repealed the act of 1794, and renewed its provis-

ions with additional powers of summary interference. The clauses so added required the owners or consignees of any armed vessel to give bond in sufficient sureties in double the value of the vessel, cargo, and armament, that it should not be employed by them to cruise or commit hostilities against any state or people with whom the United States were at peace; and authorized the revenue officers to detain any vessel about to depart under circumstances rendering it probable that she would be so employed. (§§ 10, 11, act 20th April, 1818.) It being suggested by the Spanish minister that the South American provinces in revolt, and not recognized as independent, might not be included in the word "state," the words "colony, district, or people," were added.

Dana's Wheaton, § 439, note 215.

Denmark having remonstrated, in 1848, on the building and fitting out in New York, in that year, during an armistice in the hostilities between Denmark and Germany, of a steamer at New York to be used as a ship-of-war by Germany, the German minister replied that the vessel had been ordered without regard to the war. She was to be used, it was alleged, for defensive purposes during the armistice. The United States Government, however, refused to permit the vessel to proceed to Germany until security had been given, under the statute, that she should not be employed as a vessel of war during hostilities then about to recommence.

Dana's Wheaton, § 439, note 215; citing Annuaire des Deux Mondes, 1852-'53, 485. Ex. Doc. 5, 31st Cong. 5 Op., 42, Toucey, 1848.

In 1855 the British consul at New York applied to this Department for the arrest of a ship called the Maury, fitting out there, which, he claimed, was intended to cruise under the Russian flag against Great Britain. The United States district attorney at New York libeled the vessel and placed her in the custody of the marshal. After a full examination, the British consul was satisfied and withdrew the complaint.

Dana's Wheaton, § 439, note 215; citing Senate Ex. Doc. 238, 34th Cong.

The case of the Meteor, which has been the subject of much discussion in this relation, is reported in brief, in 1 Am. Law Rev., 401. According to this report, the Meteor was built in the United States in 1865, during the war then pending between Chili and Spain, and sold to the Chilian Government, without armament, and then, it was alleged, commissioned, when in the United States, as a Chilian privateer. She was libeled in New York and seized January 23, 1866; and on the hearing before Judge Betts it was maintained by the claimant to "be no offense (under the act of 1818) to issue a commission within the United States for a vessel fitted and equipped to cruise or commit hostilities, and intended to cruise and commit hostilities, so long as such vessel was not armed at the time, and was not intended to be armed within the United States, although it could be shown that a clear intent existed, on the part of the person issuing or delivering the commission, that the vessel should receive her armament the moment she should be beyond the jurisdiction of the United States." It was said, however, by Judge Betts that "the court cannot give any such construction to the statute. Such a construction was repudiated by the Supreme Court. * * * The Meteor, although not completely fitted out for military operations, was a vessel-of-war, and not a vessel of commerce. She has in no man-

ner been altered from a vessel-of-war so as to fit her to be only a merchantman and so as to unfit her to be a vessel-of-war. It needed only that she should reach a point beyond the jurisdiction of the United States, and there have her armament and ammunition put on board of her, to become an armed cruiser of the Chilian Government against the Government of Spain. * * * To say that the neutrality laws of the United States have never prohibited the sale of a vessel-of-war as an article of commerce, is merely to say that they have not prohibited the fitting out and arming, or the attempting to fit out and arm, or the furnishing or fitting out or arming, of a vessel, within the limits of the United States, provided the unlawful and prohibited intent did not exist." The court relied as authority on Dana's Wheaton, 5 i2, 563, note 215, where it is said that "an American merchant may build and fully arm a vessel and supply her with stores, and offer her for sale in our own market. If he does any acts, as an agent or servant of a belligerent, or in pursuance of an arrangement or understanding with a belligerent, that she shall be employed in hostilities when sold, he is guilty. He may, without violating our law, send out such a vessel, so equi, ped, under the flag and papers of his own country, with no more force of crew than is suitable for navigation, with no right to resist search or seizure, and to take the chances of capture as contraband merchandise, of blockade, and of a market in a belligerent port. In such case the extent and character of the equipment is as immaterial as in the other class of cases. The intent is all. The act is open to great suspicions and abuse, and the line may often be scarcely traceable; yet the principle is clear enough. Is the intent one to prepare an article of contraband merchandise, to be sent to the market of a belligerent, subject to the chances of capture and of the market? Or, on the other hand, is it to fit out a vessel which shall leave our port to cruise, immediately or ultimately, against the commerce of a friendly nation? The latter we are bound to prevent. The former the belligerent must prevent." Judge Betts then proceeded to say: "The evidence in the present case leaves no rational doubt that what was done here in respect to the Meteor was done with the intent that she should be employed in hostile operations in favor of Chili against Spain; and that what was done by her owners towards dispatching her from the United States was done in pursuance of an arrangement with the authorized agents of Chili for her sale to that Government, and for her employment in hostilities against Spain, and that the case is not one of a *bona fide* commercial dealing in contraband of war. With these views, there must be a decree condemning and forfeiting the property under seizure, in accordance with the prayer of the libel."

See, for a further statement of Judge Betts' ruling, 2 Halleck's Int. Law (Baker's ed.), 199.

Judge Betts' decree was reversed in the circuit court, where the following opinion was delivered by Mr. Justice Nelson:

"This is an appeal in admiralty from a decree of condemnation in a libel of information for the violation of the neutrality laws of the United States. We have examined the pleadings and proofs in the case, and have been unable to concur in the judgment of the court below, but from the pressure of other business have not found time to write out at large the grounds and reasons for the opinion arrived at. We must, there-

fore, for the present, be content in the statement of our conclusions in the matter:

"1. Although negotiations were commenced and carried on between the owners of the Meteor and agents of the Government of Chili, for the sale of her to the latter, with the knowledge that she would be employed against the Government of Spain, with which Chili was at war, yet these negotiations failed and came to an end from the inability of the agents to raise the amount of the purchase-money demanded; and if the sale of the vessel, in its then condition and equipment, to the Chilian Government would have been a violation of our neutrality laws, of which it is unnecessary to express any opinion, the termination of the negotiation put an end to this ground of complaint.

"2. The furnishing of the vessel with coal and provisions for a voyage to Panama, or some other port of South America, and the purpose of the owners to send her thither, in our judgment, was not in pursuance of an agreement or understanding with the agents of the Chilian Government, but for the purpose and design of finding a market for her, and that the owners were free to sell her on her arrival there to the Government of Chili or of Spain, or of any other Government or person with whom they might be able to negotiate a sale.

"3. The witnesses chiefly relied on to implicate the owners in the negotiations with the agents of the Chilian Government, with a view and intent of fitting out and equipping the vessel to be employed in the war with Spain, are persons who had volunteered to negotiate on behalf of the agents with the owners in expectation of large commissions in the event of a sale, or persons in the expectation of employment in some situation in the command of the vessel, and very clearly manifest their disappointment and chagrin at the failure of the negotiations, and whose testimony is to be examined with considerable distrust and suspicion. We are not satisfied that a case is made out, upon the proofs, of a violation of the neutrality laws of the United States, and must, therefore, reverse the decree below, and enter a decree dismissing the libel."

An appeal was taken by the Government from the decision of the circuit court to the Supreme Court of the United States, but was not prosecuted to a hearing, being dismissed by consent November 9, 1868.

Report of the case of the steamship Meteor, Balch, 201, 202. Little, Brown & Co., 1869.

In a criticism on Judge Betts' ruling, in the North American Review for October, 1866 (vol. 103, p. 188), we have the following:

"It has been by many supposed that the decision in this Meteor case will be of great weight and importance as a precedent in the question of the Alabama and other Confederate vessels, now pending between this country and Great Britain, and the suspicion has been intimated by some that the law was a little warped by the learned judge with the

charitable intent of aiding Mr. Seward in the controversy. To justify either of these ideas, it is of course primarily necessary that the cases should be at least substantially parallel. That they are far from being so may be briefly shown. The Meteor was built as a purely commercial enterprise to be sent to a foreign land, there to take her chance of finding a market, subject to the risk of capture on the way, to be followed by confiscation as contraband of war, and to the further risk, should she reach her destination in safety, of finding no market in case the war should be drawing to a close, or terms could not be agreed on; liable, also, to be sold to any other bidder who would pay a better price. She differed nowise from any other contraband merchandise, except in the wholly insignificant fact that instead of being of such a nature as to require to be carried she was able to move herself. She was simply a mercantile speculation in contraband merchandise, which is of all men and nations confessedly and avowedly legitimate. The Alabama presents no one of these characteristics. * * * The question then being, as Mr. Dana says, of *intent*, the vital difference is readily distinguishable. The English builders had assured their trade before they entered upon the undertaking; the American merchants only had in view a quite probable purchaser. The former were not free to dispose of their ship to any person who might offer her price, for she was bespoken; the latter would have been very glad to have received and closed with a fair offer from any source. In short, the action of the former betrays clearly the *intent*, the element of illegality, but how the action of the latter can have been regarded in the same light we must confess ourselves unable to see. Where, then, is the similarity? Or why should it have been conceived necessary to sacrifice the Meteor, to overrule old and good law, to create a new necessity requiring to be met by new statutes of untried efficiency, simply for the purpose of creating a precedent which is after all no precedent?"

The captain and mate of a United States vessel, if they, knowing the character of their cargo and its intended purpose, transport arms from a port within the United States to a foreign port, together with men and stores to be used in a military expedition against a people at peace with the United States, are guilty of a misdemeanor under Revised Statutes, section 5286.

U. S. *v.* Rand, 17 Fed. Rep., 142, E. Dist. of Pa., 1883.

In United States *v.* The Mary Anne Hogan (18 Fed. Rep., 529) it was held that an expedition organized in parts in one of our ports, to be united at a common rendezvous at sea, for the purpose of aiding one of the belligerents in a foreign war, this purpose being plainly shown, is within the prohibitions of section 5283, Revised Statutes.

The fact that a steamer carries to foreign insurgents arms for their use, with false manifests, and accompanied by an agent for the insurgents, is, with other circumstances, probable cause for the arrest, though on trial the vessel was discharged.

U. S. *v.* City of Mexico, 25 Fed. Rep., 924.

Whether a neutral sovereign is bound to pursue beyond his territorial waters a belligerent vessel fitted out in such waters in violation of his

neutrality, has been much discussed. In La Amistad de Rues, 5 Wheat., 390, it was said by Story, J., that when a neutral nation is "called upon by either of the belligerents to act in such cases, all that justice seems to require is that the neutral nation should fairly execute its own laws and give no asylum to the property captured." (See further as to this case *infra*, § 400.) On the other hand, it is said by Story, J., in the Marianna Flora, 11 Wheat., 42, that "it is true that it has been held in the courts of this country that American ships, offending against our laws, and foreign ships, in like manner offending within our jurisdiction, may, afterwards, be pursued and seized upon the ocean, and rightfully be brought into our courts for adjudication. This, however, has never been supposed to draw after it any right of visitation or search. The party in such case seizes at his peril. If he establishes the forfeiture he is justified. If he fails he must make full compensation in damages." Sir W. Harcourt, in criticising these rulings in Historicus (p. 158) says: "The principle to be deduced from this decision (La Amistad) is that the neutral power cannot be called upon by the injured belligerent to grant him any remedy beyond that which may be exercised over property or persons who are at the time within the neutral jurisdiction. It is true that in the celebrated case of the Portuguese expedition to Terceira, it was contended by the Duke of Wellington's government that an expedition having fraudulently evaded the English jurisdiction and started from these shores in violation of the enlistment act, the English Government was entitled to pursue and seize the ships beyond the jurisdiction; and though this doctrine receives some countenance from the *dicta* of the court in the American case of the Marianna Flora (11 Wheat., 42), nevertheless this doctrine was vehemently, and it is generally thought successfully, controverted by the minority, of whom Sir J. Mackintosh and the late Dr. Joseph Phillimore and Mr. Huskisson were the principal spokesmen. (*Vide* Hansard, vol. xxiv, new series.) At all events, I think it is quite clear that, whether such a *right* exists or not, on the part of a neutral, it is not a *duty* on his part which the belligerent can call upon him to enforce."

As to restrictions in use of neutral waters by belligerents, see *infra*, § 399; *supra*, § 27.

As to arrests outside of three-mile limit, see *supra*, § 32.

If a vessel be fitted out, furnished, or armed within the waters of the United States, and there be sufficient grounds for believing that it is done with intent to employ it in the service of any foreign prince or state, to cruise or commit hostilities upon the subjects or property of another foreign prince or state with whom the United States are at peace, it is unlawful under the act of Congress.

1 Op., 191, Rush, 1816.

If an English vessel be seeking an armament with the latter purpose, it will be unlawful. But there is no law to prohibit her taking in arms or military stores, in the way of trade, or for necessary self-defense.

*Ibid.*

The building of vessels in New York for the Mexican Government, while at war with Texas, to be equipped at New York as war vessels

and there placed under the control of the Mexican Government, was a violation of the act of 1818.

3 Op., 738, Legaré, 1841.

The object of the act of 1818 was to prevent all equipping of vessels-of-war in our ports for a foreign power actually engaged in hostilities with a nation with which the United States are at peace, knowing the purpose for which they are to be employed. Where, however, the vessel, though to be delivered to a belligerent, was not to be transferred within the jurisdiction of the United States, was to be sent out of port unarmed, and was to continue under the control of our own citizens, every precaution being taken to insure her pacific conduct on the high seas, it was advised that she be permitted to sail, bonds having first been given, under section 10 of the act of 1818, that she should not be employed to cruise or commit hostilities, etc.

*Ibid.*

The repair of Mexican war steamers in the port of New York, together with the augmentation of their force by adding to the number of their guns, etc., is a violation of the act of 1818. But the repair of their bottoms, copper, etc., does not constitute an increase or augmentation of force within the meaning of the act.

4 Op., 336, Nelson, 1844.

The fitting out of a war vessel of the German Government in the port New York, while a state of war exists between that Government and Denmark, such vessel being calculated to cruise and commit hostilities against Denmark, its property, or subjects, is contrary to the act of 1818. The fact that the vessel was to repair to Bremerhaven, there to await orders, made no difference, as any intent, ultimate or proximate, to commit hostilities is violation of the act.

5 Op., 92, Johnson, 1849.

"The effects of a violation of neutrality committed by means of the construction, equipment, and armament of a vessel are not done away with by any commission which the Government of the belligerent power, benefited by the violation of neutrality, may afterward have granted to that vessel; and the ultimate step by which the offense is completed cannot be admissible as a ground for the absolution of the offender, nor can the consummation of his fraud become the means of establishing his innocence. The privilege of extra-territoriality, accorded to vessels-of-war, has been admitted into the law of nations, not as an absolute right, but solely as a proceeding founded on the principle of courtesy and mutual deference between different nations, and, therefore, can never be appealed to for the protection of acts done in violation of neutrality."

Award of Geneva tribunal. 4 Pap. Rel. Treat. of Wash., 10, 11. *Infra*, § 402*a*.

"It is an offense by the law of nations for a sovereign to permit the issue from his ports of a man-of-war so commissioned, when this might be prevented by the exercise of proper care and diligence. It may be said that between selling, by subjects of a neutral state, of armed ships to a belligerent, which is not forbidden by the law of nations, and fitting out by individuals of a cruiser commissioned and armed to serve such belligerent, which is forbidden, there is no perceptible distinction. But between the sale of ships and of munitions of war, and the fitting out of a cruiser commissioned or to be commissioned for belligerent purposes, there is as real a difference as between permitting individuals, though armed, to emigrate to a belligerent country, and permitting the enlistment of soldiers to serve such belligerent. To prevent the sale of ships or of munitions of war to a belligerent, would, as we have seen, inflict a serious injury on commerce, as well as make countries which do not produce iron and other essentials of iron-clads, and munitions of war, victims of a country by which these staples are produced. But this argument does not apply to the fitting out and manning of cruisers and permitting a neutral port to be made the basis from which such cruisers go forth commissioned by one belligerent to destroy the shipping of the other belligereut at sea. The imperfect performance by the British Government of its duties in this respect, provoked a controversy with the United States, which led to the Treaty of Washington, above noticed. It is true that, as will be seen, the rules laid down in the Treaty of Washington are not to be regarded as incorporated in international law, or as forming interpretations of that law by which the parties are bound. But while this is the case, the whole procedure must be regarded as ratifying the general principle above stated, that it is a breach of international law for a neutral sovereign to permit the issuing from his ports of cruisers fitted out, commissioned, and manned for belligerent warfare. *Infra*, § 402*a*.

"But a neutral country may, without breach of neutrality, permit both belligerents to equip vessels in its ports. Even without any previous stipulation with either party, the ports of a neutral nation may be closed or kept open to the prizes of both. (Mr. Lawrence, North Am. Rev., July, 1878, p. 25.)

"The question is discussed by Sir W. Harcourt (Historicus), Int. Law, 151; in Bernard on British Neutrality, etc., London, 1870, and in Bemis on American Neutrality, Boston, 1866. It was argued with great research in the Alexandra (Attorney-General *v.* Sillem), London, 1863, and in The Meteor, Boston (Little, Brown & Co.), 1869. (See Holmes' Kent, i, 124, and 3 Am. Law Rev., 234.)

"In the Alexandra case (see pamph. rep.) the applicability of the foreign enlistment act to such cases was fully discussed. (See notice in Bernard on British Neutrality, etc.) The arguments on the motion to discharge the rule are given in Atty. Gen. *v.* Sillem, 2 Hurl. & C., 431.

"'The direct logical conclusions,' says Mr. Hall (International Law, Oxford, 1880, § 225), 'to be obtained from the ground principles of neutrality, go no further than to prohibit the issue from neutral waters of a vessel provided with a belligerent commission or belonging to a belligerent, and able to inflict damage on his enemy. * * * On the other hand, it is fully recognized that a vessel completely armed, and in every respect fitted the moment it receives its crew to act as a man-of-war, is a proper subject of commerce. There is nothing to prevent

its neutral possessor from selling it, and undertaking to deliver it to the belligerent, either in the neutral port or in that of the purchaser, subject to the right of the other belligerent to seize it as contraband if he meets it on the high seas or within his enemy's waters.'

"'The existing law, according to the summary of it given by Chancellor Kent (Com., i, 128) and adopted by Wheaton (Lawrence's Wheaton, 729), declares it to be a misdemeanor for any person within the jurisdiction of the United States to augment the force of any armed vessel belonging to one foreign power at war with another power with whom they are at peace; or to hire or enlist troops or seamen for foreign military or naval service, or to be concerned in fitting out any vessel to cruise or commit hostilities in foreign service against a nation at peace with them; and the vessel in this latter case is made subject to forfeiture. The President is also authorized to employ force to compel any foreign vessel to depart, which by the law of nations or treaties ought not to remain within the United States, and to employ generally the public force in enforcing the duties of neutrality prescribed by law. (Revised Statutes, §§ 1033 *ff.*' Note by Mr. Lawrence in Whart. Crim. Law, 8th ed., § 1908.)

"In the Santissima Trinidad, 7 Wheat., 283, Judge Story, giving the opinion of the court, maintained that the sale of armed ships-of-war to belligerents by neutrals was never held unlawful in the United States. 'There is nothing in our laws,' he said, 'or in the law of nations, that forbids our citizens from sending armed vessels as well as munitions of war to foreign ports for sale.'"

Whart. Com. Am. Law, § 249.

"Mr. Baron Channell, in the case of the Alexandra, said: 'The foreign enlistment act, particularly the seventh section, is very imperfectly worded. There is no doubt that it was in a great measure, but with what appeared to me very important variations, penned from an act of the United States, passed in Congress in 1792, and re-enacted in 1818.' This vessel was built at Liverpool, nominally for Frazer, Trenholm & Co. She was, after being launched, immediately taken to a public dock for completion. According to the evidence at the trial, she was apparently built for war, but not for commerce, but might have been used as a yacht. At the trial, which took place before the chief baron of the court of exchequer, on an information by the attorney-general, the jury found for the defendants. The question was left to the jury by the chief baron as follows: 'Was there any intention that in the port of Liverpool, or in any other port, she should be either equipped, furnished, fitted out, or armed with the intention of taking part in any contest? If you think the object was to equip, furnish, fit out, or arm that vessel at Liverpool, then that is a sufficient matter. But if you think the object really was to build a ship in obedience to an order and in compliance with a contract, leaving to those who bought it to make what use they thought fit of it, then it appears to me that the foreign enlistment act has not in any degree been broken.' (The Neutrality of Great Britain During the American Civil War, Montague Bernard, ch. xiii, 355.) The arguments on the motion to discharge the rule are in Attorney-General *v.* Sillem, 2 Hurl & C., 431.

"Contrary to the course of the United States, in confiding the execution of her neutrality acts, including that of 1818, to the admiralty courts, the English act of 1819 gave jurisdiction to the common-law courts; and the case of the Alexandra, which was formally decided in

favor of the defendant, though the opinions of the judges of the court of exchequer were divided on a technical question of construction, produced an irritation in the minds of the American people, which neither the decision, in a contrary sense, of a Scotch court, nor even the interference of the Government with the purchase of the Anglo-Chinese squadron, supposed to be intended for the South, had any effect in allaying.

"So far back as January, 1867, a commission was appointed, consisting of some of the most eminent English jurists, including Phillimore, Twiss, and Vernon Harcourt, all high authorities on international law, and to which Mr. Abbott (now Lord Tenterden) was attached in the capacity that he held to the high commission at Washington. The result of their labors was embodied in the act of 9th of August, 1870, the passage of which was hastened by the Franco-Prussian war. This act prohibits the building, or causing to be built, by any person within Her Majesty's dominions any ship, with intent or knowledge of its being employed in the military or naval service of any foreign state at war with any friendly state; issuing or delivering any commission for any such ship; equipping any such ship, or dispatching or causing any such ship to be dispatched for such purpose. It is deserving of notice that Mr. Vernon Harcourt dissented to that portion of the report of the commissioners that applied to the prohibition of ship-building. Jurisdiction in cases under the act is given to the court of admiralty, which is not the least important amendment of the law."

Note by Mr. W. B. Lawrence to Whart. Crim. Law (9th ed.), § 1908.

(4) OR PASSAGE OF BELLIGERENT TROOPS OVER SOIL.

## § 397.

The Government of the United States will not at the request of a foreign Government, intervene to prevent the transit to the country of the latter persons objectionable to it unless they form part of a hostile military expedition.

Mr. Jefferson, Sec. of State, to the minister of France, Nov. 30, 1793. MSS. Notes, For. Leg. 4 Jeff. Works, 86.

"I transmit a copy of letters to this Department from the Secretary of War, of the 13th, 15th, and 16th instant, with their accompaniments. They relate to a conflict between troops in the service of Diaz and other forces, supposed to be in the interests of Lerdo, on the Rio Grande frontier. It seems that the Diaz troops, after defeating and routing their adversaries on Mexican soil, pursued them into Texas, where they again attacked and dispersed them. This was a violation of the territory of the United States which you will lose no time in remonstrating against.

"While it is deemed hardly probable that this unjustifiable invasion of American soil was made in obedience to any specific orders from the Mexican capital, it is, nevertheless, a grave violation of international law, which cannot for a moment be overlooked. You are instructed to call the attention of the officers of the *de facto* Government with whom

you are holding unofficial intercourse to this case, and to say that the Government of the United States will confidently expect a prompt disavowal of the act, with reparation for its consequences, and the punishment of its perpetrators."

Mr. Evarts, Sec. of State, to Mr. Foster, June 21, 1877. MSS. Inst., Mex.; For. Rel., 1877.

That this is a breach of neutrality, see Field's Int. Code, § 971, and see *supra*, §§ 11*a*, 13 *ff*.

As to permission to belligerent to transport troops, see correspondence in 4 Hamilton's Works, Lodge's ed., 48 *ff*; and see, also, *supra*, § 13, where the question is further discussed.

(5) BOUND NOT TO PERMIT TERRITORY TO BE MADE THE BASE OF BELLIGERENT OPERATIONS.

§ 398.

"It is the right of every nation to prohibit acts of sovereignty from being exercised by any other within its limits, and the duty of a neutral nation to prohibit such as would injure one of the warring powers."

Mr. Jefferson, Sec. of State, to Mr. Genet, June 5, 1793. 1 Am. St. Pap. (For. Rel.), 150; 1 Wait's St. Pap., 80. Same to same, July 24, 1793. 1 Am. St. Pap. (For. Rel.), 166.

It is a principle of the law of nations that no belligerent can rightfully make use of the territory of a neutral state for belligerent purposes, without the consent of the neutral Government.

7 Op., 387, Cushing, 1855. See further *supra*, § 27; *infra*, § 399.

When belligerent troops, in order to escape the other belligerent, take refuge in neutral territory, if they do not lay down their arms they should be compelled to do so by the neutral sovereign. In such case they are protected by the law of nations from the opposing belligerent. This, it is true, is contested by Bynkershoek.

"But this opinion of Bynkershoek is not supported by the practice of nations, nor by writers on public law. Abreu, Valin, Emerigon, Vattel, Azuni, Sir William Scott, Martens, Phillimore, Manning, and other European writers maintain the sounder doctrine, that when the flying enemy has entered neutral territory he is placed immediately under the protection of the neutral power, and that there is no exception to the rule that every voluntary entrance into neutral territory, with hostile purposes, is absolutely unlawful. Kent, Wheaton, Story, and other American writers oppose the doctrine of Bynkershoek, and the Government of the United States has invariably claimed the absolute inviolability of neutral territory."

2 Halleck's Int. Law (Baker's ed.), 180. See *supra*, § 394.

The question how far it is a breach of neutrality to supply coal to a belligerent has been already incidentally considered (*supra*, § 369). It may be here stated, in connection with the present head, that it is not a breach of neutrality for a neutral state to permit the coaling of belligerent steamers in its ports to the same extent as it permits the coaling of other foreign steamers resorting to its ports casually and

without settled stations established for them. Nor is it a breach of neutrality for a neutral state to permit the sale of coal to any extent to a belligerent. It would, however, be a breach of neutrality for a neutral to permit a permanent depot or magazine to be opened on its shores, on which a particular belligerent could depend for constant supplies. To require a neutral to shut up its ports so as to exclude from coaling all belligerents, would expose a nation with ports as numerous as those of the United States to an expense as great as would be imposed by actual belligerency. It is on the belligerent, who goes to war, not on the neutral, who desires to keep out of it, that should be thrown expenses so enormous, and constitutional strains so severe as those thus required. On the other hand, the breaking up of central depots or magazines for the constant supply of particular belligerents would be within easy range of ordinary national police. Nor can there be any charge of partiality made in allowing coaling with the limitation above stated, when the same privilege is granted to both belligerents.

Whart. Crim. Law (9th ed.), § 1903. *Supra*, § 369; *infra*, §§ 399, 402*a*.

(6) NOR TO PERMIT BELLIGERENT NAVAL OPERATIONS IN TERRITORIAL WATERS.

§ 399.

"I inclose you also several memorials and letters which have passed between the Executive and the ministers of France and England. These will develop to you the principles on which we are proceeding between the belligerent powers. The decisions, being founded on what is conceived to be rigorous justice, give dissatisfaction to both parties, and produce complaints from both. It is our duty, however, to persevere in them and to meet the consequences. You will observe that Mr. Hammond proposes to refer to his court the determination of the President that the prizes taken by the Citoyen Genet could not be given up; the reasons for this are explained in the papers. Mr. Genet had stated that she was manned by French citizens. Mr. Hammond had not stated to the contrary before the decision. Neither produced any proofs. It was therefore supposed that she was manned principally with French citizens. After the decision Mr. Hammond denies the fact, but without producing any proof. I am really unable to say how it was, but I believe it to be certain that there were very few Americans. He says the issuing the commission, etc., by Mr. Genet within our territory was an infringement of our sovereignty; therefore, the proceeds of it should be given up to Great Britain. The infringement was a matter between France and us. Had we insisted on any penalty or forfeiture by way of satisfaction to our insulted rights, it would have belonged to us, not to a third party. As between Great Britain and us, considering all the circumstances explained in the papers, we deemed we did enough to satisfy her. We are moreover assured that it is the standing usage of France, perhaps, too, of other nations, in all wars, to lodge blank commissions with all their foreign consuls to be given to every vessel of

their nation, merchant or armed, without which a merchant vessel would be punished as a pirate were she to take the smallest thing of the enemy that should fall in her way. Indeed, the place of the delivery of a commission is immaterial, as it may be sent by letter to any one. So it may be delivered by hand to him anywhere; the place of *signature by the sovereign* is the material thing. Were that to be done in any other jurisdiction than his own, it might draw the validity of the act in question."

Mr. Jefferson, Sec. of State, to Mr. Pinckney, June 14, 1793. MSS. Inst., Ministers.

"France, England, and all other nations have a right to cruise on our coasts, a right not derived from our permission, but from the law of nature. To render this more advantageous, France has secured to herself by a treaty with us (as she has done also by a treaty with Great Britain, in the event of a war with us or any other nation), two special rights: (1) Admission for her prizes and privateers into our ports. This, by the seventeenth and twenty-second articles, is secured to her exclusively of her enemies, as is done for her in the like case by Great Britain, were her present war with us instead of Great Britain. (2) Admission for her public vessels-of-war into our ports, in cases of stress of weather, pirates, enemies, or other urgent necessity, to refresh, victual, repair, etc. This is not exclusive. As, then, we are bound by treaty to receive the public armed vessels of France, and are not bound to exclude those of her enemies, the Executive has never denied the same right of asylum in our ports to the public armed vessels of your nation. They, as well as the French, are free to come to them in all cases of stress of weather, piracies, enemies, or other urgent necessity, and to refresh, victual, repair, etc. And so many are these urgent necessities to vessels far from their own ports, that we have thought inquiries into the nature as well as the degree of the necessities which drive them hither as endless as they would be fruitless, and therefore have not made them. And the rather because there is a third right, secured to neither by treaty, but due to both on the principles of hospitality between friendly nations, that of coming into our ports, not *under the pressure of urgent necessity*, but whenever their comfort or convenience induces them. On this ground, also, the two nations are on a footing."

Mr. Jefferson, Sec. of State, to Mr. Hammond, Sept. 9, 1793. MSS. Notes, For. Leg. 4 Jeff. Works, 65.

A foreign sovereign who uses the hospitality of our ports as a base of operations for the purpose of sallying forth to harass our allies as well as our own citizens, may be called upon for reparation.

Mr. Randolph, Sec. of State, to Mr. Hammond, Apr. 13, 1795. MSS. Notes, For. Leg.

"As it is contrary to the law of nations that any of the belligerent powers should commit hostility on the waters which are subject to the

exclusive jurisdiction of the United States, so ought not the ships-of-war belonging to any belligerent power to take a station in these waters in order to carry on hostile expeditions from them."

Mr. Randolph, Sec. of State, circular to the governors, Apr. 16, 1795. MSS. Dom. Let. This position is further discussed in Mr. Randolph's letter to Mr. Hammond, of Apr. 22, 1795. MSS. Notes, For. Leg. *Supra*, §§ 27 *ff.*

"Since our last meeting the aspect of our foreign relations has considerably changed. Our coasts have been infested and our harbors watched by private armed vessels, some of them without commissions, others with those of legal form, but committing piratical acts beyond the authority of their commissions. They have captured in the very entrance of our harbors, as well as on the high seas, not only the vessels of our friends coming to trade with us, but our own also. They have carried them off under pretense of legal adjudication, but not daring to approach a court of justice, they have plundered and sunk them by the way, or in obscure places where no evidence could arise against them; maltreated the crews, and abandoned them in boats in the open sea or on desert shores, without food or covering. These enormities appearing to be unreached by any control of their sovereigns, I found it necessary to equip a force to cruise within our own seas, to arrest all vessels of these descriptions found hovering on our coast within the limits of the Gulf Stream, and to bring the offenders in for trial as pirates.

"The same system of hovering on our coasts and harbors under color of seeking enemies has been also carried on by public armed ships, to the great annoyance and oppression of our commerce. New principles, too, have been interpolated into the law of nations, founded neither in justice nor the usage or acknowledgment of nations. According to these, a belligerent takes to himself a commerce with his own enemy which he denies to a neutral on the ground of its aiding that enemy in the war. But reason revolts at such an inconsistency, and the neutral having equal right with the belligerent to decide the question, the interest of our constituents and the duty of maintaining the authority of reason, the only umpire between just nations, impose on us the obligation of providing an effectual and determined opposition to a doctrine so injurious to the rights of peaceable nations. Indeed the confidence we ought to have in the justice of others still countenances the hope that a sounder view of those rights will of itself induce from every belligerent a more correct observance of them."

President Jefferson, Fifth Annual Message, 1805.

The invasion of neutral rights by an attack on one belligerent cruiser by another on neutral waters is not condoned by the fact that the chase was begun outside of the neutral line.

Mr. Madison, Sec. of State, to Mr. Monroe, Nov. 11, 1806. MSS. Inst., Ministers.

"When a foreign territorial jurisdiction has been violated in the seizure of an American vessel (by officers of the United States), and this

seizure has been the means of bringing her within reach of the process of the court, it has been decided by our Supreme Court, in affirming the condemnation of a vessel so seized, that the offense thereby committed against the foreign power did not invalidate the proceedings against the vessel. (Ship Richmond, 9 Cranch, 102.)"

Mr. Buchanan, Sec. of State, letter to Committee of Claims, Mar. 4, 1846. MSS. Report Book.

The seizure of an American vessel by an American ship-of-war, within the jurisdiction of a foreign Government, for an infringement of our revenue or navigation laws, is a violation of the territorial authority of the foreign Government, though this is a matter of which such Government alone can complain.

4 Op., 285, Nelson, 1843.

The pursuit by a belligerent cruiser of an enemy's ship within neutral waters, and driving the latter ashore, is a violation of the law of nations.

Mr. Seward, Sec. of State, to Mr. Tassara, May 21, 1862. MSS. Notes, Spain.

"I am directed by the President to ask you to give the following instructions, explicitly, to the naval officers of the United States, namely:

"Firstly, that under no circumstances will they seize any foreign vessel within the waters of a friendly nation.

"Secondly, that in no case are they authorized to chase and fire at a foreign vessel without showing their colors, giving her the customary preliminary notice of a desire to speak and visit her.

"Thirdly, that when this visit is made the vessel is not then to be seized without a search, carefully made, so far as to render it reasonable to believe that she is engaged in carrying contraband of war to the insurgents and to their ports, or otherwise violating the blockade, and that if it shall appear that she is actually bound, and passing from one friendly or so-called neutral port to another, and not bound or proceeding to or from a port in the possession of the insurgents, then she cannot be lawfully seized; and,

"Finally, that official seals, or locks, or fastenings of foreign authorities are in no case nor on any pretext to be broken or parcels covered by them read by any naval authorities of the United States, but all bags or other things conveying such parcels, and duly sealed and fastened by foreign authorities, will be, in the discretion of the United States officer to whom they may come, delivered to the consul, commanding naval officer, or legation of the foreign Government to be opened, upon the understanding that whatever is contraband or important as evidence concerning the character of a captured vessel, will be remitted to the said court or to the Secretary of State at Washington, or such sealed bags or parcels may be at once forwarded to this Department to the end that the proper authorities of the foreign Government may receive them without delay."

Mr. Seward, Sec. of State, to Mr. Welles, Aug. 8, 1862. MSS. Dom. Let.

The capture of the Florida, a Confederate cruiser, by the United States war steamer Wachusett, in the port of Bahia, "was an unauthorized, unlawful, and indefensible exercise of the naval force of the United States within a foreign country, in defiance of its established and duly recognized Government," and as such is entitled to reparation. It was held, however, that to this might be set off the damages to the United States arising from Brazil giving asylum and succor to the Florida, which the United States did not regard as a belligerent cruiser. But it was admitted that "it does not belong to the captains of the ships-of-war of the United States, or to the commanders of their armies, or to their vessels residing in foreign parts, acting without the authority of Congress and without such executive direction, and choosing their own manner and occasion, to redress the wrongs of the country." The crew of the Florida were released, being unlawfully captured. The Florida was not restored, because, on her way to port, she sunk from "a leak which could not be seasonably stopped."

Mr. Seward, Sec. of State, to Mr. Barbosa da Silva, Dec. 26, 1864. MSS. Notes, Brazil.

As to the capture of the Florida, see more fully *supra*, § 27.

Supply in a neutral port of coal to a belligerent cruiser from a constant coaling base, made available as a system for the purposes of the belligerent, is a breach of neutrality.

4 Pap. Rel., Treat. Wash., 12 *ff.* *Infra*, §§ 398, 402*a*. *Supra*, § 369.

But the mere occasional supply of coal to a belligerent cruiser, not from a constant coaling base, or in such quantities as to greatly enhance the cruiser's capacity for destruction, is not of itself a breach of neutrality.

*Ibid.* See criticism by Mr. Lawrence in Whart. Crim. Law (9th ed.), § 1908. And see also Whart. Com. Am. Law, §§ 249 *ff.* See also *supra*, § 396; *infra*, § 402*a*.

A capture made in neutral waters is, as between enemies, deemed to all intents and purposes rightful. It is only by the neutral sovereign that its legal validity can be called in question; and if he omits or declines to interpose a claim, the property is condemnable, *jure belli*, to the captors. If the captured vessel commence hostilities upon the captor in neutral waters, she forfeits the neutral protection, and the capture is not an injury for which redress can be sought from the neutral sovereign.

The Anne, 3 Wheat., 435.

A capture of Spanish property by a vessel built, armed, equipped, and owned in the United States, is illegal, and the property, if brought within our territorial limits, will be restored to the original owners.

La Concepcion, 6 Wheat., 235.

Restitution ought not to be decreed on the ground of the violation of our neutrality, unless the fact be established beyond a reasonable doubt.

The Santissima Trinidad, 7 Wheat., 283.

A purchase of a ship-of-war from an enemy whilst lying in a neutral port, to which it had fled for refuge, is invalid, and the ship remains liable to capture and condemnation, though the purchase was *bona fide* for a commercial purpose, the ship having been dismantled prior to the sale and afterwards fitted up for the merchant service.

The Georgia, 7 Wall., 32. See more fully *supra*, § 393.

The seizure by one belligerent, in neutral territory, of a ship belonging to another belligerent, is unlawful, and the ship must be restored.

1 Op., 32, Randolph, 1793; 1 Am. St. Pap. (For. Rel.), 148; *supra*, § 27.

Where it is claimed by a foreign minister that a seizure made by an American vessel was a violation of the sovereignty of his Government, the President may, upon being satisfied of the fact, where there is a suit pending for the seizure, cause the Attorney-General to file a suggestion of the fact in the cause, in order that it may be disclosed to the court.

1 Op., 504, Wirt, 1821.

Every neutral nation has a right to exact, by force, if need be, that belligerent powers shall not make use of its territory for the purposes of their war.

7 Op., 122, Cushing, 1855.

"Our courts held (during the war between France and England) and they continue to hold, that if the capture be made within the territorial limits of a neutral country into which the prize is brought, or by a privateer which has been illegally equipped in such neutral country, the prize courts of that country not only possess the power, but it is their duty to restore the property to the owner."

Mr. Lawrence, North Am. Rev., July, 1878, p. 26.

The claims maintained by the United States against Denmark from 1779, for a series of successive years, were for certain prizes captured during the Revolutionary War by the privateers under Paul Jones. These prizes were carried into a port of Norway, then under the Danish Crown. Denmark surrendered them to Great Britain. A demand for indemnity was made at once by Dr. Franklin, and was met by the Danish Government by an assertion that Denmark was bound to this course by her engagements with Great Britain. An indemnity was, however, offered, but was declined as inadequate. (3 Sparks's Dip. Corr., 121.) After further negotiations, in 1805, Mr. Madison, Secretary of State, insisted that in any view the restoration of the prizes to the other party in the war would be unauthorized, and the right of the United States to compensation was unquestionable.

Congress, in 1806, made an appropriation to the commander of one of the frigates "on account of his claim for prize money," "to be de-

ducted from his proportion of the money which may be obtained from the Danish Government."

6 U. S. Stat. L., 61.

The further progress of these claims is discussed in Lawrence's Wheaton (ed. 1863), 41 *ff*, and their character is considered *supra*, § 329*a*.

In a dispatch from Mr. Wheaton to Mr. Upshur, Secretary of State, November 10, 1843, which was adopted as the basis of instructions in reply, Mr. Wheaton took the ground that, in "the absence of any treaty with England to exclude the prizes of her enemy, and of any previous prohibition to the United States, by either of which means their prizes might have been refused admission without any violation of neutrality, they had a right to presume the assent of Denmark to send them into her ports; the more especially had they such a right when based, as in the actual case, on necessity from stress of weather. When once arrived in the port, the neutral Government of Denmark was bound to respect the military right of possession, lawfully acquired through war, by capture on the high seas, and continued in the port to which the prize was brought."

See further as to these claims, House Ex. Doc. 264, 28th Cong., 1st sess.; Senate Rep. 63, 29th Cong., 2d sess.; Cong. Globe, 37th Cong., 1st sess., 312. Lawrence's Wheaton, *ut supra*, and details given *supra*, § 329*a*.

"It is undoubtedly true that no private person can rest a claim for the restoration of prize in the courts of the captor on the ground that the capture was made in neutral waters, and that the neutral nation whose rights have been infringed alone can interpose."

The Lilla, 2 Sprague, 177; The Sir William Peel, 5 Wall., 517; The Adela, 6 *ibid.*, 266; The Anne, 3 Wheaton, 435; Wheaton, Dana's note, 209; Judge Holmes' note to 1 Kent, 118.

"A neutral state, also, is not bound to receive in its waters the ships-of-war of belligerents, though it may grant the privilege, if it grants it to the vessels of both belligerents. In cases of necessity, an asylum should not on any pretense be refused. The mere transit of belligerent ships-of-war through neutral territorial waters is permitted when such waters are the margin of the open seas. But the use of the territorial waters of a neutral state cannot by the law of nations be granted to a belligerent for warlike purposes, or for the purposes of equipment with munitions of war. It is otherwise with regard to repairs and obtaining provisions and coal; though, as we shall see, a neutral cannot open a depot for the permanent supply of coal and provisions to belligerent cruisers. And the stay of belligerent cruisers in a neutral port is usually limited by proclamations of the neutral Government to twenty-four hours, unless a longer time be required by stress of weather or by the necessity for repairs. It is settled that a belligerent cruiser cannot be permitted to pursue a ship of the other belligerent into neutral waters, or, *à fortiori*, to engage in direct warfare in such waters. It has been argued that a belligerent cruiser, when pursued, cannot be granted an asylum in a neutral port, except on condition of going out of service during the war, though the preponderance of opinion is against this view. But it is generally agreed that it is not permissible for a belligerent cruiser to pursue a cruiser or merchant vessel of the

other belligerent immediately on the latter leaving the neutral port. Before such pursuit is permitted, twenty-four hours should intervene."

Whart. Com. Am. Law, § 239. See more fully *supra*, § 27.

The case of the American privateer brig General Armstrong, destroyed in the harbor of Fayal, in September, 1814, by an English squadron, has been elsewhere referred to (*supra*, §§ 27, 227, 248; *infra*, § 401), and it has been seen that the claim brought by the United States against Portugal for breach of neutrality in permitting the outrage, was referred to Louis Napoleon as umpire, whose decision was adverse to the United States.

*Supra*, § 227. See also Lawrence's Wheaton (ed. 1863), 720, 721, citing Senate Ex. Doc., 32d Cong., 1st sess.; House Ex. Doc. 53, 32d Cong., 2d sess.; Senate Ex. Doc., 24.

"Again, in the case of the reclamations made by the United States Government upon that of Portugal for the destruction of the privateer General Armstrong, in Fayal Harbor, in 1814, by an English squadron, being in effect a violation of neutral territory, the matter was referred to the arbitration of the Emperor Louis Napoleon, at that time President of the French Republic, who, by his award dated the 30th November, 1852, having ascertained that the first shot was fired by the American commander, that the protection of the Portuguese Government was not appealed to until the fight had commenced, and that consequently the American captain had himself violated the neutral territory of the Portuguese sovereign, held that as on these grounds Portugal was not responsible for the result of the conflict, consequently no indemnity was due to the American Government."

Abdy's Kent (2d ed.), 157.

It is maintained by Sir W. Harcourt (Historicus, 161, 162), that when neutral rights have been invaded by one belligerent to the injury of another, the latter, "who, though he may have sustained injury, has suffered the violation of no right, has no definite or lawful claim upon the neutral for reparation. He may urge on the neutral, by way of remonstrance, the duty of obtaining redress for him at the hands of the offender; this, however, is only a duty of imperfect obligation. He cannot demand at the hands of the neutral compensation for the injury he may have sustained, nor can he impose upon the neutral the duty of obtaining for him any remedy beyond that which may be had over persons or things which may be *infra præsidia*, and consequently within the neutral jurisdiction." To this effect is cited The Anne, 3 Wheat., 435; Story, J.; 1 Kent Com., 116, 119, 121. But Judge Holmes (in his note to 1 Kent Com., 117) says: "The text does not seem to bear out the conclusion just stated. In the well-known case of the General Armstrong, the United States made a claim against Portugal for not preventing the destruction of a United States privateer by British vessels, when lying in a Portuguese harbor, during the war of 1812. The case was submitted to Louis Napoleon, then President of the French Republic, who held that Portugal was excused, even admitting the principle that a neutral might be liable under such circumstances, by the alleged facts that the garrison was feeble and that the American commander had not applied in proper time to the local officer for protection, but had resisted the attack with arms, thus himself violating the neutrality of the territory. Wheaton, Lawrence's note, 217; Wheaton, Dana's note, 208. In 1 Pis-

toye et Duverdy, Traité des Prises Maritimes, 197, a contrary doctrine to that of Historicus is laid down."

On general principles, as is elsewhere shown, a neutral may, by failure to perform the duties of neutrality, make himself liable to a belligerent who suffers from such failure. *Supra*, § 227; *infra*, § 400.

(7) NOR TO PERMIT SALE OF PRIZE IN PORTS.

§ 400.

"Restitution of prizes has been made by the Executive of the United States only in the two cases, 1st, of capture, within their jurisdiction, by armed vessels originally constituted such without the limits of the United States; or 2d, of capture, either within or without their jurisdiction, by armed vessels, originally constituted such within the limits of the United States, which last have been called proscribed vessels.

"All *military equipments* within the ports of the United States are forbidden to the vessels of the belligerent powers, even where they have been constituted vessels-of-war before their arrival in our ports; and where such equipments have been made before detection, they are ordered to be suppressed when detected, and the vessel reduced to her original condition. But if they escape detection altogether, depart and make prizes, the Executive has not undertaken to restore the prizes.

"With due care it can scarcely happen that military equipments of any magnitude shall escape discovery. Those which are small may sometimes, perhaps, escape, but to pursue these so far as to decide that the smallest circumstance of military equipment to a vessel in our ports shall invalidate her prizes through all time, would be a measure of incalculable consequences. And since our interference must be governed by some general rule, and between great and small equipments no practicable line of distinction can be drawn, it will be attended with less evil on the whole to rely on the efficiency of the means of prevention, that they will reach with certainty equipments of any magnitude, and the great mass of those of smaller importance also; and if some should in the event escape all our vigilance, to consider these of the number of cases which will at times baffle the restraints of the wisest and best guarded rules which human foresight can devise. And I think we may safely rely that since the regulations which got into a course of execution about the middle of August last it is scarcely possible that equipments of any importance should escape discovery."

Mr. Jefferson, Sec. of State, to minister of Great Britain, Nov. 14, 1793. MSS. Notes, For. Leg.; 4 Jeff. Works, 79. See as to treaty with France *supra*, § 148.

British ships with their prizes were not, in 1795, under the then treaty with France, suffered to come into the ports of the United States.

Mr. Randolph, Sec. of State, to Mr. Hammond, Apr. 13, 1795. MSS. Notes, For. Leg.

"The sale of prizes brought into the ports of the United States by armed vessels of the French Republic, * * * has been regarded by us not as a right to which the captors were entitled either by the law of nations or our treaty of amity and commerce with France."

Mr. Pickering, Sec. of State, to Mr. Adet, May 24, 1796. MSS. Notes, For. Leg. 1 Am. St. Pap. (For. Rel.), 651. In Mr. Pickering's letter to Mr. Adet, of Nov. 15, 1796, this is confined, for the present, to sales of prizes taken by *privateers*. MSS. Notes, For. Leg.

Fitting out in the ports of the United States privateers to attack British commerce being an invasion of the neutrality of the United States, "the most effectual means of defeating their unlawful practices was the seizing of their prizes when brought within our jurisdiction."

Mr. Pickering, Sec. of State, to Mr. Pinckney, June 16, 1797. MSS. Inst., Ministers.

When a foreign belligerent cruiser brings a prize into a neutral port, the cruiser will be required to depart as soon as practicable, and will not be permitted to dispose in such port of the prize or of its goods.

Mr. Clay, Sec. of State, to Mr. Tacon, Apr. 11, 1828. MSS. Notes, For. Leg.

"The laws of the United States do not admit of the sale within their jurisdiction, for any purpose of prize, goods taken by one belligerent from another and brought into their ports. This Government does not take jurisdiction at all upon the question of prize or no prize, but leaves that question exclusively to the cognizance of the tribunals of the respective belligerents."

Mr. Clay, Sec. of State, to Mr. Obregon, May 1, 1828; *ibid.*

"Neither belligerent is allowed by the laws of the United States to sell his prizes within their ports. The rights of hospitality are equally offered to both. They could not be denied, in many cases. without a violation of the duties of humanity."

Mr. Clay, Sec. of State, to Mr. Rebello, May 1, 1828; *ibid.*

After a privateer of one belligerent has captured a merchant vessel of the other, "the property cannot be transferred until after it shall have been condemned by a court of admiralty; and the question of prize or no prize belongs exclusively to the courts of the captor."

Mr. Buchanan, Sec. of State, to Mr. Saunders, June 13, 1847. MSS. Inst., Spain.

The Chesapeake, a United States merchant steamer, was seized by a Confederate privateer, which, in order to avoid recapture, brought her into a Nova Scotian port. There she was seized by the provincial authorities and held for adjudication. The judge before whom the case was argued held that the sovereign whose territorial rights are violated by the subjects or citizens of a friendly state, can, if he finds them within his jurisdiction, inflict on them his own penalty in his own mode; that the Chesapeake, if a prize at all, was an uncondemned prize; that for a

belligerent to bring an uncondemned prize into a neutral port, to avoid recapture, is such a grave offense against the neutral state that it *ipso facto* subjects the prize to forfeiture, and that the vessel should be restored to the owners on the payment of costs. "By the direction of the President I have advised that the owners pay the costs under protest. This Government still adheres to the opinion that it was its right under the circumstances of the case to have an immediate and unconditional restitution of the Chesapeake and her cargo by executive authority, without waiting for an adjudication; nevertheless, it accepts the restitution so far as it has been ordered, and in the form in which it has been adjudged, and willingly leaves further claim for future consideration, being satisfied that Her Majesty's provincial authorities in Nova Scotia have conducted their proceedings in this matter in a spirit at once just and friendly towards the United States; and that the judgment rendered reflects honor upon the enlightened magistrate who presides in the vice-admiralty court."

Mr. Seward, Sec. of State, to Mr. Adams, Feb. 24, 1864. MSS. Inst., Gr. Brit. A general narrative of the proceedings in reference to the Chesapeake is given *supra*, § 27.

If a capture be made by a privateer which had been illegally equipped in a neutral country, the prize courts of such country have power, and it is their duty, to restore the captured property, if brought within their jurisdiction, to its owner.

Brig Alerta *v.* Moran, 9 Cranch, 359.

If a prize, taken in violation of our neutrality, is voluntarily brought within our territory, the courts must decree restitution to the original owners. Where, however, the original owner seeks restitution on the ground of a violation of our neutrality by the captors, the *onus probandi* rests on him to make out his case.

La Amistad de Rues, 5 Wheat., 385.

"The doctrine heretofore asserted in this court is, that whenever a capture is made by any belligerent in violation of our neutrality, if the prize come voluntarily within our jurisdiction, it shall be restored to the original owners. This is done upon the footing of the general law of nations, and the doctrine is fully recognized by the act of Congress of 1794. But this court have never yet been understood to carry their jurisdiction in cases of violation of neutrality beyond the authority to decree restitution of the specific property, with the costs and expenses during the pending of the judicial proceedings. We are now called upon to give *general damages* for plunderage, and if the particular circumstances of any case shall hereafter require it, we may be called upon to inflict exemplary damages to the same extent as in ordinary cases of marine torts. We entirely disclaim any right to inflict such damages, and consider it no part of the duty of a neutral nation to

interpose upon the mere footing of the law of nations to settle all the rights and wrongs which may grow out of a capture between belligerents. Strictly speaking, there can be no such thing as a marine tort between the belligerents. Each has an undoubted right to exercise all the rights of war against the other, and it cannot be a matter of judicial complaint that they are exercised with severity, even if the parties do transcend those rules which the customary laws of war justify. At least, they have never been held within the cognizance of the prize tribunals of neutral nations. The captors are amenable to their own Government exclusively for any excess or irregularity in their proceedings, and a neutral nation ought not otherwise to interfere than to prevent captors from obtaining any unjust advantage by a violation of its neutral jurisdiction. A neutral nation may, indeed, inflict pecuniary or other penalties on the parties for any such violation; but it then does it professedly in vindication of its own rights, and not by way of compensation to the captured. When called upon by either of the belligerents to act in such cases, all that justice seems to require is that the neutral nation should fairly execute its own laws and give no asylum to the property unjustly captured. It is bound, therefore, to restore the property if found within its own ports, but beyond this it is not obliged to interpose between the belligerents."

*Ibid.*, 389; Story, J. See further *supra*, § 396.

There is high authority for the position that a prize may be carried into a neutral port and there sold, but considerations of expediency should lead the neutral sovereign to exercise his undoubted right of prohibiting such sale.

2 Op., 86, Wirt, 1828.

It would be a breach of neutrality to permit a port to be made a cruising station for a belligerent, or a depot for his spoils and prisoners.

*Ibid.*

It is not a breach of neutrality to permit a vessel captured as prize to be repaired in our ports and put in a condition to be taken to a port of the captor for adjudication.

*Ibid.*

(8) BOUND TO REDRESS DAMAGES DONE TO BELLIGERENT BY ITS CONNIVANCE OR NEGLIGENCE.

§ 401.

Mr. Jefferson, Secretary of State, in his letter of September 5, 1793, to Mr. Hammond, stated that "having, for particular reasons, forborne to use *all the means in our power* for the restitution" (to England) of certain vessels captured by French privateers which were fitted out in ports of the United States, "the President thought it incumbent on the United States to make compensation for them."

1 Wait's St. Pap., 166; 1 Am. St. Pap. (For. Rel.), 174.

"I take the true principle to be that 'for violations of jurisdiction, with the consent of the sovereign or his voluntary sufferance, indemnification is due; but that for others he is bound only to use all *reasonable* means to obtain indemnification from the aggressor, which must be calculated on his circumstances, and these endeavors *bona fide* made; and, failing, he is no further responsible.' It would be extraordinary, indeed, if we were to be answerable for the conduct of belligerents through our whole coast, whether inhabited or not."

Mr. Jefferson, President, to the Secretary of State, Apr. 21, 1807. 5 Jeff. Works, 69.

When there is an invasion of neutral rights by privateers commissioned by the United States their commissions will be withdrawn.

Mr. Monroe, Sec. of State, to Mr. Rademaker, May 1, 1814. MSS. Notes, For. Leg.

When there is probable cause to believe that expeditions are on foot to violate the neutrality laws of the United States, the President will direct the district attorneys of the jurisdictions in which such movements are suspected to exist to order due inquiries, and, if there be sufficient evidence, to commence legal proceedings against the parties implicated.

Mr. Forsyth, Sec. of State, circular, Dec. 21, 1837. MSS. Dom. Let. Other circulars to the same effect will be found in the records of the Department of State for 1837–'38–'39. See also letter of Mr. Forsyth to the Governor of Vermont, Dec. 27, 1837; *ibid.* See *infra*, § 402.

A vessel was fitted out at Savannah with armament, munitions, and sea stores, and being afterwards found, under another name, with a commission from the Republic of Venezuela to cruise against the subjects of the King of Spain, was seized by the United States authorities for violating the neutrality laws. The captain admitted that the vessel had already made a cruise in the capacity above stated, but applied to the President for her discharge from further prosecution on the ground that she was a legitimate armed vessel, lawfully sailing under the flag of Venezuela. It was held that the case was one for adjudication in court, and did not call for the extraordinary interference of the Government.

1 Op., Wirt, 1818.

The better opinion is that the belligerent of whom an unjust advantage is taken (by a neutral's partiality) has a right to redress from the neutral who permits his neutrality to be thus abused.

Whart. Com. Am. Law, §§ 249 *ff*, citing Lawrence's Wheaton, note 217; Dana's Wheaton, 208; Holmes' note to 1 Kent Com., 117, 118.

This was the position taken in the long-litigated case of the brig General Armstrong, which was seized during the war of 1812, in a Portuguese port, by a British cruiser, in violation of Portuguese neutrality. The parties interested claimed redress from Portugal, but, on

reference to Louis Napoleon (afterwards emperor) as arbitrator, the case was decided against them. Congress then passed a resolution appropriating a fund to repay them their losses.

The claim of those interested in the brig General Armstrong is discussed in greater detail *supra*, §§ 27, 247, 248, 399.

"The power A lives in perfect harmony and friendship with power B. The power C, either with reason or without, commits hostilities against the subjects of the power B, takes some of their vessels, carries them into the ports of A, friend of both, where they are condemned and sold by the official agents of power C, without power A being able to prevent it. At last a treaty is entered into, by which the powers B and C adjust their differences, and in this treaty the power B renounces and abandons to power C the right to any claim for the injuries and losses occasioned to its subjects by the hostilities from power C.

"*Quære.* Has the power B any right to call upon power A for indemnities for the losses occasioned in its ports and coasts to its subjects by those of power C, after the power B has abandoned or relinquished, by its treaty with C, its rights for the damages which could be claimed for the injuries sustained by the hostile conduct of the power C?

"*Answer.* We have considered the above case, and are of opinion that, on the general principles of the law of nations, the power A is not liable to the power B for acts done upon the vessels belonging to the subjects of power B by the power C, within the ports of A, *the latter not being able to prevent it.* Nations are not, any more than individuals, bound to perform impossibilities.

"But even leaving impossibilities out of the question, and admitting that the power A could have prevented the injury which was committed by the power C, but refused or neglected to do it, we are of opinion that, if the power B has released or relinquished the same injury to power C, in that case the power A is no longer liable to any responsibility in damages on account of its acquiescence:

"1st. Because it appears to us that, in the present case, the power C is to be considered as the principal party and the power A merely as an accessory, and that it is in that relation to each other that their several acts and their respective liability to the injured party is to be considered. Now, it is in the nature of all accessory things that they cannot subsist without the principal thing, and the principal trespass being done away by the release to C, the accessory offense of A must be done away likewise, according to the well-known maxim of law, *accessorium sequitur principale.*

"2d. Because a release or relinquishment of a right implies in law the receipt of satisfaction; and it is contrary to every principle of jurisprudence for a party to receive a double satisfaction for the same injury, and here the injury received by B from C and from A is essentially the same. The acts of those two powers were indeed different, but the effect which they produced was the same, and that effect only can be the object of compensation in damages.

"3d. Because if the power A could be compelled to make satisfaction to power B for the injury which the latter has released or relinquished to C, that release or relinquishment would be defeated to every useful purpose, as the power C would be liable to the power A for the same damages from which it was intended to be discharged by the release of B. Now a release, as well as every other contract or engagement, im-

plies that nothing shall be done by the grantor directly or indirectly to defeat its *bona fide* intent or effect. If, therefore, the claim preferred by B upon A will, if admitted, indirectly defeat the release granted to C, such claim must be pronounced to be illegal.

"Upon the whole, we are of opinion that the release granted by the power B to the power C operates also as a release to the power A for its participation in the injury which was the object of that release.

"JARED INGERSOLL.
"WILLIAM RAWLE.
"J. B. McKEAN.
"P. S. DUPONCEAU.

"PHILADELPHIA, *November* 15, 1802."

2 Am. St. Pap. (For. Rel.), 605.

"The power and duty of the United States to restore captures made in violation of our neutral rights and brought into American ports, have never been matters of question; but, in the constitutional arrangement of the different authorities of the American Federal Union, doubts were at first entertained whether it belonged to the executive Government or to the judiciary to perform the duty of inquiry into captures made in violation of American sovereignty, and of making restitution to the injured party. But it has long since been settled that this duty appropriately belongs to the Federal tribunals, acting as courts of admiralty and maritime jurisdiction. It, however, has been judicially determined that this peculiar jurisdiction of the courts of the neutral Government to inquire into the validity of captures made in violation of the neutral immunity, will be exercised only for the purpose of restoring the specific property when voluntarily brought within the territory, and does not extend to the infliction of vindictive damages, as in ordinary cases of maritime injuries, and as is done by the courts of the captor's own country. The punishment to be imposed upon the party violating the municipal statutes of the neutral state is a matter to be determined in a separate and distinct proceeding. The court will exercise jurisdiction and decree restitution to the original owner, in case of capture from a belligerent power by a citizen of the United States, under a commission from another belligerent power, such capture being a violation of neutral duty; but they have no jurisdiction on a libel for damages for the capture of a vessel as prize by the commissioned cruiser of a belligerent power, although the vessel belong to citizens of the United States and the capturing vessel and her commander be found and proceeded against within the jurisdiction of the court."

2 Halleck's Int. Law (Baker's ed.), 207. See as to action of prize courts in such cases, *supra*. §§ 328 *ff*.

### III. *DEGREE OF VIGILANCE TO BE EXERCISED.*

#### (1) NOT PERFECT VIGILANCE, BUT SUCH AS IS REASONABLE UNDER THE CIRCUMSTANCES.

### § 402.

"Observations on the value of peace with other nations are unnecessary. It would be wise, however, by timely provisions to guard against those acts of our own citizens which might tend to disturb it, and to put ourselves in a condition to give that satisfaction to foreign nations

which we may sometimes have occasion to require from them. I particularly recommend to your consideration the means of preventing those aggressions by our citizens on the territory of other nations, and other infractions of the law of nations, which, furnishing just subject of complaint, might endanger our peace with them. And, in general, the maintenance of a friendly intercourse with foreign powers will be presented to your attention by the expiration of the law for that purpose, which takes place, if not renewed, at the close of the present session."

President Washington, Fourth Annual Address, 1792.

"You may on every occasion give assurances, which cannot go beyond the real desires of this country, to preserve a fair neutrality in the present war, on condition that the rights of neutral nations are respected in us as they have been settled in *modern* times either by the express declarations of the powers of Europe, or their adoption of them on particular occasions. From our treaties with France and Holland, and that of England and France, a very clear and simple line of conduct can be marked out for us, and I think we are not unreasonable in expecting that England shall recognize towards us the same principles which she has stipulated to recognize towards France in a state of neutrality."

Mr. Jefferson, Sec. of State, to Mr. Pinckney, Apr. 20, 1793. MSS. Inst., Ministers.

"Whereas it appears that a state of war exists between Austria, Prussia, Sardinia, Great Britain, and the United Netherlands on the one part, and France on the other, and the duty and interests of the United States require that they should with sincerity and good faith adopt and pursue a conduct friendly and impartial toward the belligerent powers:

"I have, therefore, thought fit, by these presents, to declare the disposition of the United States to observe the conduct aforesaid toward those powers respectively, and to exhort and warn the citizens of the United States carefully to avoid all acts and proceedings whatsoever which may in any manner tend to contravene such disposition.

"And I do hereby also make known that whosoever of the citizens of the United States shall render himself liable to punishment or forfeiture under the law of nations by committing, aiding, or abetting hostilities against any of the said powers, or by carrying to any of them those articles which are deemed contraband by the modern usage of nations, will not receive the protection of the United States against such punishment or forfeiture; and further, that I have given instructions to those officers to whom it belongs to cause prosecutions to be instituted against all persons who shall, within the cognizance of the courts of the United States, violate the laws of nations with respect to the powers at war or any of them."

President Washington's proclamation, Apr. 22, 1793.

"The public papers giving us reason to believe that the war is becoming nearly general in Europe, and that it has already involved nations with which we are in daily habits of commerce and friendship, the President has thought it proper to issue the proclamation of which I inclose you a copy, in order to mark out to our citizens the line of conduct they are to pursue. That this intimation, however, might not work to their prejudice, by being produced against them as conclusive evidence of their knowledge of the existence of war and of the nations engaged in it, in any case where they might be drawn into courts of justice for acts done without that knowledge, it has been thought necessary to write to the representatives of the belligerent powers here the letter, of which a copy is also inclosed, reserving to our citizens those immunities to which they are entitled till authentic information shall be given to our Government by the parties at war, and be thus communicated with due certainty to our citizens."

Mr. Jefferson, Sec. of State, to Messrs. Morris, Pinckney, and Short, Apr. 26, 1793. MSS. Inst., Ministers.

"This [the Cabinet] sits almost every day on questions of neutrality. H. produced the other day the draft of a letter from himself to the collectors of the customs, giving them in charge to watch over all proceedings in their districts contrary to the laws of neutrality or tending to impair our peace with the belligerent powers, and particularly to observe if vessels pierced for guns should be built, and to inform *him* of it. This was objected to: (1) As setting up a system of espionage destructive of the peace of society; (2) transferring to the Treasury Department the conservation of the laws of neutrality and peace with foreign nations; (3) it was rather proposed to intimate to the judges that the laws respecting neutrality being now come into activity, they should charge grand juries with the observance of them, these being constitutional and public informers, and the persons accused knowing of what they should do, and having an opportunity of justifying themselves. E. R. found out a hair to split, which, as always happens, became the decision. H. is to write to the collectors of the customs, who are to convey their information to the attorney of the district, to whom E. R. is to write, to receive their information and proceed by indictment. The clause respecting the building vessels pierced for guns is to be omitted; for, although three against one thought it would be a breach of neutrality, yet they thought we might defer giving a public opinion on it as yet. Everything, my dear sir, hangs upon the opinion of a single person, and that the most indecisive one I ever had to do business with. He always contrives to agree in principle with one, but in conclusion with the other."

Mr. Jefferson, Sec. of State, to Mr. Madison, May 13, 1793. 2 Randall's Life of Jefferson, 131.

"The United States, in prohibiting all the belligerent powers from equipping, arming, and manning vessels-of-war in their ports, have exercised a right and a duty with justice and with great moderation."

Mr. Jefferson, Sec. of State, to Mr. Genet, June 5, 1793. 1 Wait's St. Pap., 93; 1 Am. St. Pap. (For. Rel.), 150.

"You have most perfectly seized the *original* idea of the proclamation. When first proposed as a declaration of neutrality, it was opposed, first, because the Executive had no power to declare neutrality; second, as such, a declaration would be premature, and would lose us the benefit for which it might be bartered. It was urged that there was a strong impression in the minds of many that they were free to join in the hostilities on the side of France. Others were unapprised of the danger they would be exposed to in carrying contraband goods, etc. It was, therefore, agreed that a proclamation should issue, declaring that we were in a state of peace, admonishing the people to do nothing contravening it, and putting them on their guard as to contraband. On this ground, it was accepted or acquiesced in by all, and E. R., who drew it, brought it to me (the draft) to let me see there was no such word as neutrality in it. Circumstances forbid other verbal criticisms. The public, however, soon took it up as a declaration of neutrality, and it came to be considered at length as such. * * * With respect to our citizens who had joined in hostilities against a nation with whom we are at peace the subject was thus viewed: Treaties are law. By the treaty with England, we are in a state of peace with her. He who breaks that peace, if within our jurisdiction, breaks the laws, and is punishable by them. And if he is punishable, he ought to be punished, because no citizen should be free to commit his country to war."

Mr. Jefferson, Sec. of State, to Mr. Monroe, July 14, 1793. 2 Randall's Life of Jefferson, 167.

Mr. Hamilton's circular instructions of Aug. 4, 1793, to collectors of customs are in 1 Am. St. Pap. (For. Rel.) 140; and are given *supra*, § 196.

"On the declaration of war between France and England, the United States being at peace with both, their situation was so new and inexperienced by themselves, that their citizens were not, in the first instant, sensible of the new duties resulting therefrom, and of the restraints it would impose even *on their dispositions* towards the belligerent powers. Some of them imagined (and chiefly their transient sea-faring citizens, that they were free to indulge those dispositions to take side with either party, and enrich themselves by depredations on the commerce of the other, and were meditating enterprises of this nature, as there was reason to believe. In this state of the public mind, and before it should take an erroneous direction, difficult to be set right, and dangerous to themselves and their country, the President thought it expedient, through the channel of proclamation, to remind our fellow-citizens that we were in a state of peace with all the belligerent powers; that in that state it was our duty neither to aid nor injure any; to exhort and warn them against acts which might contravene this duty, and particularly those of positive hostility, for the punishment of which the laws would be appealed to, and to put them on their guard also as to the risks they would run if they should attempt to carry articles of contraband to any. This proclamation, ordered on the 19th and signed the 22d

day of April, was sent to you in my letter of the 26th of the same month."

Mr. Jefferson, Sec. of State, to Mr. Morris, Aug. 16, 1793. MSS. Instructions, Ministers.

"As in cases where vessels are reclaimed by the subjects or citizens of the belligerent powers as having been taken within the jurisdiction of the United States, it becomes necessary to ascertain that fact by testimony taken according to the laws of the United States, the governors of the several States, to whom the application will be made in the first instance, are desired immediately to notify thereof the attorneys of their respective districts. The attorney is thereupon instructed to give notice to the principal agent of both parties who may have come in with the prize, and also to the consuls of the nations interested, and to recommend to them to appoint, by mutual consent, arbiters to decide whether the capture was made within the jurisdiction of the United States, as stated to you in my letter of the 8th instant, according to whose award the governor may proceed to deliver the vessel to the one or the other party. But in case the parties or consuls shall not agree to name arbiters, then the attorney, or some person substituted for him, is to notify them of the time and place when and where he will be, in order to take the depositions of such witnesses as they may cause to come before him, which depositions he is to transmit for the information and decision of the President."

Mr. Jefferson, Sec. of State, to Mr. Hammond, Nov. 10, 1793. MSS. Notes, For. Leg. 4 Jeff. Works, 76; 1 Am. St. Pap. (For. Rel.), 183; 1 Wait's St. Pap., 196.

"As soon as the war in Europe had embraced those powers with whom the United States have the most extensive relations, there was reason to apprehend that our intercourse with them might be interrupted and our disposition for peace drawn into question by the suspicions too often entertained by belligerent nations. It seemed, therefore, to be my duty to admonish our citizens of the consequences of a contraband trade and of hostile acts to any of the parties, and to obtain, by a declaration of the existing legal state of things, an easier admission of our right to the immunities belonging to our situation. Under these impressions the proclamation which will be laid before you was issued.

"In this posture of affairs, both new and delicate, I resolved to adopt general rules which should conform to the treaties and assert the privileges of the United States. These were reduced into a system, which will be communicated to you. Although I have not thought myself at liberty to forbid the sale of the prizes permitted by our treaty of commerce with France to be brought into our ports, I have not refused to cause them to be restored when they were taken within the protection of our territory, or by vessels commissioned or equipped in a warlike form within the limits of the United States.

"It rests with the wisdom of Congress to correct, improve, or enforce this plan of procedure; and it will probably be found expedient to extend the legal code and the jurisdiction of the courts of the United States to many cases which, though dependent on principles already recognized, demand some further provisions.

"Where individuals shall, within the United States, array themselves in hostility against any of the powers at war, or enter upon military expeditions or enterprises within the jurisdiction of the United States, or usurp and exercise judicial authority within the United States, or where the penalties on violations of the law of nations may have been indistinctly marked or are inadequate, these offenses cannot receive too early and close an attention, and require prompt and decisive remedies.

"Whatsoever these remedies will be, they will be well administered by the judiciary, who possess a long-established course of investigation, effectual process, and officers in the habit of executing it.

"In like manner, as several of the courts have doubted, under particular circumstances, their power to liberate the vessels of a nation at peace, and even of a citizen of the United States, although seized under a false color of being hostile property, and have denied their powers to liberate certain captures within the protection of our territory, it would seem proper to regulate their jurisdiction in these points. But if the Executive is to be the resort in either of the two last-mentioned cases, it is hoped that he will be authorized by law to have facts ascertained by the courts when for his own information he shall require it."

President Washington, Fifth Annual Address, 1793. 1 Am. St. Pap. (For. Rel.), 21.

President Washington's proclamation of December 3, 1793, which was the second of the series of important papers issued during his administration settling neutral rights, as now generally understood, declared that "whosoever of the citizens of the United States shall render himself liable to punishment or forfeiture under the law of nations by committing, aiding, or abetting hostilities against any of the said powers, or by carrying to them any of those articles which are deemed contraband by the *modern* usage of nations (the italics as in original) will not receive the protection of the United States," etc. The period fixed by the definition, therefore, was before the expansion of the term in the war that ensued.

1 Am. St. Pap. (For. Rel.), 140.

Mr. Hamilton, in his essays entitled Pacificus, published in exposition of President Washington's "neutrality" proclamation of 1793, took the ground that all treaty-making and war powers are Executive prerogatives and belong to the President of the United States, except so far as limited by the Constitution. He insisted, therefore, that the proclamation in question was not merely an exposition of the intention of the Executive to enforce the laws, but an authoritative announcement of the position to be taken by the United States as to foreign powers. Mr. Madison's reply, published shortly after over the name of

Helvidius, maintained that treaty-making and war-making are attributes of sovereignty which, in popular governments, are in the nature of laws, to be enacted by the legislature and enforced by the Executive. From his argument the following passages are extracted:

"If we consult for a moment the nature and operation of the two powers to declare war and to make treaties, it will be impossible not to see that they can never fall within a proper definition of executive powers. The natural province of the Executive Magistrate is to execute laws, as that of the legislature is to make laws. All his acts, therefore, properly executive, must presuppose the existence of the laws to be executed. A treaty is not an execution of laws; it does not presuppose the existence of laws. It is, on the contrary, to have itself the force of a *law*, and to be carried into *execution*, like all *other laws*, by the *Executive Magistrate*. To say, then, that the power of making treaties, which are confessedly laws, belongs naturally to the department which is to execute laws, is to say that the executive department naturally includes a legislative power. * * * In the general distribution of powers, we find that of declaring war expressly vested in the Congress, where every other legislative power is declared to be vested; and without any other qualification than what is common to every other legislative act. The constitutional idea of this power would seem, then, clearly to be that it is of a legislative and not of an executive nature. * * * The power of treaties is vested jointly in the legislature and the Senate, which is a branch of the legislature. From this arrangement, merely, there can be no inference that would necessarily exclude the power from the Executive class; since the Senate is joined with the President in another power, that of appointing to offices, which, so far as relates to executive offices at least, is considered as of an executive nature. Yet, on the other hand, there are sufficient indications that the power of treaties is regarded by the Constitution as materially different from mere executive power, and as having more affinity to the legislative than to the executive character. One circumstance indicating this, is the constitutional regulation under which the Senate give their consent in the case of treaties. In all other cases the consent of the body is expressed by a majority of voices. In this particular case a concurrence of two-thirds at least is made necessary, as a substitute or compensation for the other branch of the legislature, which, on certain occasions, could not be conveniently a party to the transaction. But the conclusive circumstance is that treaties, when formed according to the constitutional mode, are confessedly to have the force and operation of *laws*, and are to be a rule for the courts in controversies between man and man as much as any *other laws*. They are even emphatically declared by the Constitution to be 'the supreme law of the land.'"

1 Madison's Writings, 614 *ff.*

Mr. Hamilton, in Pacificus, argued that the clause declaring that "the President shall receive ambassadors, other public ministers, and consuls," might be so construed as to give the Executive the power "of putting the United States in a condition to become an associate in war." To this Mr. Madison, in Helvidius, replied by quoting and adopting the following from No. 69 of the Federalist, written by Mr. Hamilton:

"The President is also to be authorized to receive ambassadors and other public ministers. This, though it has been a rich theme of declamation, is more a matter of dignity than of authority. It is a circumstance that will be without consequence in the administration of the

Government, and it is far more convenient that it should be arranged in this manner, than that there should be a necessity of convening the legislature or one of its branches upon every arrival of a foreign minister, though it were merely to take the place of a departed predecessor."

Mr. Madison proceeded to comment as follows:

"When a foreign minister presents himself, two questions immediately arise: Are his credentials from the existing and acting Government of his country? Are they perfectly authenticated? These questions belong of necessity to the Executive; but they involve no cognizance of the question whether those exercising the Government have the right along with the possession. This belongs to the nation, and to the nation alone, on whom the Government operates. The questions before the Executive are merely questions of fact, *and the Executive would have precisely the same right, or rather, be under the same necessity, of deciding them, if its function was simply to receive without any discretion to reject public ministers.*"

1 Madison's Writings, 632 *ff.*

Mr. Madison's construction of this particular clause is no doubt logically correct. But at the same time, as Mr. Madison was among the first practically to assert, it is a function of the Executive primarily to determine the question of recognition of foreign revolutionary movements either as belligerents or Governments. See *supra*, §§ 87, 137.

On the question how far the proclamation of April 22, 1793, was meant to be a settlement of the relation of the United States to the belligerent powers, and not simply the views of the Executive as to such relation, we have the following letter from Mr. Jefferson to Mr. Madison of June 23, 1793:

"The proclamation as first proposed was to have been a declaration of neutrality. It was opposed on these grounds: (1) That a declaration of neutrality was a declaration that there should be no war, to which the Executive was not competent; (2) that it would be better to hold back the declaration of neutrality as a thing worth something to the powers at war—that they would bid for it, and we might reasonably ask for it *the broadest privileges of neutral nations.* The first objection was so far respected as to avoid inserting the term *neutrality;* and the drawing of the instrument was left to Edmund Randolph. That there should be a proclamation was passed unanimously, with the approbation or acquiescence of all parties."

3 Rives' Madison, 325.

"A contest in the arena of the public press between two such champions could not fail to draw the earnest attention of their contemporaries, for, though they engaged with vizors down, they were easily recognized by the superior temper and polish of their weapons and the practiced skill with which they were wielded. Mr. Madison embarked in it, as we have seen, with great reluctance. His habitual aversion to controversy was in this instance increased by his knowledge of the particular character of his adversary. 'One thing that particularly vexes me,' he said in an unreserved letter to a friend, 'is that I foreknow, from the prolixity and tenacity of the writer, that the business will not be terminated by a single fire, and, of course, that I must return to the charge in order to prevent a triumph without a victory.' Happily, he was relieved from this annoyance. Pacificus attempted no reply, and the apologetic suggestion of one connected with him by the closest relations, that the papers of Pacificus, being written amid harassing

cares and vexations, may be liable to some 'little cavils,' would lead to the conclusion that, if no reply to Helvidius was attempted, it was from the consciousness that none could be successfully made."

Mr. Rives in 3 Rives' Madison, 354, 355.

Mr. Hildreth (4 Hist. U. S., 429), following the line of the extreme Federalists, thus states the issue: "Hamilton took the field in defense of the proclamation of neutrality in a series of articles under the signature of Pacificus, in which he maintained with great ability not only the policy of that measure, but the President's right, by its issue, to decide upon the position in which the nation stood." As to this, it is to be observed that the proclamation carefully avoided the use of the term "neutrality," nor did it undertake to state what were the relations of the country as to peace or war, or what should be the compacts entered into by it with foreign states. The proclamation rested on the assumption that war with foreign countries could be declared *only* by Congress, and that treaties required for their adoption the action of President and Senate. All that the proclamation stated was the determination of the President not to create neutrality, but to perform such neutral duties as were imposed on him by law.

As to the controversy in the Cabinet on the question how far our treaty relations to France were affected by the French revolution, see *supra*, §§ 137, 148.

The note of Mr. Randolph, Sec. of State, to Mr. Hammond, British minister, of June 2, 1794, vindicating the neutral action of the United States Government, is found in 1 Am. St. Pap. (For Rel.), 464.

The execution of the neutrality laws was at first left to the State executives, on the appeal of the President. "The militia of Richmond, in Virginia, actually marched, at a moment's warning, between seventy and eighty miles, to seize a vessel supposed to be under preparation as a French privateer. Resistance was at first apprehended, but it was overawed, and the business completely effected."

Mr. Randolph, Sec. of State, to Mr. Pinckney, Aug. 11, 1794. MSS. Inst., Ministers.

"The extent of the United States imposes the necessity of substituting the agency of the governors in the place of an instantaneous action of the Federal Executive, and therefore general rules alone can be provided."

Mr. Randolph, Sec. of State, to Mr. Fauchet, Oct. 22, 1794. MSS. Notes, For. Leg. 1 Am. St. Pap. (For. Rel.), 589.

Duress cannot be set up by a sovereign when charged with breach of neutrality unless it "be shown that the force or danger which destroyed the free agency really existed, and that all reasonable means were employed to prevent or remedy the evil resulting."

Mr. Madison, Sec. of State, to Mr. C. C. Pinckney, Oct. 25, 1802. Same to same, Feb. 6, 1804. MSS. Inst., Ministers. See *supra*, §§ 17, 50 *ff.*

It is no defense that the breaches of neutrality were committed by an alien resident.

Same to same, Oct. 25, 1802. Mr. Madison to Mr. Monroe, Oct. 25, 1804. MSS. Inst., Ministers. See *supra*, § 205

"We have seen with sincere concern the flames of war lighted up again in Europe, and nations with which we have the most friendly and useful relations engaged in mutual destruction. While we regret the miseries in which we see others involved, let us bow with gratitude to that kind Providence which, inspiring with wisdom and moderation our late legislative councils while placed under the urgency of the greatest wrongs, guarded us from hastily entering into the sanguinary contest, and left us only to look on and to pity its ravages. These will be heaviest on those immediately engaged. Yet the nations pursuing peace will not be exempt from all evil. In the course of this conflict let it be our endeavor, as it is our interest and desire, to cultivate the friendship of the belligerent nations by every act of justice and of innocent kindness; to receive their armed vessels with hospitality from the distresses of the sea, but to administer the means of annoyance to none; to establish in our harbors such a police as may maintain law and order; to restrain our citizens from embarking individually in a war in which their country takes no part; to punish severely those persons, citizen or alien, who shall usurp the cover of our flag for vessels not entitled to it, infecting thereby with suspicion those of real Americans, and committing us into controversies for the redress of wrongs not our own; to exact from every nation the observance, toward our vessels and citizens, of those principles and practices which all civilized people acknowledge; to merit the character of a just nation, and maintain that of an independent one, preferring every consequence to insult and habitual wrong. Congress will consider whether the existing laws enable us efficaciously to maintain this course with our citizens in all places, and with others while within the limits of our jurisdiction, and will give them the new modifications necessary for these objects. Some contraventions of right have already taken place, both within our jurisdictional limits and on the high seas. The friendly disposition of the Governments from whose agents they have proceeded, as well as their wisdom and regard for justice, leave us in reasonable expectation that they will be rectified and prevented in future, and that no act will be countenanced by them which threatens to disturb our friendly intercourse. Separated by a wide ocean from the nations of Europe, and from the political interests which entangle them, together with products and wants which render our commerce and friendship useful to them and theirs to us, it cannot be the interest of any to assail us, nor ours to disturb them. We should be most unwise, indeed, were we to cast away the singular blessings of the position in which nature has placed us, the opportunity she has endowed us with of pursuing, at a distance from foreign contentions, the paths of industry, peace, and happiness; of cultivating general friendship, and of bringing collisions of interest to the umpirage of reason rather than of force."

President Jefferson, Third Annual Message, 1803.

In a letter of Mr. Madison, Secretary of State, to Mr. Armstrong, March 14, 1806, the course of the United States Government in respect to Miranda's expedition is detailed, and it is shown that the Government took prompt measures to suppress that expedition.

As to Miranda's expedition, see *supra*, § 395*a*; *infra*, § 404.

"It is found that the existing laws have not the efficacy necessary to prevent violations of the obligations of the United States as a nation at peace toward belligerent parties, and other unlawful acts on the high seas, by armed vessels equipped within the waters of the United States.

"With a view to maintain more effectually the respect due to the laws, to the character, and to the neutral and pacific relations of the United States, I recommend to the consideration of Congress the expediency of such further legislative provisions as may be requisite for detaining vessels actually equipped, or in a course of equipment, with a warlike force, within the jurisdiction of the United States; or, as the case may be, for obtaining from the owners or commanders of such vessels adequate securities against the abuse of their armaments, with the exceptions in such provisions, proper for the cases of merchant vessels furnished with the defensive armaments usual on distant and dangerous expeditions, and of a private commerce in military stores permitted by our laws, and which the law of nations does not require the United States to prohibit."

President Madison, message of Dec. 26, 1816. 11 Wait's St. Pap., 203. As to arming merchant vessels, see *supra*, § 39.

"In addition to the letter I wrote to you on the 6th, in reply to the one which you wrote to me on the 1st instant, I have the honor to state that information has been received at this Department, from various sources, that vessels have been armed and equipped in our ports for the purpose of cruising against the commerce of nations in amity with the United States, and no doubt is entertained that this information was in some instances correct. The owners of these vessels have, however, generally taken care so to conceal these armaments and equipments, and the object of them, as to render it extremely difficult, under existing circumstances, to prevent or punish this infraction of the law. It has been represented—

"First. That vessels belonging to citizens of the United States or foreigners have been armed or equipped in our ports, and have cleared out from our custom-houses as merchant vessels, and, after touching at other ports, have hoisted the flag of some of the belligerents, and cruised under it against the commerce of nations in amity with the United States.

"Secondly. That in other instances, other vessels, armed and equipped in our ports, have hoisted such flags after clearing out and getting to sea, and have in like manner cruised against the commerce of nations in amity with the United States, extending their depredations in a few cases to the property of citizens of the United States.

"Thirdly. That in other instances, foreign vessels have entered the ports of the United States, and, availing themselves of the privileges allowed by our laws, have in various modes augmented their armaments with pretended commercial views; have taken on board citizens of the United States as passengers, who, on their arrival at neutral ports, have assumed the character of officers and soldiers in the service of some of the parties in the contest now prevailing in our southern hemisphere.

"Information, founded upon these representations, has from time to time been given to the attorneys and collectors of the respective districts in which the armaments are stated to have been made, but from the difficulty of obtaining the necessary evidence to establish facts on which the law would operate few prosecutions have been instituted.

"In reply to your second inquiry, I beg leave to refer to the communication from the Secretary of the Treasury to the Committee of Ways and Means, during the last session of Congress, in the case of the American Eagle, and to the papers inclosed herewith."

Mr. Monroe, Sec. of State, to Mr. Forsyth, Jan. 10, 1817. 4 Am. St. Pap. (For. Rel.), 104.

"It was anticipated at an early stage that the contest between Spain and the colonies would become highly interesting to the United States. It was natural that our citizens should sympathize in events which affected their neighbors. It seemed probable also that the prosecution of the conflict along our coasts and in contiguous countries would occasionally interrupt our commerce and otherwise affect the persons and property of our citizens. These anticipations have been realized. Such injuries have been received from persons acting under the authority of both the parties, and for which redress has in most instances been withheld. Through every stage of the conflict the United States have maintained an impartial neutrality, giving aid to neither of the parties in men, money, ships, or munitions of war. They have regarded the contest not in the light of an ordinary insurrection or rebellion, but as a civil war between parties nearly equal, having, as to neutral powers, equal rights. Our ports have been open to both, and every article, the fruit of our soil or of the industry of our citizens, which either was permitted to take, has been equally free to the other. Should the colonies establish their independence, it is proper now to state that this Government neither seeks nor would accept from them any advantage in commerce or otherwise which will not be equally open to all other nations. The colonies will in that event become independent states, free from any obligation to or connection with us which it may not then be their interest to form on the basis of a fair reciprocity."

President Monroe, First Annual Message, 1817.

"The Government of the United States, having used all the means in its power to prevent the fitting out and arming of vessels (in this case

privateers under South American flags, but alleged to have been manned with American citizens to cruise against Portugal) in their ports to cruise against any nation with whom they are at peace, and having faithfully carried into execution the laws enacted to preserve inviolate the neutral and pacific obligations of the Union, cannot consider itself bound to indemnify individual foreigners for losses for captures over which the United States have neither control nor jurisdiction."

Mr. Adams, Sec. of State, to Mr. Correa de Serra, Mar. 14, 1818. MSS. Notes, For. Leg.

"By the usual principles of international law, the state of *neutrality* recognizes the cause of both parties to the contest as *just;* that is, it avoids all consideration of the merits of the contest. But when, abandoning that neutrality, a nation takes one side in a war of other parties, the first question to be settled is the *justice* of the cause to be assumed. If the European allies are to take side with Spain, to reduce her South American colonies to submission, we trust they will make some previous inquiry into the justice of the cause they are to undertake. As neutrals we are not required to decide the question of justice. We are sure we should not find it on the side of Spain."

Mr. Adams, Sec. of State, to Mr. Gallatin, May 19, 1818. MSS. Inst., Ministers.

"In the civil war existing between Spain and the Spanish provinces in this hemisphere, the greatest care has been taken to enforce the laws intended to preserve an impartial neutrality. Our ports have been equally open to both parties, and on the same conditions, and our citizens have been equally restrained from interfering in favor of either, to the prejudice of the other. The progress of the war, however, has operated manifestly in favor of the colonies. Buenos Ayres still maintains unshaken the independence which it declared in 1816, and has enjoyed since 1810. Like success has attended Chili and the provinces north of the La Plata bordering on it, and likewise Venezuela."

President Monroe, Third Annual Message, 1819.

"In the existing unfortunate civil war between Spain and the South American provinces, the United States have constantly avowed and faithfully maintained an impartial neutrality. No violation of that neutrality, by any citizen of the United States, has ever received sanction or countenance from this Government. Whenever the laws, previously enacted for the preservation of neutrality, have been found, by experience, in any manner defective, they have been strengthened by new provisions and severe penalties. Spanish property, illegally captured, has been constantly restored by the decisions of the tribunals of the United States; nor has the *life itself* been spared of individuals guilty of piracy, committed upon Spanish property on the high seas."

Mr. Adams, Sec. of State, to Mr. Vives, May 3, 1820. MSS. Notes, For. Leg.

"This contest was considered at an early stage by my predecessor a civil war in which the parties were entitled to equal rights in our ports. This decision, the first made by any power, being formed on great consideration of the comparative strength and resources of the parties, the length of time, and successful opposition made by the colonies, and of all other circumstances on which it ought to depend, was in strict accord with the law of nations. Congress has invariably acted on this principle, having made no change in our relations with either party. Our attitude has, therefore, been that of neutrality between them, which has been maintained with the strictest impartiality. No aid has been afforded to either, nor has any privilege been enjoyed by the one which has not been equally open to the other party, and every exertion has been made in its power to enforce the execution of the laws prohibiting illegal equipments with equal rigor against both.

"By this equality between the parties their public vessels have been received in our ports on the same footing; they have enjoyed an equal right to purchase and export arms, munitions of war, and every other supply, the exportation of all articles whatever being permitted under laws which were passed long before the commencement of the contest; our citizens have treated equally with both, and their commerce with each has been alike protected by the Government.

"Respecting the attitude which it may be proper for the United States to maintain hereafter between the parties, I have no hesitation in stating it as my opinion that the neutrality heretofore observed should still be adhered to. From the change in the Government of Spain and the negotiation now depending, invited by the Cortes and accepted by the colonies, it may be presumed that their differences will be settled on the terms proposed by the colonies. Should the war be continned, the United States, regarding its occurrences, will always have it in their power to adopt such measures respecting it as their honor and interest may require."

President Monroe, Second Inaugural Address, 1821.

"The attention of this Government has been drawn with great solicitude to other subjects, and particularly to that relating to a state of maritime war, involving the relative rights of neutral and belligerent in such wars. Most of the difficulties which we have experienced, and of the losses which we have sustained, since the establishment of our independence, have proceeded from the unsettled state of those rights and the extent to which the belligerent claim has been carried against the neutral party. It is impossible to look back on the occurrences of the late wars in Europe, and to behold the disregard which was paid to our rights as a neutral power, and the waste which was made of our commerce by the parties to those wars, by various acts of their respective Governments, and under the pretext by each that the other had set the

example, without great mortification, and a fixed purpose never to submit to the like in future."

President Monroe, Eighth Annual Message, 1824.

The efforts made by the United States to maintain neutrality in the contest between Spain and Portugal, on the one side, and the South American colonies, on the other, in connection with the various political influences to which the administration was exposed, are discussed *supra*, §§ 71, 72, 161*a*. See also Mr. Dana's notes to Wheaton, § 440.

In the 4th and 5th volumes of Mr. J. Q. Adams' Memoirs will be found much interesting information on this topic.

As to the bearing of the Monroe doctrine on this question, see *supra*, §§ 57, 71, 72.

As to limits of United States neutrality in war between Mexico and Texas, see Mr. Forsyth, Sec. of State, to Mr. Ellis, Dec. 9, 1836. MSS. Inst., Mex.; *supra*, §§ 58, 348*d*.

As to neutrality in respect to Mexico, see report of Mr. Forsyth, Sec. of State, Jan. 8, 1838, House Doc. 74, 25th Cong., 2d sess.

The President's proclamation in 1838, in respect to the Canadian troubles, will be found in the Brit. and For. St. Pap., 1849–'50, vol. 38, 1074.

The message of President Van Buren, Jan. 8, 1838, as to breaches of neutrality on our northern frontier, will be found in House Ex. Doc. 73, 25th Cong., 2d sess.

"Depredations by our citizens upon nations at peace with the United States, or combinations for committing them, have at all times been regarded by the American Government and people with the greatest abhorrence. Military incursions by our citizens into countries so situated, and the commission of acts of violence on the members thereof, in order to effect a change in its Government, or under any pretext whatever, have, from the commencement of our Government, been held equally criminal on the part of those engaged in them, and as much deserving punishment as would be the disturbance of the public peace by the perpetration of similar acts within our own territory."

President Van Buren, Second Annual Message, 1838.

The President's proclamation of Aug. 11, 1849, as to threatened invasion of Cuba and Mexico is found in the Brit. and For. St. Pap., 1849–'50, vol. 39, 77.

"Although these offenders against the laws have forfeited the protection of their country, yet the Government may, so far as is consistent with its obligations to other countries, and its fixed purpose to maintain and enforce the laws, entertain sympathy for their unoffending families and friends, as well as a feeling of compassion for themselves. Accordingly no proper effort has been spared, and none will be spared, to procure the release of such citizens of the United States, engaged in this unlawful enterprise, as are now in confinement in Spain; but it is to be hoped that such interposition with the Government of that country may not be considered as affording any ground of expectation that the Government of the United States will, hereafter, feel itself under any obligation of duty to interfere for the liberation or

pardon of such persons as are flagrant offenders against the law of nations and the laws of the United States. Those laws must be executed. If we desire to maintain our respectability among the nations of the earth, it behooves us to enforce steadily and sternly the neutrality acts passed by Congress, and to follow, as far as may be, the violation of those acts with condign punishment.

"But what gives a peculiar criminality to this invasion of Cuba is that, under the lead of Spanish subjects and with the aid of citizens of the United States, it had its origin with many in motives of cupidity. Money was advanced by individuals, probably in considerable amounts, to purchase Cuban bonds, as they have been called, issued by Lopez, sold, doubtless, at a very large discount, and for the payment of which the public lands and public property of Cuba, of whatever kind, and the fiscal resources of the people and Government of that island, from whatever source to be derived, were pledged, as well as the good faith of the Government expected to be established. All these means of payment, it is evident, were only to be obtained by a process of bloodshed, war, and revolution. None will deny that those who set on foot military expeditions against foreign states by means like these are far more culpable than the ignorant and the necessitous whom they induce to go forth as the ostensible parties in the proceeding. These originators of the invasion of Cuba seem to have determined with coolness and system upon an undertaking which should disgrace their country, violate its laws, and put to hazard the lives of ill-informed and deluded men. You will consider whether further legislation be necessary to prevent the perpetration of such offenses in future.

"No individuals have a right to hazard the peace of the country or to violate its laws upon vague notions of altering or reforming Governments in other states. This principle is not only reasonable in itself and in accordance with public law, but is ingrafted into the codes of other nations as well as our own. But while such are the sentiments of this Government it may be added that every independent nation must be presumed to be able to defend its possessions against unauthorized individuals banded together to attack them. The Government of the United States at all times since its establishment has abstained and has sought to restrain the citizens of the country from entering into controversies between other powers and to observe all the duties of neutrality. At an early period of the Government—in the administration of Washington—several laws were passed for this purpose. The main provisions of these laws were re-enacted by act of April, 1818, by which, amongst other things, it was declared that if any person shall, within the territory or jurisdiction of the United States, begin or set on foot or provide or prepare the means for any military expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace, every person so offending shall

be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars and imprisoned not more than three years; and this law has been executed and enforced to the full extent of the power of the Government from that day to this.

"In proclaiming and adhering to the doctrine of neutrality and non-intervention the United States have not followed the lead of other civilized nations; they have taken the lead themselves, and have been followed by others. This was admitted by one of the most eminent of modern British statesmen, who said in Parliament, while a minister of the Crown, 'that if he wished for a guide in a system of neutrality he should take that laid down by America in the days of Washington and the Secretaryship of Jefferson'; and we see, in fact, that the act of Congress of 1818 was followed the succeeding year by an act of the Parliament of England substantially the same in its general provisions. Up to that time there had been no similar law in England, except certain highly penal statutes passed in the reign of George II, prohibiting English subjects from enlisting in foreign service, the avowed object of which statutes was that foreign armies, raised for the purpose of restoring the house of Stuart to the throne, should not be strengthened by recruits from England herself.

"All must see that difficulties may arise in carrying the laws referred to into execution in a country now having three or four thousand miles of seacoast, with an infinite number of ports and harbors and small inlets, from some of which unlawful expeditions may suddenly set forth, without the knowledge of Government, against the possessions of foreign states."

President Fillmore, Second Annual Message, 1851; Mr. Webster, Sec. of State.

"In reply the undersigned has to acquaint General Almonte that there is no law of the United States which authorizes the refusal of a clearance to a vessel bound to a port in a state of insurrection, or the imposition of any penalty for the entrance of a United States vessel into such a port for commercial purposes only. The just belligerent rights, however, of all powers, engaged in civil or foreign war, so far as those rights may be invaded by citizens of the United States, are, it is conceived, amply protected by the act of Congress of the 20th of April, 1818."

Mr. Marcy, Sec. of State, to Mr. Almonte, May 14, 1855. MSS. Notes, Mex.

"A grand jury of this country having presented yourself and Colonel Kinney for a violation of our laws in getting up the expedition, Colonel Kinney having evaded trial by leaving the United States, and the Government of Nicaragua having declared it to be an intended hostile invasion of its territories, you ought not to indulge the slightest expectation that this Government could be induced to aid or countenance the enterprise. In view of what has already been disclosed, the Government cannot assume as an undoubted fact, and act upon it as such,

your declaration that your undertaking is conformable to the laws of your own country and not liable to objection from the authorities of the country which is the seat of your contemplated operations.

"This Government acknowledges it to be a duty to protect the rights of its citizens engaged in lawful pursuits abroad from tyrannical power, and will not shrink from the performance of that duty on any and all proper occasions; but it does not believe that you present a case where this duty arises.

"It has also another duty to perform not at all incompatible with the former; it is to maintain friendly relations with all foreign powers, and to discountenance and repress, when illegal, all enterprises designed to disturb the safety or tranquillity of any other state.

"I am aware that civil discord now prevails in the Republic of Nicaragua, and it is natural to conclude that what one party oppose another may favor. While this Government believes it prudent to abstain from interfering as far as practicable with these internal divisions, yet it cannot decline, in certain emergencies, to decide who possess the political power of the state. Our minister in Nicaragua has regarded the authorities which issued the proclamation against your expedition to be in possession of the executive power of Nicaragua; he has been received by and has treated with them as the Government of that country, and has lately negotiated a treaty with them. This fact has an important bearing on the subjects presented in your letter of the 26th instant, and sustains the positions I have taken in this reply to it."

Mr. Marcy, Sec. of State, to Mr. Fabers, June 29, 1855. MSS. Dom. Let.

"The Government of the undersigned regrets that persons who may owe it either temporary or permanent allegiance should proceed from the United States to any foreign country for hostile purposes, and acknowledges its obligation to prevent this misdemeanor by all proper means. The laws of the United States by which this policy and obligation are declared and acknowledged are believed to be ample for their purpose. Circumstances, however, imputable neither to the inadequacy of those laws nor to the want of good faith in the persons charged with their administration, may occasionally enable offenders to escape detection."

Mr. Marcy, Sec. of State, to Mr. Molina, Dec. 10, 1855. MSS. Notes, Cent. Am.

"The United States gave an early example to other nations in regard to its neutral duties by enacting stringent neutrality laws; they certainly preceded Great Britain in legislation upon the subject. These laws have laid upon the citizens or residents of the United States such restraints as neutral obligations towards other states require, or are compatible with the spirit of free institutions. They prohibit enlistments for foreign service within the limits of the United States, or any agreement to go beyond those limits, for the purpose of such enlistments; they denounce, under heavy penalties, the fitting out of priva-

teers or the organizing any expeditions against foreign states or their territories. Mr. Molina will find it difficult to show an instance in which any other country, including his own, has done more by legislation than the United States to preserve with fidelity neutral relations with other powers. The execution of these laws is all that can be required of this Government in maintaining its foreign relations."

Mr. Marcy, Sec. of State, to Mr. Molina, Apr. 25, 1856. MSS. Notes, Cent. Am.
In Mr. Cass's instructions of July 25, 1858, to Mr. Lamar (MSS. Inst., Cent. Am.), the vigilance and good faith of the United States in putting down filibustering preparations in Nicaragua is shown in detail.

"A Government is responsible only for the faithful discharge of its international duties, but not for the consequences of illegal enterprises of which it had no knowledge, or which the want of proof or other circumstances rendered it unable to prevent."

Mr. Cass, Sec. of State, to Mr. Molina, Nov. 26, 1860. MSS. Notes, Cent. Am.

It is within the competency of a belligerent to place, as a war measure, the export of anthracite coal under such limitations as would most cripple its antagonist.

Mr. Seward, Sec. of State, to Mr. Stuart, Oct. 3, 1862. MSS. Notes, Gr. Brit.
Mr. Seward to Lord Lyons, Jan. 9, 1863; *ibid.* Same to same, Mar. 18, 1864, *ibid*; see *supra*, § 369.

When notified of the Crimean war, the Secretary of State informed the French minister at Washington "that the laws of the United States imposed severe restrictions not only upon its own citizens, but upon all persons who might be resident in this country, against equipping privateers, receiving commissions, or enlisting men therein, for the purpose of taking a part in any foreign war; that it was not apprehended that there would be any attempt to violate these laws, but should the just expectation of the President be disappointed, he would not fail in his duty to use the power with which he was invested to enforce obedience to them."

Mr. Seward, Sec. of State, to Mr. Dayton, Oct. 24, 1863. MSS. Inst., France.

While objecting to a continuance granted by the presiding judge in the trial of the case of Rumble, tried and acquitted in England in 1865 for breach of neutrality laws, "the Government acknowledges that it does not otherwise find any sufficient ground for questioning the learning or impartiality of the presiding judge in the conduct of the trial."

Mr. Seward, Sec. of State, to Mr. Adams, Mar. 21, 1865. MSS. Inst., Gr. Brit.

Persons and vessels arrested under order of the President for breach of neutrality may be detained by the naval forces of the United States, under his directions, until lawfully discharged.

Mr. Fish, Sec. of State, to Mr. Edwards, June 29, 1869. MSS. Dom. Let.

"It is impossible not to compare and contrast the conduct of the states-general as regards Great Britain, on occasion of the revolt of

the British colonies, with that of Great Britain as regards the insurrection in the Southern States. No fleets were fitted out by America in the ports of the Netherlands to prey on the commerce of Great Britain. Only in a single instance did American cruisers have temporary harborage in the Texel. Year after year the exports of munitions of war from the Netherlands were forbidden by the states-general, the more completely to fulfill their duty of amity and neutrality towards Great Britain. But, nevertheless, Great Britain treated a declaration of neutrality by the states-general, and the observance of that declaration, as a sufficient cause of war against the Netherlands, prior to which the British Government continually complained of the occasional supplies derived by the colonies from the island of St. Eustatius. How light in this respect would have been the burdens of the United States during the late insurrection if British aid had been confined to a contraband commerce between the insurgents and the port of Nassau!"

Mr. Fish, Sec. of State, to Mr. Motley, Sept. 25, 1869. MSS. Inst., Gr. Brit.

"The Government of the United States may almost be said to have originated the modern doctrine of the obligations of neutrals to maintain their neutrality. They were the first to make that international obligation the subject of a municipal law. They have been loyal to that doctrine throughout their history. They have suffered because other powers have been less loyal to it than themselves, and they have continued to maintain it throughout the present disturbances in the islands of the West Indies. If there was any neglect to properly scrutinize the character of these vessels in the United States, which I do not admit, it was due in the one case to the neglect of the minister of Hayti and in the other case to the neglect of the Haytian consul."

Mr. Fish, Sec. of State, to Mr. Bassett, Oct. 13, 1869. MSS. Inst., Hayti.

In July, 1869, the President issued to the district-attorney and marshal for the eastern district of New York a commission empowering them, or either of them, "to employ such part of the land or naval forces of the United States, or of the militia thereof, for the purposes indicated by the eighth section of the act of April 20, 1818, commonly known as the neutrality act."

Mr. Fish, Sec. of State, to Mr. Pierrepont, July 13, 1869. MSS. Dom. Let.

Orders were at the same time given for the capture of all concerned in expeditions violating such law.

*Ibid.*

See also Mr. Fish's letter to Mr. Pierrepont, of July 15, 1869; Mr. Fish to Mr. Barlow, July 17, 1869; Mr. Fish to Mr. Robeson, Aug. 10, 1869; Mr. Fish to Mr. Barlow, Aug. 10, 1869, as to custody of gunboats seized under above order. MSS. Dom. Let.

As to the subsequent destiny of these gunboats see Mr. Fish to Mr. Pierrepont, Nov. 26, 1869. *Ibid.*

"Whereas a state of war unhappily exists between France, on the one side, and the North German Confederacy and its allies, on the other side; and whereas the United States are on terms of friendship and amity with all the contending powers, and with the persons inhabiting their several dominions; and whereas great numbers of the citizens of the United States reside within the territories or dominions of each of the said belligerents, and carry on commerce, trade, or other business or pursuits therein, protected by the faith of treaties; and whereas great numbers of the subjects or citizens of each of the said belligerents reside within the territory or jurisdiction of the United States, and carry on commerce, trade, or other business or pursuits therein; and whereas the laws of the United States, without interfering with the free expression of opinion and sympathy, or with the open manufacture or sale of arms or munitions of war, nevertheless impose upon all persons who may be within their territory and jurisdiction the duty of an impartial neutrality during the existence of the contest:

"Now, therefore, I, Ulysses S. Grant, President of the United States, in order to preserve the neutrality of the United States and of their citizens and of persons within their territory and jurisdiction, and to enforce their laws, and in order that all persons, being warned of the general tenor of the laws and treaties of the United States in this behalf, and of the law of nations, may thus be prevented from an unintentional violation of the same, do hereby declare and proclaim that by the act passed on the 20th day of April, A. D. 1818, commonly known as the 'neutrality law,' the following acts are forbidden to be done, under severe penalties, within the territory and jurisdiction of the United States, to wit:

"1. Accepting and exercising a commission to serve either of the said belligerents by land or by sea against the other belligerent.

"2. Enlisting or entering into the service of either of the said belligerents as a soldier, or as a marine, or seaman on board of any vessel of war, letter of marque, or privateer.

"3. Hiring or retaining another person to enlist or enter himself in the service of either of the said belligerents as a soldier, or as a marine, or seaman on board of any vessel of war, letter of marque, or privateer.

"4. Hiring another person to go beyond the limits or jurisdiction of the United States with intent to be enlisted as aforesaid.

"5. Hiring another person to go beyond the limits of the United States with the intent to be entered into service as aforesaid.

"6. Retaining another person to go beyond the limits of the United States with intent to be enlisted as aforesaid.

"7. Retaining another person to go beyond the limits of the United States with intent to be entered into service as aforesaid. (But the said act is not to be construed to extend to a citizen or subject of either belligerent who, being transiently within the United States, shall, on board of any vessel-of-war, which, at the time of its arrival within the

United States, was fitted and equipped as such vessel of war, enlist or enter himself or hire or retain another subject or citizen of the same belligerent, who is transiently within the United States, to enlist or enter himself to serve such belligerent on board such vessel-of-war, if the United States shall then be at peace with such belligerent.)

"8. Fitting out and arming, or attempt to fit out and arm, or procuring to be fitted out and armed, or knowingly being concerned in the furnishing, fitting out, or arming of any ship or vessel with intent that such ship or vessel shall be employed in the service of either of the said belligerents.

"9. Issuing or delivering a commission within the territory or jurisdiction of the United States for any ship or vessel to the intent that she may be employed as aforesaid.

"10. Increasing or augmenting, or procuring to be increased or augmented, or knowingly being concerned in increasing or augmenting, the force of any ship of-war, cruiser, or other armed vessel, which at the time of her arrival within the United States was a ship-of-war, cruiser, or armed vessel in the service of either of the said belligerents, or belonging to the subjects or citizens of either, by adding to the number of guns of such vessels, or by changing those on board of her for guns of a larger caliber, or by the addition thereto of any equipment solely applicable to war.

"11. Beginning or setting on foot or providing or preparing the means for any military expedition or enterprise to be carried on from the territory or jurisdiction of the United States against the territories or dominions of either of the said belligerents.

"And I do further declare and proclaim that by the nineteenth article of the treaty of amity and commerce which was concluded between His Majesty the King of Prussia and the United States of America, on the 11th day of July, A. D. 1799, which article was revived by the treaty of May 1, A. D. 1828, between the same parties, and is still in force, it was agreed that 'the vessels-of-war, public and private, of both parties, shall carry freely, wheresoever they please, the vessels and effects taken from their enemies, without being obliged to pay any duties, charges, or fees to officers of admiralty, of the customs, or any others; nor shall such prizes be arrested, searched, or put under any legal process, when they come to and enter the ports of the other party, but may freely be carried out again at any time by their captors to the places expressed in their commissions, which the commanding officer of such vessel shall be obliged to show.'

"And I do further declare and proclaim that it has been officially communicated to the Government of the United States by the envoy extraordinary and minister plenipotentiary of the North German Confederation, at Washington, that private property on the high seas will be exempted from seizure by the ships of His Majesty the King of Prussia, without regard to reciprocity.

"And I do further declare and proclaim that it has been officially communicated to the Government of the United States by the envoy extraordinary and minister plenipotentiary of His Majesty the Emperor of the French, at Washington, that orders have been given that, in the conduct of the war, the commanders of the French forces on land and on the seas shall scrupulously observe toward neutral powers the rules of international law, and that they shall strictly adhere to the principles set forth in the declaration of the congress of Paris of the 16th of April, 1856, that is to say: 1st. That privateering is and remains abolished. 2d. That the neutral flag covers enemy's goods, with the exception of contraband of war. 3d. That neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag. 4th. That blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy; and that, although the United States have not adhered to the declaration of 1856, the vessels of His Majesty will not seize enemy's property found on board of a vessel of the United States, provided that property is not contraband of war.

"And I do further declare and proclaim that the statutes of the United States and the law of nations alike require that no person within the territory and jurisdiction of the United States shall take part, directly or indirectly, in the said war, but shall remain at peace with each of the said belligerents, and shall maintain a strict and impartial neutrality, and that whatever privileges shall be accorded to one belligerent within the ports of the United States shall be in like manner accorded to the other.

"And I do hereby enjoin all the good citizens of the United States, and all persons residing or being within the territory or jurisdiction of the United States, to observe the laws thereof, and to commit no act contrary to the provisions of the said statutes, or in violation of the law of nations in that behalf.

"And I do hereby warn all citizens of the United States, and all persons residing or being within their territory or jurisdiction, that, while the free and full expression of sympathies in public and private is not restricted by the laws of the United States, military forces in aid of either belligerent cannot lawfully be originated or organized within their jurisdiction; and that while all persons may lawfully, and without restriction, by reason of the aforesaid state of war, manufacture and sell within the United States arms and munitions of war, and other articles ordinarily known as 'contraband of war,' yet they cannot carry such articles upon the high seas for the use or service of either belligerent, nor can they transport soldiers and officers of either, or attempt to break any blockade which may be lawfully established and maintained during the war, without incurring the risk of hostile capture and the penalties denounced by the law of nations in that behalf.

"And I do hereby give notice that all citizens of the United States,

and others who may claim the protection of this Government, who may misconduct themselves in the premises, will do so at their peril, and that they can in no wise obtain any protection from the Government of the United States against the consequences of their misconduct."

President Grant's neutrality proclamation, Aug. 22, 1870. For. Rel., 1870.

"Whereas on the 22d day of August, 1870, my proclamation was issued, enjoining neutrality in the present war between France and the North German Confederation and its allies, and declaring, so far as then seemed to be necessary, the respective rights and obligations of the belligerent parties and of the citizens of the United States; and whereas subsequent information gives reason to apprehend that armed cruisers of the belligerents may be tempted to abuse the hospitality accorded to them in the ports, harbors, roadsteads, and other waters of the United States, by making such waters subservient to the purposes of war:

"Now, therefore, I, Ulysses S. Grant, President of the United States of America, do hereby proclaim and declare that any frequenting and use of the waters within the territorial jurisdiction of the United States by the armed vessels of either belligerent, whether public ships or privateers, for the purpose of preparing for hostile operations, or as posts of observation upon the ships-of-war or privateers or merchant vessels of the other belligerent lying within or being about to enter the jurisdiction of the United States, must be regarded as unfriendly and offensive, and in violation of that neutrality which it is the determination of this Government to observe; and to the end that the hazard and inconvenience of such apprehended practices may be avoided, I further proclaim and declare that, from and after the 12th day of October instant, and during the continuance of the present hostilities between France and the North German Confederation and its allies, no ship-of-war or privateer of either belligerent shall be permitted to make use of any port, harbor, roadstead, or other waters within the jurisdiction of the United States as a station or place of resort for any warlike purpose, or for the purpose of obtaining any facilities of warlike equipment; and no ship-of-war or privateer of either belligerent shall be permitted to sail out of or leave any port, harbor, or roadstead, or waters subject to the jurisdiction of the United States from which a vessel of the other belligerent (whether the same shall be a ship-of-war, a privateer, or a merchant ship) shall have previously departed, until after the expiration of at least twenty-four hours from the departure of such last-mentioned vessel beyond the jurisdiction of the United States. If any ship-of-war or privateer of either belligerent shall, after the time this notification takes effect, enter any port, harbor, roadstead, or waters of the United States, such vessel shall be required to depart and to put to sea within twenty-four hours after her entrance into such port, harbor, roadstead, or waters, except in case of

stress of weather or of her requiring provisions or things necessary for the subsistence of her crew, or for repairs; in either of which cases the authorities of the port or of the nearest port (as the case may be) shall require her to put to sea as soon as possible after the expiration of such period of twenty-four hours, without permitting her to take in supplies beyond what may be necessary for her immediate use; and no such vessel which may have been permitted to remain within the waters of the United States for the purpose of repair shall continue within such port, harbor, roadstead, or waters for a longer period than twenty-four hours after her necessary repairs shall have been completed, unless within such twenty-four hours a vessel, whether ship-of-war, privateer, or merchant ship of the other belligerent, shall have departed therefrom, in which case the time limited for the departure of such ship-of-war or privateer shall be extended so far as may be necessary to secure an interval of not less than twenty-four hours between such departure and that of any ship-of-war, privateer, or merchant ship of the other belligerent which may have previously quit the same port, harbor, roadstead, or waters. No ship-of-war or privateer of either belligerent shall be detained in any port, harbor, roadstead, or waters of the United States more than twenty-four hours, by reason of the successive departures from such port, harbor, roadstead, or waters of more than one vessel of the other belligereut. But if there be several vessels of each or either of the two belligerents in the same port, harbor, roadstead, or waters, the order of their departure therefrom shall be so arranged as to afford the opportunity of leaving alternately to the vessels of the respective belligerents, and to cause the least detention consistent with the objects of this proclamation. No ship-of-war or privateer of either belligerent shall be permitted, while in any port, harbor, roadstead, or waters within the jurisdiction of the United States, to take in any supplies except provisions and such other things as may be requisite for the subsistence of her crew, and except so much coal only as may be sufficient to carry such vessel, if without sail power, to the nearest European port of her own country; or in case the vessel is rigged to go under sail, and may also be propelled by steam power, then with half the quantity of coal which she would be entitled to receive if dependent upon steam alone; and no coal shall be again supplied to any such ship-of-war or privateer in the same or any other port, harbor, roadstead, or waters of the United States, without special permission, until after the expiration of three months from the time when such coal may have been last supplied to her within the waters of the United States, unless such ship-of-war or privateer shall, since last thus supplied, have entered a European port of the Government to which she belongs."

President Grant's proclamation of Oct. 8, 1870. For. Rel., 1870.

"The undersigned, Secretary of State of the United States of America, has the honor to acknowledge the receipt of the two notes which Mr. Lopez Roberts, the envoy extraordinary and minister plenipotentiary of Spain, did him the honor to address to him on the 17th instant. One of these notes incloses copies of a correspondence between the Spanish consul at New York and the district attorney of the United States for the southern district of New York, in relation to the steamer Hornet.

"In transmittiug this correspondence Mr. Lopez Roberts avails himself of the opportunity to make certain comments upon the conduct of some of the officers of the United States towards that steamer. If the undersigned correctly apprehends the purpose of that note of Mr. Lopez Roberts, its complaints relate to acts said to have been done, or omitted to be done, at two distinct periods. Those first complained of are charged as happening about the time when the correspondence took place between the Spanish consul and the district attorney. The remaining charges relate to matters that took place prior to that correspondence, and which have no connection with it. With regard to the first complaint, it would appear, from the correspondence transmitted by Mr. Lopez Roberts, that the Spanish consul at New York, on the 8th instant, informed the district attorney for the southern district of New York that, in compliance with a supposed intimation or suggestion from the Secretary of State, he called his attention to the steamer Hornet, that that steamer had been formerly employed in illegal expeditions against Cuba; that she had been libeled for this at Wilmington; that on the 7th day of June last, bonds were given for her discharge, and she was released; that she was then brought to the port of New York; that the Spanish consul again made complaint against her, and she was again seized and libeled on the 6th day of October last; that, application being made for her release, a hearing was had before the court, in which the Spanish consul took part; that, as the result of that judicial hearing, she was again released; that the consul, at the date of his letter, had information, on which he relied with perfect confidence, that the steamer was being fitted out in the port of New York for the purpose of proceeding to sea, and there taking on board military expeditions from Nassau and Key West, and conducting them to the coast of Cuba; that he thought his note to a local prosecuting officer as 'sufficient to call for the exercise of the ample preventive power of this Government against the departure;' and that he left in the hands of that officer the responsibility of permitting the vessel to proceed.

"The district attorney appears to have replied to this note, on the same day, that there was no proof or evidence in it which would authorize him to seize the Hornet, or to take any steps beyond those which he had already taken; that he had caused a rigid scrutiny to be exercised in order to prevent the Hornet from taking on board anything indicating hostile intentions; that he had been advised that it was the purpose

of that vessel to clear for Nassau; that he could not act legally on mere surmise; but that, if proper evidence were furnished, he would take any steps necessary to prevent violations of the laws of the United States.

"It is further charged in Mr. Lopez Roberts' note that the steamer Hornet on the same day put to sea, without such steps 'having been taken to prevent her departure as should have been dictated by the circumstances and criminal antecedents of the aforesaid vessel.'

"The undersigned has the honor, in reply to this portion of the first note of Mr. Lopez Roberts, to say that it appears from this correspondence that the Hornet, having been seized on the complaint of the Spanish consul only two months before the date of the correspondence, and a hearing in which the Spanish consul took part having resulted in the discharge of the vessel, no subsequent proof, or anything in the nature of legal evidence other than a repetition of that which had already been passed upon by the court, and been decided to be insufficient for the detention of the vessel, had been furnished by the consul, or by any other Spanish official; that, nevertheless, the district attorney offered to again take steps to detain the Hornet, if proof were furnished which would warrant him in so doing, which proof was not furnished.

"The undersigned takes the liberty to call the attention of Mr. Lopez Roberts to the fact that a district attorney of the United States is an officer whose duties are regulated by law, and who, in the absence of executive warrant, has no right to detain the vessels of American citizens without legal process, founded not upon surmises, or upon the antecedent character of a vessel, or upon the belief or conviction of a consul, but upon proof submitted according to the forms required by law. Although it appears to the undersigned that in this case the district attorney complied with his duty, and would not have been justified in taking steps for the seizure of the Hornet in December, on the unsupported representations of the consul, after the failure of that officer to furnish the requisite proof to authorize her continued detention, yet, as Mr. Lopez Roberts seems to think that there may have been a dereliction of duty, the undersigned will transmit to the head of the Department of Justice, to whom the district attorney for the southern district of New York is subordinate, a copy of Mr. Lopez Roberts' complaint, and of the correspondence inclosed in his note.

"The undersigned, in taking leave of this branch of the subject, invites the attention of Mr. Lopez Roberts to the inaccuracy of the Spanish consul at New York, when he states that 'the Secretary of State of the United States has informed his excellency the minister of Spain that all complaints or information in respect to violations of the neutrality laws of this Government, to the prejudice of the lawful authority of Spain, shall be presented to you (the district attorney), as the prosecuting officer of the United States.' It is undoubtedly true that the undersigned did request Mr. Lopez Roberts, for convenience in the judicial proceed-

ings which might be begun, as well as to secure promptness of action in the courts when necessary, to say to the consuls of Spain that they would be authorized to lay before the prosecuting officers of the United States, without previous transmission to the undersigned through the Spanish legation at Washington, any legal proof of a violation of its laws that might be in their possession. The undersigned was thus able to show to the Government of Spain that the United States would omit nothing that could be reasonably deemed essential to the performance of their duties toward Spain. But it was not the purpose of the undersigned to surrender to these subordinates the respective right and duty of making and receiving all complaints in respect to any alleged violation of the neutrality laws of this country, to the prejudice of the lawful authority of Spain. Such a proceeding would not have accorded with the dignity of this Government, or with the respect which it entertains for its ancient ally and friend. It it also reasonable to conclude from the transmission of this note to the undersigned, that Mr. Lopez Roberts regards the subject in the same light, and that when he inclosed in his note a copy of the consul's letter, he failed to consider with his usual care the latitude of its signification.

"The remainder of the note, to which the undersigned is now replying, is devoted to a criticism upon the conduct of the Government of the United States with reference to the previous career of the Hornet. The second note of Mr. Lopez Roberts, of the same date, is devoted to the examination of the conduct of this Government toward certain other vessels and persons charged with past violations of the neutrality laws of the United States connected with previous alleged expeditions against the Island of Cuba. The undersigned proposes to treat these subjects together.

"Mr. Lopez Roberts claims that he has shown by satisfactory proof that the vessels known as the Perit, the Catherine Whiting, the H. M. Cool, the Jonathan Chase, the George B. Upton, and the Hornet, have been engaged in aiding the insurrection in Cuba, in such a way as to violate the laws of the United States known as the 'neutrality laws.' He also says that in his judgment the owners of all vessels who, 'knowing the purpose for which their property is destined, load them in order to break the laws established for the maintenance of the duties of international neutrality, should be made to feel the legal consequences of their conduct in the improper employment of their property.' He further gives the names of sundry persons who, in the city of New York and elsewhere in the territory of the United States, are said to have aided and abetted in alleged violations of the laws of the United States in one or more of these expeditions. With regard to most of these persons, he sets forth with some detail a variety of acts which were said to have been committed prior to the 12th day of October last.

"It would also appear, from the statement of Mr. Lopez Roberts, that some efforts have been made by Spanish officials to induce the district

attorney for the southern district of New York to proceed against some of these vessels or persons, and that he has decided that, in some of the cases, no proceedings can be had, for technical reasons that are stated in Mr. Lopez Roberts' note, and that, as to the individuals named, no proceedings can be maintained, because it is supposed by him that under the operation of the proclamation of the President of the United States, dated October 12, 1870, all offenses against international or municipal law referred to in the proclamation were pardoned or condoned.

"He also complains, in the case of the Hornet, that the proceedings which were begun against that vessel at Wilmington were not prosecuted to final judgment and execution; and he adds that, 'if the Federal Government had given the necessary orders for it to be continued in the courts of justice, it is not to be doubted that, at the present moment, the steamer Hornet would not be about to commence new and criminal adventures.'

"He complains of the restitution of the Hornet as 'an incomprehensible act of neglect.' He says that while he 'is far from wishing to make any suggestion which could be interpreted as an interference in the administration of the laws of this country in that which relates to past offenses against neutrality, yet he cannot avoid the conviction that the Secretary of State will agree that such an indulgence * * * tends to preserve and encourage the state of things in New York relative to expeditions against Cuba.'

"It would be a sufficient answer for the undersigned, in reply to these portions of Mr. Lopez Roberts' notes, to say that his very proper disclaimer of a purpose to interfere in the administration of the laws of this country in that which relates to past offenses against neutrality, renders all these statements irrelevant. So long as the rights in the domestic tribunals of the United States which are secured to the subjects of Spain by treaty are not invaded, and so long as the officials of the United States manifest the readiness which they have ever shown to prevent attempted violations of the laws enacted to enforce their international obligations, a criticism upon the conduct of the courts of the United States in the treatment of persons charged with past offenses could not but be regarded as a step beyond the recognized bounds of diplomatic correspondence. It may not, however, be improper, while accepting the disclaimer of Mr. Lopez Roberts, to indicate to him the leading motives which prompted the benevolent act of the President and the merciful policy of this Government.

"A fierce and sanguinary conflict had been raging for two years in the Island of Cuba when the President's proclamation of October 12 was issued. That this conflict originated in a sense of wrongs sustained through a long series of years of misgovernment prior to the outbreak of the late revolution on the peninsula, would probably not be denied by the eminent men who were at the head of that revolution. On the contrary, it is understood that they have been free in the expression of

their regret that the Cubans would not trust the remedy of their undoubted grievances to the hands of the liberals of Spain.

"In the prosecution of this contest several decrees were made by the Spanish authorities which interfered with, or threatened to interfere with, the rights of citizens of the United States. The United States took occasion in advance to express their dissatisfaction with such decrees, and to point out how they might conflict with the rights of their citizens.

"In the progress of events the sympathies of large portions of the people of the United States naturally became interested in the struggle to throw off a political connection which had entailed upon Cuba an onerous system of taxation, and which had deprived it of its autonomy. This natural feeling was increased and vivified when it became known that the insurgents were further contending for a cause for which the American people had themselves suffered so much—the abolition of African slavery.

"The Government of the United States felt constrained by its international duties not to permit itself to be controlled by this popular sympathy. The authorities of Spain denied that the insurrection possessed that civil and political organization, and that probablity of success, which would require the other national powers to accord to it the right to carry on a recognized war, and this Government admitted that such was the case, and has continued so to regard it up to the present time.

"In the course of the struggle, as had been foreseen, the rights of citizens of the United States were affected by the steps taken by the Spanish authorities to crush the insurrection. It being found inconvenient to refer all such cases to Madrid, Mr. Lopez Roberts was, upon the request of this Government, authorized to settle by agreement with the captain-general of Cuba, without consulting the Spanish Government, questions arising with this Government or its citizens, from the circumstances through which the Island of Cuba was passing, except in cases of disagreement with the superior authority, or in a case of such gravity that, in the judgment of Mr. Lopez Roberts, it might require previous consultation with the Government.

"Under the operation of this regulation, various representations were from time to time made to Mr. Lopez Roberts by the undersigned, and questions were thus amicably adjusted, until the power was withdrawn by the Government at Madrid, '*in view*,' as the undersigned was afterward officially informed, '*of the favorable situation in which the Island of Cuba then was.*'

"It was understood here, both from representations made to the American minister at Madrid, and from the views repeatedly expressed by the Spanish minister at Washington, that the 'favorable situation' referred to was the supposed extinction of an organized armed resistance to Spanish authority in Cuba.

"The President did not and would not suppose that the Government of Spain would lessen the means of protection to the persons and properties of citizens of the United States in Cuba, which it had extended during the insurrection at the request of this Government, unless it was convinced that the insurrection, which made it necessary, had virtually ceased. He could not and would not assume that a Government which had maintained such friendly relations with this Government would voluntarily do so unfriendly an act as to withdraw, without notice, the powers conferred upon Mr. Lopez Roberts at his request, unless it was convinced that the necessity for them had ceased in consequence of the suppression of the insurrection. He was pleased to believe that, in the opinion of the Spanish Government, the danger from the insurrection was over; that the time for milder measures had come, and that the blessings of peace were to follow. It did not appear to him that the restraints upon the commerce of the United States and upon the free movements of their citizens—measures which had been taken because the maintenance of the obligations of the United States as one of the family of nations appeared to require them—should be longer imposed. It did not seem to this Government that good could come from continuing preventive, much less punitive, proceedings against individuals or vessels, when the cause which prompted the alleged illegal acts was supposed to have disappeared. It was believed to be in harmony with the humane policy which has characterized this Government, that a suspension of the rigid prosecution of offenses (partaking of a political character) growing out of a sympathy with a political struggle in a neighboring island, might well take place. It was hoped that the benevolent example of the United States in this respect might, perhaps, be reflected in the policy of Spain toward Cuba. It was believed that the reforms which had been so often promised to the representative of the United States at Madrid were about to be granted; that the blot of slavery would disappear; that the right of colonial self-government would be given to the island; that the burdensome system of taxation would be abolished, and that, peace being restored, all the desired reforms being granted, and amnesty and pardon being given, the Government of the United States would be relieved from the disagreeable duties which it had performed for about two years.

"Mr. Lopez Roberts will find in these considerations an evidence of the generous purposes and desires of the Government of the United States toward his Government and toward the Island of Cuba, and its logical action in reliance upon the promises and the representations of the Spanish Government, and of its esteemed representative to this Government. He will permit the undersigned also to say (in reply to his suggestion that these persons have been stimulated and encouraged by the indulgence hitherto shown them by a benevolent Government) that it seems to the undersigned that they have found their encouragement and their stimulus, not in the humane course of this Government, but in that

love of liberty and in that sympathy with communities struggling against oppression, and for freedom, which is the portion of all generous natures; and that such stimulus and encouragement will fail them when Spain shall imitate the benign policy of the United States.

"Mr. Lopez Roberts also does the undersigned the honor to quote, with approval, from a dispatch from the undersigned to Mr. Motley, the following passages:

"'We hold that the international duty of the Queen's Government in this respect was above and independent of the municipal law of England. It was a sovereign duty, attaching to Great Britain as a sovereign power. The municipal law was but a means of repressing or punishing individual wrong-doers; the law of nations was the true and proper rule of duty for the Government.

"'But the Government of the United States has never been able to see the force of this alleged difficulty. The common law of England is the common law of the United States. In both countries, and certainly in England, revenue seizures are made daily, and ships are prevented from going to sea on much less cause of suspicion than attached to the suspected ships of the Confederates.'

"The undersigned receives with great satisfaction this official adhesion of Spain to the doctrine that in time of war it is as well the right as the duty of the non-combatant powers to maintain a neutral position—a doctrine of which the United States were the earliest and have remained the most consistent advocates. In the first stage of their national history, they suffered from the unlawful attempts of other belligerent powers to force them from the neutral attitude which they had the right to maintain. In a later and more trying period, they were injured by the neglect of other powers to preserve their neutrality when they themselves were in a state of war. It is a satisfaction to feel that the position which they have maintained when they were at peace, and claimed when they were at war, is gaining ground on the continent of Europe.

"The intelligence and acumen of Mr. Lopez Roberts cannot have failed to notice that these doctrines were applied to a condition when a state of war was recognized by the neutral; that the whole of the context of the argument from which Mr. Lopez Roberts has done the undersigned the honor to excerpt the passages which are quoted above, relate to a recognized condition of war, and that the grievances complained of by the United States in the dispatch from which the quotations are made were the acts of a Government which had formally recognized a state of war between the United States and their armed opponents.

"To make the doctrine of the passages which have been quoted applicable to the relations of Spain and Cuba, the former must acknowledge a state of war between herself and the inhabitants of Cuba which other nations may recognize.

"The undersigned has not heretofore understood that the Government of Spain had yet recognized, or was yet willing that the other

powers should recognize, a state of war as existing in the Island of Cuba, but the application which his excellency the minister of Spain endeavors to make of the position in which the United States acknowledged to have found themselves after that several powers, including Spain, had accorded the rights of belligerents to their revolted citizens, induces the undersigned to inquire whether Spain now regards her position toward the insurgents of Cuba the same as that which the United States occupied toward their insurgent citizens at the time of the occurrence of the acts complained of in the dispatch from which Mr. Lopez Roberts has quoted."

Mr. Fish, Sec. of State, to Mr. Lopez Roberts, Dec. 28, 1870. MSS. Notes, Spain; For. Rel., 1871.

"Your dispatch No. 64, of the 25th ultimo, has been received. The assurances offered to you by the Haytian Government as to its disposition to keep wholly neutral in the contest between the Dominican parties, severally headed by Baez and Cabral, did not seem to be expressed in a way to inspire perfect confidence in their sincerity. If it be borne in mind that, for a considerable period, both the Spanish and French parts of the island of San Domingo were under the sole dominion of Hayti, that it has been the policy of that Government not only to oppose the independence of the Spanish part of the island, but to prevent its occupation by a foreign power, the difficulty of lending entire credence to any assurances which that Government may give as to its indisposition to interfere in Dominican affairs will be apparent. The protest of the Haytians against the recent attempt of Spain to regain her foot-hold in that island is fresh in the recollection of the public. * * *

"It may easily be understood that the Haytians, being mostly descended from those of African extraction, who, once held in slavery, won their freedom and independence by expelling their former masters, should be reluctant to allow any nation tolerating slavery to acquire dominion in San Domingo. This feeling should not now, however, include the United States, especially in view of the fact that the equality of races here before the law is signally exemplified in the person of our diplomatic representative accredited to them."

Mr. Fish, Sec. of State, to Mr. Bassett, Feb. 9, 1871. MSS. Inst. Hayti: For. Rel., 1871.

"Since the last instruction to you upon the subject, reiterated representations have been received here from the Government of the Dominican Republic to the effect that, despite its professions of neutrality, the Haytian Government has taken part with Cabral and Luperon, the armed enemies of that Republic on the frontier, and has furnished them with men, munitions, and arms in furtherance of their designs. The facts stated, or some of them, are of a character which may not be denied by the Government of Hayti. If their accuracy should be acknowledged, that Government might be said to have acted with a want of

good faith towards the Government of the United States, against which you will again remonstrate pointedly but dispassionately."

Mr. Fish, Sec. of State, to Mr. Bassett, June 24, 1871. MSS. Inst., Hayti; For. Rel., 1871.

"The position which the United States assumed, and has maintained, * * * has been that when reasonable grounds were presented to a Government, by a friendly power, for suspicion that its peace is threatened by parties within the jurisdiction of that Government, it is the duty of the latter to become the active prosecutor of those threatening the peace of the former."

Mr. Fish, Sec. of State, to Mr. Akerman, Nov. 20, 1871. MSS. Dom. Let.

[This supposes that the Government in which such disturbing action takes place has the legal and constitutional power to suppress it. Whether, supposing it has such power, it is internationally liable for failure to prosecute, depends upon the amount of proof accessible to it, and the nature of the alleged breaches of neutrality. But want of constitutional power to prosecute is not in itself a bar to a claim for a failure to enforce neutrality. See *supra*, § 9; and further rulings in this and the following section.]

The President, under the eighth section of the act of April 20, 1818, is not required to arrest in a United States port an unarmed vessel unless it be shown that a military enterprise is begun or set on foot through her contrary to the provisions of the statute.

Mr. Fish, Sec. of State, to Mr. Bernabé, Mar. 23, 1874. MSS. Notes, Spain.

"The United States do not employ any police force. Consequently, it is usually advisable for the agents of a foreign state which may suppose that illegal enterprises against it are about to be set on foot in this country to employ detectives of their own to watch suspected parties. If a discovery should thereby be made of an offense against the law the testimony of the detective would be available for the prosecution of the offenders. Under the law of this country and of England, as contradistinguished, I believe, from that of the continent of Europe and elsewhere, no person can be arrested or prosecuted for a crime or misdemeanor except upon the affidavit of a credible witness."

Mr. Fish, Sec. of State, to Mr. Garcia, Nov. 17, 1874. MSS. Notes, Arg. Rep.

"This Government has hitherto expected and will continue to expect that other Governments will fulfill their duties as *neutrals* towards the United States. It has been its endeavor and always will be its purpose to fulfill the same duties towards other nations, and in like manner towards Spain. It is not conscious of any dereliction in this respect, and it believes that its power is ample for the purpose. Any Government which requires the exercise of that power must, however, proceed in the only way by which that authority can be available."

Mr. Fish, Sec. of State, to Mr. Mantilla, Sept. 27, 1875. MSS. Notes, Spain.

For a discussion of the Alabama case, see Mr. Fish, Sec. of State, to Sir E. Thornton, Sept. 18, 1876. MSS. Notes, Gr. Brit.; and see *infra*, § 402 *a*.

The allowing a vessel bearing the flag of the United States to take part in warlike operations against a Government with which the United States is at peace is a violation of the spirit of our neutrality statutes.

Mr. Fish, Sec. of State, to Mr. Marsh, Jan. 29, 1877. MSS. Instr., Italy.

"I have the honor to acknowledge the receipt of your note of the 30th of April, in which you communicate to me officially the information that 'Russia has declared war against the Ottoman Empire, and commenced hostilities in Europe and Asia.' You state also that, in view of these events, the Sublime Porte is convinced that the Government of the United States will, as a neutral state, be pleased to guarantee the same treatment that it granted to the belligerents in the last great European war of 1870–'71.

"I am directed by the President to say in reply that the expectation of the Sublime Porte that a just and impartial neutrality will be observed by the United States is well founded. The Government of the United States will now, as heretofore, be found earnest, not only in maintaining an attitude of neutrality in European contests, but in faithfully observing all treaty obligations with either of the belligerent powers, and also in preventing the infraction, by any persons in this country, of the laws of the United States or the laws of nations.

"While thus adhering with fidelity to a line of action which is in accord both with legal obligations and with the public sentiment of the American people, the Government of the United States anticipates with confidence that the Sublime Porte will, on its part, take due care that the rights of the United States as a neutral power shall be fully and scrupulously respected, and that citizens of the United States, wherever pursuing their peaceable and lawful avocations, shall in no wise be unjustly interfered with or molested."

Mr. Evarts, Sec. of State, to Aristarchi Bey, May 3, 1877. MSS. Notes, Turkey; For. Rel., 1877.

"Your dispatch, No. 7, of the 29th of April last has been received. It relates to neutral rights and the rights of peaceable and unarmed citizens in bombarded towns. The general views upon these subjects which you express are approved, and you were judiciously cautious before you joined your diplomatic colleagues in signing the protest which was addressed to the commander of the Chilian fleet, to require that paper to be so changed as to make the protest dependent upon the truth of the facts which originally was assumed. The prudence of this step is understood to have since been illustrated by the disclosure that the bombardment of at least one of the points named was by no means unprovoked, but was in retaliation for the firing upon boats of the Chilian squadron, which approached the port under a flag of truce for the purpose of announcing the blockade. The firing upon a flag of truce is notoriously one of the gravest breaches of the laws of war which a

belligerent can commit, and is held to justify severe measures of retaliation, such as were adopted in the instance adverted to.

"Although the policy of this Government has heretofore shown a leaning towards neutral rights, this has never been or intended to be such as to extinguish the just rights of belligerents, especially of comparatively weak powers. It is apprehended that the capitalists of great European states, who have heavy investments in the funds and in the trade of the South American countries, are so alarmed about their interests that they may not be indisposed to deny any belligerent rights to those countries in the war now unhappily on foot. Undoubtedly they endeavor to impress their views and their anxieties upon their Governments at home. This Department is not aware how these may have been received. It is hoped, however, that in deciding upon the subject that no neutral will omit to bear in mind that an acknowledgment of the independence of the belligerents implies a concession to them of all the rights in that character which they may claim under the public law, however the exercise of those rights may infringe upon the interests of neutrals.

"The war adverted to is much to be deplored, and, for the sake of humanity at least, it is hoped that it may soon be brought to an honorable close. Although our own citizens have a much smaller interest in this than those of European countries, complaints upon the subject, especially from owners of vessels in the carrying trade, have reached this Department. Hostilities in this case, however, are not likely to be soonest ended, or peace to be permanent, if neutrals show such impatience as they would not be likely to acquiesce in if the situation were to be reversed.

"In regard to the law applicable to the bombardment of unfortified places permit me to refer you to the opinion of Attorney-General Henry Stanbery, of the 31st of August, 1866, relative to the bombardment of Valparaiso by the Spaniards. A manuscript copy of the paper is herewith transmitted to provide for the contingency of your not having a printed one."

Mr. Evarts, Sec. of State, to Mr. Christiancy, June 18, 1879. MSS. Inst., Peru; For. Rel., 1879.

In Mr. Evarts' instruction is inclosed the following:

"It appears from your letter of the 27th instant that the American commercial houses of Wheelwright & Co. and Loring & Co., domiciled for commercial purposes at Valparaiso, sustained losses of their merchandise in the conflagration caused by the bombardment of that city by the Spanish fleet on the 31st of March last.

"The question presented for my opinion is, whether a case is made for the intervention of the United States on behalf of these citizens for indemnity against Spain or Chili?

"I do not see any ground upon which such intervention is allowable in respect to either of those Governments.

"The bombardment was in the prosecution of an existing war between Spain and Chili. Although, under the circumstances, it was a measure of extreme severity, yet it cannot be said to have been contrary to the laws of war, nor was it unattended with the preliminary warning to non-combatants usual in such cases.

"It does not appear that in carrying on the bombardment any discrimination was made against resident foreigners or their property. On the contrary, there was at least an attempt to confine the damage to public property.

"Then, as to the Chilian authorities, it does not appear that they did or omitted any act for which our citizens there domiciled have a right to complain, or that the measure of protection they were bound by public law to extend to those citizens and their property was withheld.

"No defense was made against the bombardment, for that would have been fruitless and would have aggravated the damage, as Valparaiso was not then fortified, and no discrimination was made by those authorities between their own citizens and foreigners there domiciled. All shared alike in the common disaster.

"The rule of international law is well established that a foreigner who resides in the country of a belligerent can claim no indemnity for losses of property occasioned by acts of war like the one in question.

"The bombardment of Copenhagen by the British in 1807 is a notable illustration of this rule. Immense losses were sustained by foreigners domiciled in that city. There was no previous declaration of war against Denmark, and no reasonable ground upon which the bombardment could be justified, and yet no reclamation upon the footing of these losses was ever admitted by Great Britain. The bombardment of Greytown, in May, 1854, by the United States sloop-of-war Cyane, is another instance of this rule. Losses were sustained by French citizens there domiciled, from the fire of the Cyane. A petition to the United States from those parties for indemnity was presented through the French minister, then resident at Washington, but without the express sanction of his Government. Upon full consideration, this petition was refused. Mr. Marcy, then Secretary of State, in answer to the claim, holds the following language: 'The undersigned is not aware that the principle that foreigners domiciled in a belligerent country must share with the citizens of that country in the fortunes of war has ever been seriously controverted or departed from in practice.'

"I have therefore to repeat that I am of opinion no ground is laid for the intervention of the United States in favor of these parties."

12 Op., 21, Stanbery, Aug. 31, 1866.

As to exertions of the Government to prevent filibustering expedition from Key West to Cuba in 1884, see Mr. Frelinghuysen, Sec. of State, to Mr. Reed, Apr. 30, 1884. MSS. Inst., Spain.

"I recommend that the scope of the neutrality laws of the United States be so enlarged as to cover all patent acts of hostility committed in our territory and aimed against the peace of a friendly nation. Existing statutes prohibit the fitting out of armed expeditions and restrict the shipment of explosives, though the enactments in the latter respect were not framed with regard to international obligations, but simply for the protection of passenger travel. All the statutes were intended to meet special emergencies that had already arisen. Other emergencies have arisen since, and modern ingenuity supplies means for the

organization of hostilities without open resort to armed vessels or to filibustering parties.

"I see no reason why overt preparations in this country for the commission of criminal acts, such as are here under consideration, should not be alike punishable, whether such acts are intended to be committed in our own country or in a foreign country with which we are at peace.

"The prompt and thorough treatment of this question is one which intimately concerns the national honor."

President Arthur, Fourth Annual Message, 1884.

"I have the honor to acknowledge the receipt to-day of your note of the 26th instant, in which you inform me that the Spanish consul at New Orleans has intelligence of certain deposits of arms and munitions in the city of New Orleans, and on board of a vessel in the waters of that port, which are said to be intended for the equipment of a filibustering expedition against Cuba. In view of this you ask that the United States marshal at New Orleans be instructed, as on previous occasions, by the Attorney-General, to take action in the case, seconding the action of the collector of the port, who, as you say, is prepared to act under his standing orders.

"I have hastened to transmit your note to the Attorney-General, with the request that the agents of his Department at New Orleans be instructed by telegraph that, so soon as the judicial mechanism necessary for the enforcement of the laws applicable to the case shall have been set in motion by due information made under oath by some person cognizant of the facts alleged, or possessing belief sufficient to that end, those officers shall lend all due aid to further the ends of justice.

"I have also transmitted a translation of your note to the Secretary of the Treasury, to the end that the co-operation of the revenue officers in the enforcement of the law may be assured."

Mr. Bayard, Sec. of State, to Mr. Valera, May 28, 1885. MSS. Notes, Spain; For. Rel., 1885.

"I take this occasion to communicate, in connection with the note addressed to you on the 28th ultimo, the following terms of a telegram from the Treasury Department on the 29th ultimo, to the collector of customs, New Orleans, viz:

"'You will give United States attorney and officers acting under his direction all aid that may be legally given to prevent the shipment of arms by bark Adelina or other vessel in expedition against Cuba in violation of neutrality laws.'"

Same to same, June 13, 1885; *ibid.*

"At the earliest moment compatible with a due consideration of the subject presented, I take pleasure in replying to the note of the 21st instant which you did me the honor to address to me concerning the

manifestations of disaffected Cubans and their sympathizers in the United States, and the powers and duty of this Government, under existing law, in respect of such manifestations.

"The frankness and energy with which you present, at the instance of the chief magistrate of the Island of Cuba and on behalf of your Government, the considerations which you deem pertinent to the matter would cause a mere summary of your argument to suffer by comparison. Nor does it appear necessary to the purposes of this reply that I should recite your premises *seriatim*. It will be sufficient to regard the object you appear to have in view, which I take to be to cast upon the Government of the United States implied responsibility for 'permitting' or 'tolerating' expressions of sympathy in the United States on the part of those misguided persons who seek to disturb the peace of Spain, and to urge the obligations of this Government to prevent such expressions from being made. Incidentally you appear to impugn the sufficiency of the existing modes of procedure in the United States with reference to infractions of law, as, for instance, when you advert to the apprehended results of trial by a jury of the vicinage where the offense may have been committed, and assume that the prevalence of popular sympathy with the accused would 'almost certainly' result in acquittal.

"While the tenor of your note leads me to believe that you hold it the duty of a Government to repress outward manifestations of opinions which may result in overt violations of law, I would perhaps do you injustice if I thought you held it likewise an obligation on the part of the Executive to repress public sympathy with the actors in the case.

"The sympathies of masses of men may be mistakenly bestowed upon unworthy objects, but error of this character is not in itself a crime amenable to the punitive arm of justice.

"As you are aware, the Executive of the United States has no authority to take cognizance of individual opinions and the manifestation thereof, even when taking the shape of revolutionary or seditious expressions directed against our own Government; and it is no less incompetent to pass upon the subversive character of utterances alleged to contravene the laws of another land. In the early life of this Government an attempt was made by the 'alien and sedition' acts, passed in 1798, to invest the Executive with authority over those persons, strangers or natives, who might by conduct short of overt crime imperil the stability of the infant state, but those acts were exceedingly obnoxious to the majority of the American people, and by their own terms were of very limited duration, and since their expiration public opinion would never have justified their re-enactment. The people of the United States became early convinced of the uselessness and unwisdom of such statutes. Error being in such cases its own corrective, a safeguard is found in the fact that the open proclamation of nefarious intent renders it harmless. (See *supra*, § 389.)

"In passing from the mere announcement of the purpose to do unlawful acts to the overt commission thereof, the domain of statute law is entered. Our laws define and punish acts against the peace and safety of our own country and of friendly states. The neutrality act prescribes the duty of this Government in respect of acts harmful to its neighbors. And here let me notice the impression which seems to mark a part of your note, that the statute implies a *de facto* neutrality toward both the foreign state and those whose acts within our jurisdiction may disturb its peace.

"You say that you deplore 'as almost incomprehensible this laxity in defending a friendly nation from the attacks of any conspirators, and this singular idea of calling "neutrality" this lack of discrimination between a legitimate and civilized Government, which is regarded as friendly, and an outlaw who seeks to make war upon that Government by means of robbery, plunder, and incendiarism. *One would think that there was no room for neutrality in such a case*, and that none was possible between two parties whose characters are so entirely distinct.'

"I need scarcely remind you that the phrase 'neutrality act' is a distinctive name, applied for convenience sake merely, as is the term 'foreign enlistment act' to the analogous British statute. The scope and purpose of the act are not thereby declared or restricted. The act itself is so comprehensive that the same provisions which prevent our soil from being made a base of operations by one foreign belligerent against another likewise prevent the perpetration within our territory of hostile acts against a friendly people by those who may not be legitimate belligerents, but outlaws in the light of the jurisprudence of nations. There is and can be no 'neutrality' in the latter case. If the hostile party carries his hostility beyond the pale of law, he commits a crime against the United States and is amenable to the prescribed process and punishment.

"This Government administers its own law in the case; it does not assume to visit with penalty conduct which, if committed within a foreign jurisdiction, might be punishable therein. To do otherwise would be, in effect, to attempt to recognize and administer within the sovereignty of the United States a domestic law of another sovereign. As I intimated in my note to you of May 28 last, proceedings under the 'neutrality laws' of the United States are 'set in motion by due information made under oath by some person cognizant of the facts alleged or possessing belief sufficient to that end,' but they are so set in motion in the name, and by the power, and through the officers, of the Government of the United States. Prosecutions against any who are alleged to have contravened those laws are not by suit *inter partes*, but in the name and behalf of the Government of the United States against the accused. The foreign Government against whose peace the alleged

hostile act may be directed is not a plaintiff in the action, as you seem to suggest. The Government of the United States is the plaintiff.

"The injury complained of is not to the foreign Government, but to the peace and good order and laws of the Government of the United States. And the Executive can no more punish or repress offenses of this nature without the judicial ascertainment of the fact that an unlawful act has been committed than it could by administrative mandate award death on a charge of murder. Neither in the one case nor in the other could the representations of parties claiming to be aggrieved override the indispensable requisite of a judicial proceeding. The fact that the imputed act of wrong doing may, in its result, affect the peace of another state, does not supersede the law applicable to the case, and recourse to that law cannot 'imply the uselessness of a diplomatic representative.'

"This Government does not and cannot undertake, as I have shown, to control the workings of opinions, sympathy, and affiliation of sentiments, and the expression thereof is not punishable in this country by law; but any affidavit, founded even upon mere information or belief, charging a breach of any public law regulating acts against the peace or safety of a foreign state, will lead to an examination and a prosecution by the district officers of the United States wholly at the public cost should the facts thus alleged *ex parte* be found to bring the matter within the purview of the statute.

"The law, being so in control of the case, must follow it to the end. The Executive has no authority over the judiciary. The expressions of sympathy cannot be controlled, however misplaced. The acquittal of persons charged with the most detestable crimes against society, sometimes in the face of overwhelming evidence of guilt, is frequently accompanied by the acclaim of a reckless, unthinking body of sympathizers.

"The Government of the United States is able confidently to aver the fullest compliance, *uberrima fide*, with its obligations to the friendly power of Spain, and to avow also its readiness to set in motion instantly all the ample machinery of its laws to prevent and punish any invasion of or intrusion upon her peace, her honor, and her possessions.

"The indignation you feel, and which is reflected in your note, is doubtless very natural, but in the name of the United States, and in the interest of the harmony and good understanding which it is our common duty and pleasure to endeavor to maintain, I am constrained to deprecate the deflection of any portion of that indignation from its legitimate objects towards the Government of the United States or its officials, who, I am glad to say, heartily join with you in reprobation of those who defy law, whether in Cuba or in the United States.

"In conclusion, permit me to assure you that if any attempt on your part or by your agents to cause the laws applicable to the case, and the

nternational obligations of the United States, to be respected to their fullest extent shall fail, and the incident be brought to the notice of this Department, it will promptly lend its aid to vindicate the law and enforce its remedies."

Mr. Bayard, Sec. of State, to Mr. Valera, July 31, 1885. MSS. Notes, Spain; For. Rel., 1885. See for further directions as to enforcement of neutrality statutes, Mr. Bayard, Sec. of State, to Mr. Hall, Sept. 1, 1885. MSS. Inst., Cent. Am.

Down to 1818 the general practice was for the President to call on the governors of States to aid in enforcing neutrality laws. After the statute of April 20, 1818, the President (and sometimes the Secretary of State acting for him) addressed circular letters, or special letters, to the attorneys-general, or to district attorneys and marshals, as the case might require, calling for their assistance in preserving neutrality. Among these letters the following may be mentioned:

Mr. Calhoun, Sec. of State, to Mr. Hoffman, Sept. 21, 1844. MSS. Dom. Let.; Mr. Buchanan, Sec. of State, circular, Aug. 30, 1848, *ibid.*; Mr. Clayton, Sec. of State, circulars, Aug. 8 and 10, 1849, Jan. 23, and May 17, 1850, *ibid.*; Mr. Marcy, Sec. of State, circular, June 5, 1854, *ibid.*; Mr. Seward, Sec. of State, circular, April 6, 1861, *ibid.*; Mr. Fish, Sec. of State, to Mr. Hoar, July 24, 1869, Mar. 4, 1870, *ibid.*; Mr. J. C. B. Davis, Acting Sec. of State, to Mr. Akerman, Aug. 1, 1870, *ibid.*; Mr. Fish, Sec. of State, to Mr. Pierrepont, Feb. 19, 1876, *ibid.*; to Mr. Bliss, Aug. 19, and Nov. 1, 1876, *ibid.*; to Mr. Taft, Nov. 13, 1876, and Jan. 13, 1877, *ibid.*; Mr. F. W. Seward, Acting Sec. of State, to Mr. Devens, Apr. 25, 1877, *ibid.*; Mr. Evarts, Sec. of State, to Mr. Devens, June 5, 1877, *ibid*; to Messrs. Sullivan *et al.*, Dec. 17, 1877, *ibid.*, to Mr. Kobbe, Jan. 9, 1878, *ibid.*

Revised Statutes, § 5290, provides that "the several collectors of the customs shall detain any vessel manifestly built for warlike purposes, and about to depart the United States, the cargo of which principally consists of arms and munitions of war, when the number of men shipped on board, or other circumstances, render it probable that such vessel is intended to be employed by the owners to cruise or commit hostilities upon the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace, until the decision of the President is had thereon, or until the owner gives such bond and security as is required of the owners of armed vessels by the preceding section."

By § 5291, "the provisions of this title shall not be construed to extend to any subject or citizen of any foreign prince, state, colony, district, or people who is transiently within the United States, and [*enlist*] enlists or enters himself on board of any vessel-of-war, letter of marque, or privateer, which at the time of its arrival within the United States was fitted and equipped as such, or hires or retains another subject or citizen of the same foreign prince, state, colony, district, or people, who is transiently within the United States, to enlist or enter himself to serve such foreign prince, state, colony, district, or people, on board such vessel-of-war, letter of marque, or privateer, if the United States shall then be at peace with such foreign prince, state, colony, district, or people. Nor shall they be construed to prevent the prosecution or punishment of treason, or of any piracy defined by the laws of the United States."

A citizen of the United States who has violated its neutrality cannot shelter himself under a commission from a foreign belligerent.

The Bello Corrunes, 6 Wheat., 152.

The Government of the United States having recognized the existence of a civil war between Spain and Buenos Ayres and avowed a determination to remain neutral between the parties, and to allow to each the same rights of asylum and hospitality and intercouse, each party is to be deemed a belligerent nation, having sovereign rights of war, though the independence of the colony has not been acknowledged by us. All captures made by each must be considered as having the same validity, and all the immunities which may be claimed by public ships in our ports, under the law of nations, must be considered by the courts as equally the right of each.

The Santissima Trinidad, 7 Wheat., 283.

That a United States district judge has power to require a person, who has given just ground to suspect him of an intent to violate the neutrality laws, to give bond that he will observe them, see United States *v.* Quitman, 2 Am. L. Reg., 645.

When an officer belonging to a military force ordered out by the President, under the neutrality act of March 10, 1838, § 8 (5 Stat., 214), "to prevent the violation and to enforce the due execution" of the act, and instructed by his commanding general to execute that purpose, seized property, as a precautionary means to prevent an intended violation of the act, with a view of detaining it until an officer having the power to seize and hold it for the purpose of proceeding with it in the manner directed by the statute could be procured and act in the matter, it was held that the seizure was lawful.

Stoughton *v.* Dimick, 3 Blatch., 356; 29 Vt., 535; Circ. (Vt.), 1855.

A vessel under arrest, to prevent her from cruising against belligerent powers, may be discharged on the order of the President, communicated to the marshal having her in custody.

1 Op., 48, Bradford, 1794.

A state of neutrality does not require a nation to prevent its seamen from employing themselves in contraband trade.

1 Op., 61, Lee, 1796.

A citizen of a neutral state who, for hire, serves on a neutral ship employed in contraband commerce with a belligerent power, is not punishable personally, according to the law of nations, though taken in the act by that belligerent nation to whose detriment the trade would operate.

*Ibid.* See *supra*, § 375.

Where certain vessels being constructed in the United States for Mexico for the purpose of waging war against Texas (an independent state) were not delivered, nor the property changed, within our jurisdiction, but were sent out of port under control of our own citizens unarmed, and where every possible precaution had been taken to insure pacific conduct on the high seas, it was held that although the sale was made abroad, if the vessels were equipped by American citizens within the United States for belligerent purposes, and for a nation belligerent to another with which ours was at peace, knowing the purposes for which they were to be employed, such equipment was repugnant to the act of 1818. (3 Stat., 447; R. S., § 5283.)

3 Op., 741, Legaré, 1842.

The test of the violation of the laws of the United States against interference with foreign governments is the commission of an overt act.

8 Op., 472, Cushing, 1855.

The neutrality act of 1818 is not restricted in its operation to cases of war between two nations or where both parties to a contest have been recognized as belligerents, that is, as having a sufficiently organized political existence to enable them to carry on war. It would extend to the fitting out and arming of vessels for a revolted colony, whose belligerency had not been recognized, but it should not be applied to the fitting out, etc., of vessels for the parent state for use against a revolted colony whose independence has not in any manner been recognized by our Government.

13 Op., 177, Hoar, 1869.

Proof that a vessel transported from Aspinwall to the coast of Cuba men, arms, and munitions of war, destined to aid the Cuban insurgents, is insufficient by itself to call for proceedings against such vessel for violation of the neutrality law of the United States. (Rev. Stat., § 5281 *ff.*)

13 Op., 541, Akerman, 1871.

The papers presented by the Secretary of State in the case of the Virginius do not establish any violation of the neutrality laws, either by the owners of the steamer or by the persons engaged thereon.

14 Op., 49, Bristow, 1872.

As to the Virginius, see more fully *supra*, § 327.

As to the "armed neutrality," see 1 John Adams' Works, 333; 3 *ibid.*, 350, 352; 7 *ibid.*, 263, 322, 460, 544, 595, 636.

As to controversies in relation to neutral rights, see article by Mr. Trescot in Southern Quarterly Review for Apr., 1854, 437 *ff.*

The correspondence, in 1856, with Great Britain relative to the war then pending between Great Britain and Russia, will be found in Brit. and For. St. Pap., 1857–'58, vol. 48.

For a discussion of the policy of neutrality adopted by the United States under the Presidency of Washington, see 1 Phill. Int. Law (3 ed.), 555.

For a statement of Mr. Canning in reference to the neutral policy of the United States, see 3 Phill. Int. Law (3 ed.), 242.

"The great statesmen who wisely and firmly guided the policy of the United States during the first twenty years after the recognition of their Federal Republic as an independent power, a period of almost unprecedented conflict and excitement among the principal communities of the civilized world, deserve the credit of having done most to ascertain and to establish the sound principles on which neutrals should act towards belligerents. When war broke out between England and revolutionary France in 1793, attempts were made by the French agents to use the American ports for fitting out cruisers against English commerce. On complaint of this being made by the British minister to General Washington, the President of the United States, a formal declaration was issued by Mr. Jefferson, the Foreign Secretary of State, which declared that 'it is the right of every nation to prohibit acts of sovereignty from being exercised by any other within its limits.' So far Mr. Jefferson was only following older authorities. But the American statesman went further, and pronounced that 'it is the duty of a neutral nation to prohibit such acts as would injure one of the warring powers.' This important principle was first clearly stated thus, and was consistently acted on by the new Republic after the jurists of the Old World had long written confusedly and doubtingly, and after the statesmen of the Old World had long been 'incoherent' in their practice with regard to it."

Creasy's Int. Law, 572.

The United States and British neutrality statutes, and the decisions under them, are elaborately discussed by Mr. Abdy in Abdy's Kent (1878), 269 *ff.*

As to enforcement of neutrality by Great Britain, during the late civil war in the United States, see Senate Ex. Doc. 11, 41st Cong., 1st sess.

"But though it is an entire mistake to say that the American act of 1818 was in any respect superior to the British act of the ensuing year, it is true that, since the time the American act was passed, the working of the legal administration in the United States has become, for the purpose of proceeding against a suspected vessel, in one respect better than that of Great Britain. It appears that in each district of the United States there is a resident legal officer of the Federal Government, called the district attorney, to whom, if the action of the Government is invoked, a question of this kind is referred, and whose duty it is to ascertain the facts, collect the evidence, and report to the Government. Such an officer is, no doubt, better adapted to such a purpose than a collector of customs. But can it be said to have been the duty of the British Government, not having similar district officers, to appoint such, at the different ship-building ports, with a view the better to protect belligerents against ships being equipped or armed against them?

"Another advantage of the American system is, that the duty of adjudicating in such a case devolves on a judge in the court of admiralty instead of on a jury, who are sometimes apt to be swayed in favor of their own countrymen when sued at the instance of foreigners. But this relates to the condemnation of vessels, not to their seizure. And with the exception of the Florida and Alabama, every vessel the seizure of which could be asked for, as instanced in the cases of the Alexandra, the Pampero, and the iron-clad rams at Birkenhead, was seized and prevented from doing any harm to the commerce of the United States. The Alexandra, it is true, was released after trial in England, but she was seized again at Nassau, and not liberated till after the close of the war. Practically speaking, therefore, in the later cases,

everything was accomplished which could have resulted from the most perfect machinery that could have been devised for such a purpose."

Sir A. Cockburn, opinion in Geneva Tribunal of 1872.

In the same opinion in the Geneva Tribunal (Treaty of Washington Papers, vol. 4, 301, *ff.*,) the various "filibustering" expeditions which were started in the United States are reviewed with great zest.

"Of the great trading nations, America is almost the only one that has shown consistency of principle. The firmness and thorough understanding of the laws of nations, which during this war [the French Revolution] she has displayed, must forever rank her high in the scale of enlightened communities."

Ward's Rights and Duties, &c., 166; cited in Bemis' American Neutrality, 28.

"The conduct of the United States with respect to this matter [the principles professed by the armed neutrality of 1780] has been, under the most trying circumstances, marked, not only by perfect consistency, but by preference for right and duty over interest and the expediency of the moment."

3 Phill. Int. Law, 282; quoted in Bemis' American Neutrality, 28.

The effect of President Johnson's proclamation in putting down in the United States coöperation with the "Fenian" invasion of Canada is noticed in Bemis' American Neutrality, 92. As to the action of Presidents Van Buren and Fillmore in suppression of similar invasions of Canada, see *supra*, §§ 21, 50 *c*.

(2) RULES OF 1871 AND GENEVA TRIBUNAL.

§ 402 *a*.

Article VI of the Treaty of Washington of 1871, providing, among other things, for an arbitration to determine British liability for the depredations on the commerce of the United States by the Alabama and other Confederate cruisers which left British waters, is as follows:

"In deciding the matters submitted to the arbitrators they shall be governed by the following three rules, which are agreed upon by the high contracting parties, as rules to be taken as applicable to the case, and by such principles of international law, not inconsistent therewith, as the arbitrators shall determine to have been applicable to the case:

"RULES.

"A neutral Government is bound—

"First. To use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

"Secondly. Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

"Thirdly. To exercise due diligence in its own ports and waters, and as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

"Her Britannic Majesty has commanded her high commissioners and plenipotentiaries to declare that Her Majesty's Government cannot assent to the foregoing rules as a statement of principles of international law which were in force at the time when the claims mentioned in Article I arose, but that Her Majesty's Government, in order to evince its desire of strengthening the friendly relations between the two countries, and of making satisfactory provision for the future, agrees that in deciding the questions between the two countries arising out of these claims, the arbitrators should assume that Her Majesty's Government had undertaken to act upon the principles set forth in these rules.

"And the high contracting parties agree to observe these rules as between themselves in future, and to bring them to the knowledge of other maritime powers, and to invite them to accede to them."

DECISION AND AWARD

*Made by the tribunal of arbitration constituted by virtue of the first article of the treaty concluded at Washington the 8th of May, 1871, between the United States of America and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland.*

The United States of America and Her Britannic Majesty having agreed by Article I of the treaty concluded and signed at Washington the 8th of May, 1871, to refer all the claims "generically known as the Alabama claims" to a tribunal of arbitration to be composed of five arbitrators named:

One by the President of the United States,

One by Her Britannic Majesty,

One by His Majesty the King of Italy,

One by the President of the Swiss Confederation,

One by His Majesty the Emperor of Brazil;

And the President of the United States, Her Britannic Majesty, His Majesty the King of Italy, the President of the Swiss Confederation, and His Majesty the Emperor of Brazil having respectively named their arbitrators, to wit:

The President of the United States, Charles Francis Adams, esquire;

Her Britannic Majesty, Sir Alexander James Edmund Cockburn, baronet, a member of Her Majesty's privy council, lord chief justice of England;

His Majesty the King of Italy, His Excellency Count Frederick Sclopis, of Salerano, a knight of the Order of the Annunciata, minister of state, senator of the Kingdom of Italy;

The President of the Swiss Confederation, M. James Stämpfli;

His Majesty the Emperor of Brazil, His Excellency Marcos Antonio d'Araujó, Viscount d'Itajubá, a grandee of the Empire of Brazil, member of the council of H. M. the Emperor of Brazil, and his envoy extraordinary and minister plenipotentiary in France.

And the five arbitrators above named having assembled at Geneva (in Switzerland) in one of the chambers of the Hôtel de Ville on the 15th of December, 1871, in conformity with the terms of the second article of the Treaty of Washington, of the 8th of May of that year, and having proceeded to the inspection and verification of their respective powers, which were found duly authenticated, the tribunal of arbitration was declared duly organized.

The agents named by each of the high contracting parties, by virtue of the same Article II, to wit:

For the United States of America, John C. Bancroft Davis, esq.;

And for Her Britannic Majesty, Charles Stuart Aubrey, Lord Tenterden, a peer of the United Kingdom, companion of the Most Honorable Order of the Bath, assistant under-secretary of state for foreign affairs;

Whose powers were found likewise duly authenticated, then delivered to each of the arbitrators the printed case prepared by each of the two parties, accompanied by

the documents, the official correspondence, and other evidence on which each relied, in conformity with the terms of the third article of the said treaty.

In virtue of the decision made by the tribunal at its first session, the counter-case and additional documents, correspondence, and evidence referred to in Article IV of the said treaty were delivered by the respective agents of the two parties to the secretary of the tribunal on the 15th of April, 1872, at the chamber of conference, at the Hôtel de Ville of Geneva.

The tribunal, in accordance with the vote of adjournment passed at their second session, held on the 16th of December, 1871, re-assembled at Geneva on the 15th of June, 1872; and the agent of each of the parties duly delivered to each of the arbitrators, and to the agent of the other party, the printed argument referred to in Article V of the said treaty.

The tribunal having since fully taken into their consideration the treaty, and also the cases, counter-cases, documents, evidence, and arguments, and likewise all other communications made to them by the two parties during the progress of their sittings, and having impartially and carefully examined the same,

Has arrived at the decision embodied in the present award:

Whereas, having regard to the sixth and seventh articles of the said treaty, the arbitrators are bound under the terms of the said sixth article, "in deciding the matters submitted to them, to be governed by the three rules therein specified and by such principles of international law, not inconsistent therewith, as the arbitrators shall determine to have been applicable to the case;"

And whereas the "due diligence" referred to in the first and third of the said rules ought to be exercised by neutral Governments in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfill the obligations of neutrality on their part;

And whereas the circumstances out of which the facts constituting the subject-matter of the present controversy arose were of a nature to call for the exercise on the part of Her Britannic Majesty's Government of all possible solicitude for the observance of the rights and the duties involved in the proclamation of neutrality issued by Her Majesty on the 13th day of May, 1861;

And whereas the effects of a violation of neutrality committed by means of the construction, equipment, and armament of a vessel are not done away with by any commission which the Government of the belligerent power, benefited by the violation of neutrality, may afterwards have granted to that vessel; and the ultimate step, by which the offense is completed, cannot be admissible as a ground for the absolution of the offender, nor can the consummation of his fraud become the means of establishing his innocence;

And whereas the privilege of extra-territoriality accorded to vessels of war has been admitted into the law of nations, not as an absolute right, but solely as a proceeding founded on the principle of courtesy and mutual deference between different nations, and therefore can never be appealed to for the protection of acts done in violation of neutrality;

And whereas the absence of a previous notice cannot be regarded as a failure in any consideration required by the law of nations, in those cases in which a vessel carries with it its own condemnation;

And whereas, in order to impart to any supplies of coal a character inconsistent with the second rule, prohibiting the use of neutral ports or waters, as a base of naval operations for a belligerent, it is necessary that the said supplies should be connected with special circumstances of time, of persons, or of place, which may combine to give them such character;

And whereas, with respect to the vessel called the Alabama, it clearly results from all the facts relative to the construction of the ship at first designated by the number "290" in the port of Liverpool, and its equipment and armament in the vicinity of Terceira through the agency of the vessels called the Agrippina and the Bahama, dis-

patched from Great Britain to that end, that the British Government failed to use due diligence in the performance of its neutral obligations; and especially that it omitted, notwithstanding the warnings and official representations made by the diplomatic agents of the United States during the construction of the said number "290," to take in due time any effective measures of prevention, and that those orders which it did give at last, for the detention of the vessel, were issued so late that their execution was not practicable;

And whereas, after the escape of that vessel, the measures taken for its pursuit and arrest were so imperfect as to lead to no result, and therefore cannot be considered sufficient to release Great Britain from the responsibility already incurred;

And whereas, in despite of the violations of the neutrality of Great Britain committed by the "290," this same vessel, later known as the Confederate cruiser Alabama, was on several occasions freely admitted into the ports of colonies of Great Britain, instead of being proceeded against as it ought to have been in any and every port within British jurisdiction in which it might have been found;

And whereas the Government of Her Britannic Majesty cannot justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed:

Four of the arbitrators, for the reasons above assigned, and the fifth, for reasons separately assigned by him, are of opinion that Great Britain has in this case failed, by omission, to fulfill the duties prescribed in the first and the third of the rules established by the sixth article of the Treaty of Washington.

And whereas, with respect to the vessel called the Florida, it results from all the facts relative to the construction of the Oreto in the port of Liverpool, and to its issue therefrom, which facts failed to induce the authorities in Great Britain to resort to measures adequate to prevent the violation of the neutrality of that nation, notwithstanding the warnings and repeated representations of the agents of the United States, that Her Majesty's Government has failed to use due diligence to fulfill the duties of neutrality;

And whereas it likewise results from all the facts relative to the stay of the Oreto at Nassau, to her issue from that port, to her enlistment of men, to her supplies, and to her armament, with the co-operation of the British vessel Prince Alfred, at Green Cay, that there was negligence on the part of the British colonial authorities;

And whereas, notwithstanding the violation of the neutrality of Great Britain committed by the Oreto, this same vessel, later known as the Confederate cruiser Florida, was nevertheless on several occasions freely admitted into the ports of British colonies;

And whereas the judicial acquittal of the Oreto at Nassau cannot relieve Great Britain from the responsibility incurred by her under the principles of international law; nor can the fact of the entry of the Florida into the Confederate port of Mobile, and of its stay there during four months, extinguish the responsibility previously to that time incurred by Great Britain;

For these reasons the tribunal, by a majority of four voices to one, is of opinion that Great Britain has in this case failed, by omission, to fulfill the duties prescribed in the first, in the second, and in the third of the rules established by Article VI of the Treaty of Washington.

And whereas, with respect to the vessel called the Shenandoah, it results from all the facts relative to the departure from London of the merchant-vessel the Sea King, and to the transformation of that ship into a Confederate cruiser under the name of the Shenandoah, near the island of Madeira, that the Government of Her Britannic Majesty is not chargeable with any failure, down to that date, in the use of due diligence to fulfill the duties of neutrality;

But whereas it results from all the facts connected with the stay of the Shenandoah at Melbourne, and especially with the augmentation which the British Government itself admits to have been clandestinely effected of her force, by the enlistment

of men within that port, that there was negligence on the part of the authorities at that place:

For these reasons the tribunal is unanimously of opinion that Great Britain has not failed, by any act or omission, "to fulfill any of the duties prescribed by the three rules of Article VI in the Treaty of Washington, or by the principles of international law not inconsistent therewith," in respect to the vessel called the Shenandoah, during the period of time anterior to her entry into the port of Melbourne;

And, by a majority of three to two voices, the tribunal decides that Great Britain has failed, by omission, to fulfill the duties prescribed by the second and third of the rules aforesaid, in the case of this same vessel, from and after her entry into Hobson's Bay, and is therefore responsible for all acts committed by that vessel after her departure from Melbourne, on the 18th day of February, 1865.

And so far as relates to the vessels called the Tuscaloosa (tender to the Alabama), the Clarence, the Tacony, and the Archer (tenders to the Florida), the tribunal is unanimously of opinion that such tenders or auxiliary vessels, being properly regarded as accessories, must necessarily follow the lot of their principals, and be submitted to the same decision which applies to them respectively.

And so far as relates to the vessel called Retribution, the tribunal, by a majority of three to two voices, is of opinion that Great Britain has not failed by any act or omission to fulfill any of the duties prescribed by the three rules of Article VI in the Treaty of Washington, or by the principles of international law not inconsistent therewith.

And so far as relates to the vessels called the Georgia, the Sumter, the Nashville, the Tallahasee, and the Chickamauga, respectively, the tribunal is unanimously of opinion that Great Britain has not failed, by any act or omission to fulfill any of the duties prescribed by the three rules of Article VI in the Treaty of Washington, or by the principles of international law not inconsistent therewith.

And so far as relates to the vessels called the Sallie, the Jefferson Davis, the Music, the Boston, and the V. H. Joy, respectively, the tribunal is unanimously of opinion that they ought to be excluded from consideration for want of evidence.

And whereas, so far as relates to the particulars of the indemnity claimed by the United States, the costs of pursuit of the Confederate cruisers are not, in the judgment of the tribunal, properly distinguishable from the general expenses of the war carried on by the United States:

The tribunal is, therefore, of opinion, by a majority of three to two voices, that there is no ground for awarding to the United States any sum by way of indemnity under this head.

And whereas prospective earnings cannot properly be made the subject of compensation, inasmuch as they depend in their nature upon future and uncertain contingencies:

The tribunal is unanimously of opinion that there is no ground for awarding to the United States any sum by way of indemnity under this head.

And whereas, in order to arrive at an equitable compensation for the damages which have been sustained, it is necessary to set aside all double claims for the same losses, and all claims for "gross freights," so far as they exceed "net freights";

And whereas it is just and reasonable to allow interest at a reasonable rate;

And whereas, in accordance with the spirit and letter of the Treaty of Washington, it is preferable to adopt the form of adjudication of a sum in gross, rather than to refer the subject of compensation for further discussion and deliberation to a board of assessors, as provided by Article X of the said treaty:

The tribunal, making use of the authority conferred upon it by Article VII of the said treaty, by a majority of four voices to one, awards to the United States a sum of $15,500,000 in gold, as the indemnity to be paid by Great Britain to the United States, for the satisfaction of all the claims referred to the consideration of the tribunal, conformably to the provisions contained in Article VII of the aforesaid treaty.

And, in accordance with the terms of Article XI of the said treaty, the tribunal declares that "all the claims referred to in the treaty as submitted to the tribunal are hereby fully, perfectly, and finally settled."

Furthermore, it declares that "each and every one of the said claims, whether the same may or may not have been presented to the notice of, or made, preferred, or laid before the tribunal, shall henceforth be considered and treated as finally settled, barred, and inadmissible."

In testimony whereof this present decision and award has been made in duplicate, and signed by the arbitrators who have given their assent thereto, the whole being in exact conformity with the provisions of Article VII of the said Treaty of Washington.

Made and concluded at the Hôtel de Ville of Geneva, in Switzerland, the 14th day of the month of September, in the year of our Lord one thousand eight hundred and seventy-two.

CHARLES FRANCIS ADAMS.
FREDERICK SCLOPIS.
STÄMPFLI.
VICOMTE D'ITAJUBÁ.

The following extracts are taken from the opinions of the arbitrators:

"In the first of the rules laid down in Article VI of the Treaty of Washington mention is made of the due diligence to prevent the building, equipment, and arming of vessels, which a Government is bound to exercise, when it has *reasonable ground* to believe that this building, arming, and equipping are for the purpose of furnishing warlike aid to one of the belligerents.

"The same words occur again in the third rule, while they are wanting in the second. 'Why so?' asked Lord Cairns in the debate on the treaty which took place in the House of Lords on the 12th June of last year. It seems to me that it might be answered; because, in the case of the first and third rules there is room for investigations of persons and circumstances to ascertain the facts denounced, whereas the second relates to a series of evident facts on which no inquiry need be made as regards credibility.

"'What,' continued the noble lord, 'is the standard by which you can measure due diligence? Due diligence, by itself, means nothing. What is due diligence with one man, with one power, is not due diligence with another man, with a greater power.'

"Due diligence, then, is determined, in my opinion, as I have already said, by the relation of the matter to the obligation imposed by law. But what is the measure of the *sufficient reason?* It will be furnished by the principles of the law of nations, and the character of the circumstances.

"A vessel, thoroughly fitted out for war, leaves the shores upon which it has been built without receiving its armament; a simple merchant vessel is charged with the transport of its armament; the place of meeting is fixed, and there the arming of the vessel is completed. The trick is done. But the judge cannot allow his reason and conscience to be led astray by such stratagems. On the contrary, the manœuver will only demonstrate more clearly the criminality of both vessels.

"I return, then, to what was said by Sir Robert Peel in a memorable speech delivered in the House of Commons on the 28th April, 1830. 'If the troops were on board one vessel and their arms in another, did that make any difference?' and I do not hesitate to say that if the vessel was fitted out for war and ready to receive her armament, and her arms were on board another vessel, it made no difference. * * *

"There is no ground to fear that the application of these rules can go so far as to violate the principles on which national Governments rest. The nature of the engagement does not reach that point. It is very possible that their application may sometimes embarrass Governments in their political conduct, but it will more often prevent disorders capable of leading to misfortunes which could not be sufficiently deplored.

"The rules of the sixth article of the Treaty of Washington are destined to become principles of universal law for the maintenance of neutrality. The very text of the treaty says so, and Mr. Gladstone and Lord Granville have always, and with reason, insisted on this prospective benefit to civilization. In order to realize it, the several Governments must take measures to obtain fitting powers for the execution of the law. As regards the past, there have been great discrepancies on this point in the legislation of different nations. The United States, with their district attorneys, their marshals, and organized police officers, were better assisted than England was, with its customs and excise officers only. I do not doubt that these views will be received, if the Treaty of Washington is to be carried out in earnest, and it would be a great misfortune if it were not."

Count Sclopis.

"If, then, a vessel, built on neutral territory for the use of a belligerent, fraudulently, and without the knowledge of the neutral, comes again within the jurisdiction of the sovereign whose neutrality it has violated, it ought to be seized and detained; for it is impossible to allow to such vessel the same extra-territorial rights as are allowed to other belligerent vessels of war, built in accordance with law and without any infraction of neutrality. The commission with which such a vessel is provided is insufficient to protect her as against the neutral whose neutrality she has violated.

"And how can the belligerent complain of the application of this principle? By seizing or detaining the vessel the neutral only prevents the belligerent from deriving advantage from the fraud committed within his territory by the same belligerent; while by not proceeding against a guilty vessel, the neutral justly exposes itself to having its good faith justly called in question by the other belligerent.

"This principle of seizure, of detention, or at any rate of preliminary notice that a vessel, under such circumstances, will not be received in the ports of the neutral whose neutrality she has violated, is fair and salutary, inasmuch as it is calculated to prevent complications between neutrals and belligerents, and to contribute toward freeing neutrals from responsibility by proving their good faith in the case of a fraud perpetrated within their territory.

"The converse of this principle is repugnant to the moral sense, for it would be allowing the fraudulent party to derive benefit from his fraud.

"The rules established by the Empire of Brazil confirm the principle which we have just laid down, for in its regulations respecting neutrality directions are given—

"§ 6. Not to admit into the ports of the Empire a belligerent who has once violated the neutrality; and,

"§ 7. To compel vessels which may attempt to violate the neutrality to leave the maritime territory of the Empire immediately, without supplying them with anything whatever.

"In fine, the commission with which a vessel-of-war may be provided has not the power to protect her as against the neutral whose neutrality she has previously violated."

Viscount D'Itajubá.

"The fact that a vessel, built in contravention of the laws of neutrality, escapes and gets out to sea, does not free that vessel from the responsibility she has incurred by her violation of neutrality; she may, therefore, be proceeded against if she returns within the jurisdiction of the injured state. The fact of her having been transferred or commissioned in the mean while does not annul the violation committed unless the transfer or commissioning, as the case may be, was a *bona fide* transaction."

Mr. Stämpfli.

"It may be inferred that the sense of the words 'due diligence' is that of 'earnest labor owed to some other party,' which that party may claim as its right.

"But, if this definition be conceded, it must naturally follow that the nature and extent of this obligation cannot be measured exclusively by the judgment or pleasure of the party subject to it. If it could, in the ordinary transactions between individuals, there would be little security for the faithful performance of obligations. If it were not that the party to whom the obligation has been given retains a right to claim it in the sense that he understands it, his prospect of obtaining justice in a contested case would be but slight.

"If this view of the meaning of the words be the correct one, it follows that, when a neutral Government is bound, as in the first and third rules laid down in the treaty for our guidance, to use 'due diligence' in regard to certain things, it incurs an obligation to some external party, the nature and extent of which it is not competent to it to measure exclusively by its own will and pleasure. * * *

"To suppose that the moral stain attached to a transaction of this character can be wiped out by the mere incident of visiting one place or another, without any material alteration of the constituent body inspiring its action, seems to me to be attaching to an accident the virtue which appertains solely to an exercise of the will. I cannot, therefore, concede to this notion any shade of weight. The vessel called the Florida, in my view, carried the same indelible stamp of dishonor from its cradle to its grave; and in this opinion I have been happy to discover that I am completely sustained by the authority of one of the most eminent of the jurists of my own country who ever sat in the highest seat of her most elevated tribunal. I find it recorded in one of the volumes submitted to our consideration by the agent of Her Majesty's Government, from which I pray for leave to introduce the following extract, as making an appropriate close:

"'If this were to be admitted,' says Chief-Justice Marshall, 'the laws for the preservation of our neutrality would be completely eluded. Vessels completely fitted in our ports for military expeditions need only sail to a belligerent port, and there, after obtaining a commission, go through the ceremony of discharging and re-enlisting their crew, to become perfectly legitimate cruisers, purified from every taint contracted at the place where all their real force and capacity for annoyance was acquired. This would, indeed, be fraudulent neutrality, disgraceful to our own Government and of which no nation would be the dupe.'

"For the reasons herein specified, I have come to the conclusion in the case now presented of the Florida, that Great Britain, by reason of her

omission to use due diligence to prevent the fitting-out, arming, and equipping within its jurisdiction of that vessel, and further of her omission to forbid the crew of that vessel from making use of its ports or waters as the base of operations against the United States, has failed to fulfill the duties set forth in each and every one of the three rules prescribed to the arbitrators as their guide under the terms of the Treaty of Washington. * * *

"Let us see how these restraints on neutral commerce became settled in time. As they existed till a very recent period, according to the general practice of nations, they were as follows:

"1. Though the belligerent might resort to the neutral territory to purchase such articles as he required, even for his use in war, and the neutral in selling him such articles would be guilty of no infraction of neutrality, yet, in regard to things capable of being used in war, and which thenceforth received the appellation of 'contraband of war,' if, instead of the belligerent himself conveying them, the neutral undertook to convey them, such articles, if intercepted by the adversary, though the property of the neutral in them had not been transferred to the belligerent, were liable to be seized and became forfeited to the captor. If the article was of a doubtful character, *ancipitis usus*, that is, one that might be applied to purposes of peace or of war, the liability of seizure depended on whether the surrounding circumstances showed that it was intended for the one use or the other.

"2. If either belligerent possessed sufficient force at sea to bar the access to a port belonging to his enemy, he was entitled to forbid the neutral all access to such port for the purpose of trade, however innocent and harmless the cargo with which his ship might be charged, under the penalty of forfeiting both ship and cargo.

"3. The neutral was prohibited from carrying the goods of a belligerent, such goods not being protected by the neutral flag, but being subject to seizure.

"4. Besides this, according to the practice of France, the neutral was prohibited from having his goods carried in the enemy's ship, and if the ship was taken the goods became prize.

"Lastly, to enforce the rights thus assumed by powerful belligerents, the neutral had further to submit to what was called the right of search, in order that the belligerent might satisfy himself whether goods of the enemy, or goods contraband of war intended for the enemy, were being conveyed in the neutral ships.

"By the wise and liberal provisions of the declaration of Paris of 1856, the last two oppressive restraints on the trade of neutrals, mentioned under heads 3 and 4, have, as between most of the leading nations of the world, been done away with. The others remain. America has not as yet formally assented to the declaration of Paris. The two rules in question do not, however, come into play on this occasion.

"But the two first of the restraints put on neutral commerce occupy a prominent place in the discussions which have occurred in the course of this inquiry. Both of them are manifestly restraints, and restraints of a very serious character, on the natural freedom of neutral commerce. The advantage thus acquired of preventing the trade of the neutral in articles of warlike use, at a time when that trade is the most likely to be profitable to him, and still more that of preventing it in any shape by the blockading of an enemy's port, is obviously obtained only at the expense of the peaceful rights of neutral commerce."

Mr. Adams.

"The jurists of the seventeenth century, among whom Vinnius occupies a prominent place (Com., Lib. iii, tit. xv), divided the *diligentia* and corresponding *culpa* of the Roman law into three degrees. Thus we have *culpa lata*, *levis*, *levissima*, taking the intermediate degree, or *culpa levis*, as being the absence of the diligence which a man of ordinary prudence and care would apply in the management of his own affairs in the given circumstances of the case. Though attacked by Donellus, this tripartite division of diligence and default held its ground among juridical writers for a considerable time; but on the formation of the French code, the practical good sense of those by whom that great work was carried out, so visible in their discussions, induced them to discard it, and to establish one common standard of diligence or care as applicable to all cases of civil obligations, namely, that of the 'bon père de famille,' the 'diligens paterfamilias' of the Roman digest. The Code Napoléon has been followed in the codes of other countries. Among others, the Austrian code has lately adopted the same principle.

"The juridical view, too, of the earlier writers was not destined to stand its ground. After it had been assailed by Thibaud and Von Lohr, Hassé, in a most learned and able treatise, 'Die Culpa des römischen Rechts,' thoroughly exposed its unsoundness, and his views have since been followed by a series of German jurists, including Professor Mommsen in his well-known work 'Beiträge zum Obligationsrecht' (vol. iii, 360.)

"French authors have for the most part taken the same view. Commentators on the code—Duranton, Ducarroy, Troplong, and lastly M. Demolombe, in his great work, the 'Cours du code civil,'—have agreed that there can only be one standard for the diligence required in the affairs of life, where the interests of others are concerned, namely, that of men of ordinary capacity, prudence, and care.

"'Qu'est ce que la diligence d'un bon père de famille?' asks M. Troplong. (Code civil expliqué, vol. i, § 371.)

"'C'est la diligence de celui qui, comme le dit Heineccius, tient le milieu entre l'avare aux cent yeux et l'homme negligent et dissipe. C'est dans le système dont M. Ducarroy est l'organe, et que j'adopte pleinement, la diligence qu'un individu, assni diligent que les hommes le soni ordinairement, apporte à la conservation de ce qui lui appartient. On voit qu'en ce point les deux systèmes se rencontrent, et conduisent à une même définition—c'est-à dire, à ce juste milieu qui est dans la nature de l'humanité.'

"'The only thing to be considered,' says Professor Mommsen, 'is whether the default is such as does not occur to a diligent father of a family in general.' 'The care to be taken is "qualem diligens paterfamilias suis rebus adhibere *solet*."'"

Sir A. Cockburn.

[This view is sustained in detail in Wharton on Negligence, §§ 59*ff*., where it is shown that to make business men liable for omission of perfect diligence would place them under a burden so heavy as to be intolerable, and that the only proper definition of "culpable negligence" is "a want of such diligence as under the circumstances of the particular case good business men of the particular class are accustomed to show."]

"There are certain points on which all writers are unanimous, and, as I had till now imagined, all nations agreed.

"A sovereign has absolute dominion in and over his own ports and waters. He can permit the entrance into them to the ships of other nations, or refuse it; he can grant it to some, can deny it to others; he

ean subject it to such restrictions, conditions, or regulations as he pleases. But, by the universal comity of nations, in the absence of such restrictions or prohibition, the ports and waters of every nation are open to all comers. Ships can freely enter, and freely stay; can have necessary repairs done; can obtain supplies of every kind, and in unlimited quantity; and though their crews, when on shore, are subject to the local jurisdiction, ships of war are considered as forming part of the territory of the country to which they belong, and, consequently, as exempt from local jurisdiction; and, save as regards sanitary or other port regulations, as protected by the flag under which they sail from all interference on the part of the local authority.

"Such is the state of things while the world is at peace. But if a war arises between any two countries, a considerable modification, no doubt, of the rights both of sovereigns who remain neutral and of those engaged in the war immediately arises.

"While the neutral sovereign has the undoubted right of imposing any restrictions or conditions he pleases, in respect of any of the foregoing particulars, on the ships of-war of either belligerent, yet, if he exercises that right, the equality which is essential to neutrality requires that he shall impose them equally on both, and enforce them equally against both. On the other hand, by the universal accord of nations, the belligerent is bound to respect the inviolability of neutral waters, and therefore cannot attack his enemy within them, or make them the base of hostile operations. He is subject also to restraint in three other important particulars: He cannot recruit his crew from the neutral port; he cannot take advantage of the opportunity afforded him of having repairs done to augment in any respect the warlike force of his vessel; he cannot purchase on the neutral territory arms or munitions of war for the use of it. These restrictions are imposed by the law of nations, independently of any regulations of the local sovereign. Besides this, the belligerent is bound to conform to the regulations made by the latter with reference to the exercise of the liberty accorded to him; but subject to these conditions, a belligerent vessel has the right of asylum, that is, of refuge from storm and hostile pursuit; has liberty of entry and of stay; that of having the repairs done which are necessary to enable it to keep the sea in safety; and that of obtaining whatever is necessary for the purpose of navigation, as well as supplies for the subsistence of the crew.

"And, be it remembered—I fear it has not always been borne in mind—the liberty thus afforded is not by the general law subjected to any limitations as regards length of stay, quantity of supply, or condition as to the future proceedings of the vessel."

Sir A. Cockburn.

Mr. J. C. B. Davis, in his report, as agent of the American case, to the Secretary of State, begins by stating the position of the two contending parties as to "due diligence." On the American side, he declares, it was argued that such diligence was to be gauged "by the ability of the party incurring the liability to exercise the diligence required by the exigencies of the case, and by the extent of the injury which may follow negligence." On the other side it was said that—

"Her Majesty's Government knows of no distinction between more dignified and less dignified powers; it regards all sovereign states as enjoying equal rights and equally subject to all ordinary international obligations; and it is firmly persuaded

that there is no state in Europe or America which would be willing to claim or accept any immunity in this respect on the ground of its inferiority to others in extent, military force, or population."

"Count Sclopis, in his opinion, says:

"The words due diligence necessarily imply the idea of a relation between the duty and its object. It is impossible to define *a priori* and abstractly an absolute duty of diligence. The thing to which the diligence relates determines its degree. * * * As to the measure of activity in the performance of the duties of a neutral, I think the following rule should be laid down: That it should be in a direct ratio to the actual danger to which the belligerent will be exposed through the laxity of the neutral, and in an inverse ratio to the direct means which the belligerent can control for averting the danger."

"The tribunal, in its award, says:

"'The due diligence referred to in the first and third of the said rules ought to be exercised by neutral Governments in exact proportion to the risks to which either of the belligerents may be exposed from a failure to fulfill the obligations of neutrality on their part. * * * The circumstances out of which the facts constituting the subject-matter of the present controversy arose were of a nature to call for the exercise, on the part of Her Britannic Majesty's Government, of all possible solicitude for the observance of the rights and duties involved in the proclamation of neutrality issued by Her Majesty, on the 13th of May, 1861.'"

On the subject of the toleration of insurgent operations in England, and English feeling against the United States, Mr. Davis thus summarizes the discussion:

"Count Sclopis says, respecting this point:

"'The British Government was fully informed that the Confederates had established in England a branch of their means of attack and defense against the United States. Commissioners representing the Government of Richmond were domiciled in London, and had put themselves in communication with the English Government. Lord Russell had received these Confederate representatives in an unofficial way. The first visit took place on the 11th of May, 1861; that is to say, three days before the Queen's proclamation of neutrality, and four days before Mr. Adams arrived in London as the minister of the United States. And further, the English Government could not but know that great commercial houses were managing the interests of the Confederates at Liverpool, a town which, from that time, was very openly pronounced in favor of the South. In Parliament itself opinions were before long openly expressed in favor of the insurgents. The Queen's ministers themselves did not disguise that, in their opinion, it would be very difficult for the American Union to re-establish itself as before. * * * It results from this, in my opinion, that the English Government found itself, during the first years of the war of secession, in the midst of circumstances which could not but have an influence, if not directly upon itself, at least upon a part of the population subject to the British Crown. No Government is safe against certain waves of public opinion, which it cannot master at its will. I am far from thinking that the *animus* of the English Government was hostile to the Federal Government during the war. Yet there were grave dangers for the United States in Great Britain and her colonies which there were not direct means for averting. England, therefore, should have fulfilled her duties as a neutral by the exercise of a diligence equal to the gravity of the danger. * * * It cannot be denied that there were moments when its watchfulness seemed to fail and when feebleness in certain branches of the public service resulted in great detriment to the United States.'

"Viscount d'Itajubá has not placed on record his opinion on this subject, unless it can be gathered from a single passage in his remarks

upon the effect of a commission on an offending cruiser, when he says, 'By seizing or detaining the vessel the neutral only prevents the belligerent from deriving advantage from the fraud committed within its territory by the same belligerent; while, *by not proceeding against a guilty vessel it exposes itself to having its good faith justly called in question by the other belligerent.*'

As to duty to detain an offending cruiser when it comes again within the neutral's jurisdiction, and effect of a commission upon such cruiser, Mr. Davis made the following report:

"It was maintained in the American case that, by the true construction of the second clause of the first rule of the treaty, when a vessel like the Florida, Alabama, Georgia, or Shenandoah, which has been especially adapted within a neutral port for the use of a belligerent in war, comes again within the neutral's jurisdiction, it is the duty of the neutral to seize and detain it. This construction was denied by Great Britain. It was maintained in the British papers submitted to the tribunal that the obligation created by this clause refers only to the duty of preventing the original departure of the vessel, and that the fact that the vessel was, after the original departure from the neutral port, commissioned as a ship of war protects it against detention.

"To this point we rejoined that a commission is no protection against seizure in such case, and does not operate to release the neutral from the obligation to detain the offender.

"The Viscount d'Itajubá seemed to favor the American construction. He said:

"'According to the latter part of the first rule of Article VI of the Treaty of Washington, the neutral is bound also to use due diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above [viz, against a belligerent], such vessel having been specially adapted, in whole or in part, within its jurisdiction to warlike use. * * * If, then, a vessel built on neutral territory for the use of a belligerent, fraudulently and without the knowledge of the neutral, comes again within the jurisdiction of the sovereign whose neutrality it has violated, it ought to be seized and detained.'

"Count Sclopis says, on this point:

"'It is on the nature of these special circumstances that the first rule laid down in Article VI of the Treaty of Washington specifically rests. The operation of that rule would be illusory, if it could not be applied to vessels subsequently commissioned. The object in view is to prevent the construction, arming, and equipping of the vessel, and to prevent her departure when there is sufficient reason to believe that she is intended to carry on war on behalf of one of the belligerents; and when probability has become certainty, shall not the rule be applicable to the direct and palpable consequences which it originally was intended to prevent?'

"In the award the tribunal says that—

"'The effects of a violation of neutrality committed by means of the construction, equipment, and armament of a vessel are not done away with by any commission which the Government of the belligerent power, benefited by the violation of neutrality, may afterwards have granted to that vessel; and the ultimate step by which the offense is completed cannot be admissible as a ground for the absolution of the offender, nor can the consummation of his fraud become the means of establishing his innocence. The privilege of extraterritoriality accorded to vessels-of-war has been admitted into the law of nations, not as an absolute right, but solely as a proceeding

founded on the principles of courtesy and mutual deference between different nations, and therefore can never be appealed to for the protection of acts done in violation of neutrality.'

"It will be observed that the tribunal, instead of adopting the recognition by the Viscount d'Itajubá of *a positive obligation* on the part of the neutral to detain the vessel, in the case supposed, limited itself to expressing the opinion that, in such case, the neutral would have the *right* to make such detention."

Mr. J. C. B. Davis' report.

The following subsequent review by Mr. J. C. B. Davis, in his Notes on Treaties, of the proceedings and rulings of the tribunal, derives peculiar weight from the fact that he was agent for the United States at Geneva:

"The Treaty of Washington of May 8, 1871, contains three rules respecting the duties of neutrals in a maritime war.

"In the arbitration which took place at Geneva the main contentions on each side, and the decisions, so far as any were given, were as follows:

"I. The United States contended that the three rules were in force before the treaty was made. Great Britain denied this, both in the treaty and in the papers submitted at Geneva. In the British countercase it was said, 'These rules go beyond any definition of neutral duty which, up to that time, had been established by the law or general practice of nations.' The tribunal did not notice this point; but Mr. Gladstone, in the House of Commons, on the 26th day of May, 1873, said with respect to it, 'Were they, as regards us, an *ex post facto* law? I say they were not. We deemed that they formed part of the international law at the time the claims arose.'

"II. The United States contended that the Government of Great Britain, by its indiscreet haste in counseling the Queen's proclamation recognizing the insurgents as belligerents, by its preconcerted joint action with France respecting the declarations of the Congress of Paris, by its refusal to take steps for the amendment of its neutrality laws, by its refraining for so long a time from seizing the rams at Liverpool, by its conduct in the affair of the Trent, and by its approval of the course of its colonial officers at various times—and that the individual members of the Government, by their open and frequent expressions of sympathy with the insurgents, and of desires for their success—had exhibited an unfriendly feeling, which might affect their own course, and could not but affect the action of their subordinates; and that all this was a want of the 'due diligence' in the observance of neutral duties which is required at once by the treaty and by international law. They also contended that such facts, when proved, imbued with the character of culpable negligence many acts of subordinates in the British service for which, otherwise, the Government might not be held responsible; as, for instance, acts of the collector of customs at Liverpool respecting the Florida and the Alabama; acts of the authorities at Nassau respecting the arming of the Florida at Green Cay, and subsequently respecting her supplies of coal; acts of the authorities at Bermuda respecting the Florida, and acts of the authorities at Melbourne respecting the Shenandoah. They further contended that there were many such acts of subordinates which, taken individually and by themselves, would not form a just basis for holding culpable a Government which was honestly and with vigilance striving to perform its duty as a neutral, but which,

taken in connection with each other, and with the proofs of animus which were offered, estalished culpability in the Government itself.

"The mode of stating the contentions on each side in these proceedings was peculiar. The two parties were by the treaty required to deposit their cases simultaneously; also in like manner their counter-cases (each of which was to be a reply to the case of the other) and their arguments on the cases, counter cases, and evidence. When, therefore, the theory of the attack in the case of the United States was developed, the theory of the defense in the case of Great Britain was developed simultaneously. In respect of the necessity of bringing home to the Government itself the acts of the subordinates, it was identical in theory with the case of the United States. It said: 'A charge of injurious negligence on the part of a sovereign Government, in the exercise of any of the powers of sovereignty, needs to be sustained on strong and solid grounds. Every sovereign Government claims the right to be independent of external scrutiny or interference in its exercise of these powers; and the general assumption that they are exercised with good faith and reasonable care, and that laws are fairly and properly administered—an assumption without which peace and friendly intercourse could not exist among nations—ought to subsist until it has been displaced by proof to the contrary. It is not enough to suggest or prove that a Government, in the exercise of a reasonable judgment on some question of fact or law, and using the means of information at its command, has formed and acted on an opinion from which another Government dissents or can induce an arbitrator to dissent. Still less is it sufficient to show that a judgment pronounced by a court of competent jurisdiction, and acted upon by the Executive, was tainted with error. An administrative act founded on error, or an erroneous judgment of a court, may, indeed, under some circumstances, found a claim to compensation on behalf of a person or Government injured by the act or judgment. But a charge of negligence brought against a Government cannot be supported on such grounds. Nor is it enough to suggest or prove some defect of judgment or penetration, or somewhat less than the utmost possible promptitude and celerity of action, on the part of an officer of the Government in the execution of his official duties. To found on this alone a claim to compensation, as for a breach of international duty, would be to exact in international affairs a perfection of administration which few Governments or none attain in fact, or could reasonably hope to attain, in their domestic concerns; it would set up an impracticable, and therefore an unjust and fallacious, standard, would give occasion to incessant and unreasonable complaints, and render the situation of neutrals intolerable. Nor, again, is a nation to be held responsible for a delay or omission occasioned by mere accident, and not by the want of reasonable foresight or care. Lastly, it is not sufficient to show that an act has been done which it was the duty of the Government to endeavor to prevent. It is necessary to allege and to prove that there has been a failure to use, for the prevention of an act which the Government was bound to endeavor to prevent, such care as Governments ordinarily employ in their domestic concerns, and may reasonably be expected to exert in matters of international interest and obligation. These considerations apply with especial force to nations which are in the enjoyment of free institutions, and in which the Government is bound to obey, and cannot dispense with, the laws.'

"III. It was maintained in the American case that the diligence of the neutral should 'be proportioned to the magnitude of the subject,

and to the dignity and strength of the power which is to exercise it' (p. 158), and that it should be 'gauged by the character and magnitude of the matter which it may affect, by the relative condition of the parties, by the ability of the party incurring the liability to exercise the diligence required by the exigencies of the case, and by the extent of the injury which may follow negligence' (p. 152).

"On the other side it was said, 'Her Majesty's Government knows of no distinction between more dignified and less dignified powers; it regards all sovereign states as enjoying equal rights, and equally subject to all ordinary international obligations; and it is firmly persuaded that there is no state in Europe or America which would be willing to claim or accept any immunity in this respect, on the ground of its inferiority to others in extent, military force, or population.' 'Due diligence on the part of a sovereign Government signifies that measure of care which the Government is under an international obligation to use for a given purpose. This measure, where it has not been defined by international usage or agreement, is to be deduced from the nature of the obligation itself, and from those considerations of justice, equity, and general expediency on which the law of nations is founded. The measure of care which a Government is bound to use in order to prevent within its jurisdiction certain classes of acts, from which harm might accrue to foreign states or their citizens, must always (unless specifically determined by usage or agreement) be dependent, more or less, on the surrounding circumstances, and cannot be defined with precision in the form of a general rule. It would commonly, however, be unreasonable and impracticable to require that it should exceed that which the Governments of civilized states are accustomed to employ in matters concerning their own security or that of their own citizens.' The tribunal, in its award, said, 'the due diligence referred to in the first and third of the said rules ought to be exercised by neutral Governments in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfill the obligations of neutrality on their part; and the circumstances out of which the facts constituting the subject-matter of the present controversy arose were of a nature to call for the exercise on the part of Her Britannic Majesty's Government of all possible solicitude for the observance of the rights and duties involved in the proclamation of neutrality issued by Her Majesty on the 13th day of May, 1861.' * * *

"V. 'It was maintained in the American case that the liability of Great Britain should be measured by the rules of international law, and that it could not be escaped by reason of any alleged deficiencies in any internal legislation. The award says the Government of Her Britannic Majesty cannot justify itself for a failure in due diligence on the insufficiencies of the legal means of action which it possessed.'

VI. [The statement in topic VI, as given by Mr. Davis, is here omitted, as it is given substantially *supra*, § 369.]

"The manner in which the United States had performed their duties as a neutral was made the subject of extended comment by both sides in these proceedings. The United States were arraigned in the case of Great Britain; in the British counter-case; in the British argument; in Sir Roundell Palmer's supplemental argument. In their counter-case they met the allegations of Great Britain and they attached to it a mass of historical documents in support of their denial; and their counsel discussed the subject at length in the argument."

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

"The two parties were agreed that the rule should not be presented to foreign powers for their acceptance without an explanation which would prevent such a conclusion [unduly averse to belligerents], and which would restrain their operation to those acts which are done for the service of a vessel cruising or carrying on war, or intending to cruise or carry on war against another belligerent, and that they should not extend to cases where military supplies or arms are exported for the use of a belligerent power from neutral ports or waters in the ordinary course of commerce. To formalize a new clause in a manner acceptable to England and America had not been practicable before the interruption of the correspondence in 1872.

"It was not resumed till June, 1873, after the difficulties of agreement had been increased by the exaggerated construction given by the arbitrators to the terms of the rules. 'The due diligence,' they say, 'referred to in the first and third of the said rules, ought to be exercised by neutral Governments in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfill the obligations of neutrality on their part;' and that 'the circumstances out of which the facts constituting the subject-matter of the present controversy arose were of a nature to call for the exercise, on the part of Her Britannic Majesty's Government, of all possible solicitude for the observance of the rights and duties involved in the proclamation of neutrality issued by Her Majesty on the 31st May, 1861.'

"A dispatch of Earl Granville, alluding to the proposition of Mr. Fish to submit the three rules to the maritime powers, refers to the embarrassments which resulted from the presentation to the commission of the indirect claims, and to the difficult position in which the representatives of England and of the United States would be placed if they submitted to other states a series of rulings as to the meaning of which they entirely differed. Earl Granville furthermore insisted that, while the English Government is not at all disposed, as it appears especially from the debates in Parliament, to accept all the decisions of the tribunal at Geneva, the presentation of the three rules to 'the great powers' would probably be considered as an acceptance of its interpretation of them, and inevitably induce the rejection of the three rules by all these powers.

"The President, in pursuance of their resolution of June 3, 1878, submitted to the Senate, January 13, 1879, the correspondence between the Governments of the United States and Great Britain in regard to inviting other maritime powers to accede to the three rules. The last note, which was from Mr. Fish to Sir Edward Thornton, bears date September 18, 1876. The correspondence clearly establishes that there was no disposition on the part of the two powers, least so on the part of Great Britain, to make the submission; and from the subsequent silence we are to infer that the three rules are to be deemed limited in their operation to the single matter of the Alabama claims, and as withdrawn from any proposed reform of the law of nations. It may be added that there was a conviction on the part of both Governments that they could not receive the assent of a single state. Austria and Germany had early given instructions to that effect. (Parliamentary Papers, 1874; Congressional Documents: Senate Ex. Doc. 26, 45th Cong., 3d sess., 1879.)"

Mr. W. B. Lawrence, note to Whart. Crim. Law (9th ed.) § 1908.

"Considerable difference of opinion prevails among jurists as to the effect which the decision of the arbitrators [of the Geneva tribunal]

has made on the general principles of international law. It should be remembered that Austria, Holland, Germany, Russia, Spain, and other states were not represented at the conference, and both in Great Britain and on the continent the better opinion seems to be that oppressive and impracticable obligations, hitherto unknown to international law, would be imposed on neutral nations if the principles set forth *as the basis* of the award, and the interpretation placed on the three rules of the sixth article of the above treaty by the majority of the arbitrators, were acceded to in future cases. In reply to Mr. Hardy, on March 21, 1873, Mr. Gladstone, as prime minister, stated in the House of Commons that in bringing these rules to the knowledge of other maritime powers, and inviting them to accede to the same, 'you have a right to expect that we should take care that our recommendation of the three rules does not carry with it, in whole or in part, in substance or even in shadow, so far as we (the British Government) are concerned, the recitals of the arbitrators as being of any authority in this matter.'

"Further, some considerable correspondence passed between the British Government and the Government of the United States during the years 1871–'74, with respect to communicating to other maritime Governments the above rules, but it was not found possible to draft a note which could meet the respective views of the two Governments."

Note by Sir S. Baker in 2 Halleck's Int. Law (Baker's ed.), 189.

"Until a state had placed itself under a ruler armed with the greatest practicable amount of executive power, and free from every constitutional check whatever, it could not be said to have done all that was possible in order to insure the prompt arrest and the speedy condemnation and punishment of individuals who had broken, or who seemed likely to break, the requirements of international law as to not injuring foreign nations. Such a conclusion is really a *reductio ad absurdum*, which demonstrates the unsoundness of the dogma virtually announced by four of the Geneva arbitrators—the doctrine that in inquiring whether a state is or is not chargeable with culpable fault or negligence for not having prevented certain acts of individuals, no regard whatever is to be paid to the system of criminal process which, and which alone, is recognized and permitted by the fundamental institutions of that state."

Creasy's Int. Law, 335.

"It was an object of the Treaty of Washington to concert a code of rules on the former subject which should be binding henceforward on both the contracting parties, and should be recommended by them to all civilized states for general adoption, but, unfortunately, when the arbitrators under that treaty came to apply 'the three rules' of that treaty, it was found that the arbitrators were not all of accord as to the proper interpretation to be given to them, and 'the three rules' having served their purpose for the settlement of a passing dispute, have been allowed to remain a dead letter as regards their contemplated incorporation into the general law of nations. But one thing has resulted from the adoption of those rules for the purpose of deciding amicably a controversy between Great Britain and the United States—that both those powers have placed on record before an international tribunal their conviction that ships which are capable of being employed in the military or naval service of a belligerent power have peculiar qualities which distinguish them from other chattels which are suitable for warlike purposes, and

that the circumstance of their being private property is of no weight as regards the responsibility of a neutral power to prevent their equipment and their dispatch from its ports if it wishes to maintain good faith. The members of the Institute of International Law, in their session at Geneva in 1874, took 'the three rules' of the Treaty of Washington into their consideration, and pronounced an opinion that 'the three rules,' although in point of form they were open to objection, were in substance the clear application of a recognized principle of the law of nations. There is an apparent contradiction of principle between that opinion and the proposal which has been favorably entertained by a majority of the members of the institute in their session at The Hague, that the right of capturing enemy's ships on the high seas, if they are private property, should be denied to a belligerent. Besides, as the modern law of nations has invested a ship, notwithstanding it is private property, with a territorial character on the high seas in time of peace, there seems no sound reason why a ship should be divested of its territorial character in time of war on the ground of its being private property, more particularly when the very circumstance of war invests it with peculiar territorial qualities, which are not a fiction of law, but are of substantial and indispensable service for the purposes of war, where one of the belligerent parties is a maritime power."

Twiss, Law of Nations, as to war (2d ed.), introd., 42.

Prof. E. Robertson, in treating, in the Encyclopedia Britannica, on international law, thus speaks of the "three rules": "These rules, which we believe to be substantially just, have been unduly discredited in England, partly by the result of the arbitration, partly by the fact that they were from the point of view of English opinions *ex post facto* rules, and that the words defining liability ('due diligence') were vague and open to unforeseen constructions; for example, the construction actually adopted by the Geneva tribunal that due diligence ought to be exercised in proportion to the belligerent's risk of suffering from any failure of the neutral to fulfill his obligations."

A majority of the members attending the Institute of International Law, at its session in 1875 (Annuaire, 1877, 139), adopted the following resolution:

"L'État neutre qui veut rester en paix et en relations d'amitié avec les belligérants, et jouir des droits de la neutralité, a le devoir de s'abstenir de prendre aucune part à la guerre, au moyen de la prestation de secours militaires à l'un des belligérants ou à tous les deux, et de veiller à ce que son territoire ne serve pas comme centre d'organisations, ou comme point de départ aux expéditions hostiles contre l'un d'eux ou contre tous deux.

"En conséquence, l'État neutre ne peut mettre en aucune manière à la disposition de l'un des États belligérants, ni lui vendre ses navires de guerre, ou navires de transports militaires, comme aussi le matériel de ses arsenaux ou de ses magasins militaires, dans le but de l'aider à continuer la guerre. En outre, l'État neutre est tenu de veiller à ce que les autres personnes ne mettent des navires de guerre à la disposition d'aucun des États belligérants, dans ses ports ou dans les parties de mer qui dépendent de sa juridiction."

When the rules came before the institute, their approval was opposed by Professors Bernard and Lorimer and by Sir Travers Twiss. They are also disapproved by Sir R. Phillimore, 3 Int. Law, 270.

Of the three rules of the Treaty of Washington, Fiore, a distinguished Italian publicist, thus speaks (Fiore droit int., 2d ed., 1886, translated by Antoine, iii, § 1555):

"It cannot be at this time said that all the powers have admitted the rules thus accepted by England and the United States. These rules may, nevertheless, be considered, not only as the expression of a conventional law agreed on by two states, but as correct principles of international law. They are, in effect, and in their essence, the application of a general principle that states which are strangers to a war must prevent on their own territories the organization of expeditions or the preparing of armaments on account of either of the belligerents."

But Fiore proceeds to extend neutral duties in this respect beyond the three rules, by making the non-repression by neutral Governments of the construction by individuals of vessels for a belligerent a breach of neutrality.

In section 1556 Fiore proceeds to say that a neutral Government is required "par tous les moyens en son ponvoir, la construction dans ses ports ou dans ses eaux territoriales de navires destinés aux usages de la guerre, et la conclusion de contrats pour la construction de ces mêmes bâtiments." For a Government to use "all the means in its power" for such purposes would not only make neutrality more exhaustive than war, but would require an ubiquitously despotic police.

In the same volume are cited the following authorities bearing on the Alabama case:

Voir Réclamation de l'Alabama; Calvo, Revue de droit int., 1874, 453; Pradier Fodéré, La Question de l'Alabama, et le droit des gens; Pierantoni, Gli arbitrati internazionali, ed il trattado de Washington; Rivier, L'Affaire de l'Alabama; W. B. Lawrence, Indirect Claims, &c.; Bluntschli, Opinion impartiale sur la question de l'Alabama, Revue de droit int., 1870, 457.

On reviewing the "three rules" in connection with the subsequent proceedings of the commission, the following distinctions may be taken. The "rules" themselves may be regarded as setting forth in terms studiously general certain propositions which few publicists would disapprove. But the treaty does not by itself give these rules the authority of a code, and this for the following reasons:

(1) The "rules" were only to be binding as rules of international law if accepted by the leading powers, which they have not been.

(2) They are not binding as permanent and absolute rules on England and the United States: (*a*) because neither England nor the United States have ever considered them to be so binding; and (*b*) because, by the treaty that proposed them as temporary rules of action for guidance of a special and exceptional court, their permanent adoption is dependent upon their communication to the great European powers, which communication has never been made. This position is taken by Mr. Fish in his letters to Sir Edward Thornton, of May 8 and September 18, 1876, as communicated by President Hayes in his message to the Senate of January 13, 1879; and there is no dissent of the British Government recorded.

(3) Even if the "rules" be binding, it must be remembered that on the topics discussed in the text they are couched in a vagueness which no doubt was intentional, and which leaves open the main points of dispute.

It is to be observed, in addition, that while the weight of authority is that the "rules" themselves contain propositions which are generally unobjectionable, such is not the case with the decisions of the majority

of the arbitrators, who interpret the "rules" so as to impose on neutrals duties not only on their face unreasonable, but so oppressive as to make neutrality a burden which no prudent nation, in cases of great maritime wars abroad, would accept.

In an exposition of the arbitration in the American Law Review, vii, 237, it is said: "In limiting the rights of neutrals and augmenting the rights of belligerents, a grave injury is done to the cause of civilization and humanity. * * * It seems to us that the tendencies of modern theorists and the tendencies which have found expression in the decision at Geneva, are in the interests of absolutism, of enormously powerful states, of immense standing armies, of military power. * * * That the United States should in a few years have become so drunk with military excitement and success as to labor for such a consummation is simply marvelous."

"It will be at once seen that these rules, though leading immediately to an award superficially favorable to the United States in the large damages it gave, placed limitations on the rights of neutrals greater even than those England had endeavored to impose during the Napoleonic wars, and far greater than those which the United States had ever previously been willing to concede. If such limitations are to be strictly applied, the position of a neutral, so it may be well argued, will be much more perilous and more onerous, in case of war between maritime powers, than that of a belligerent. Our Government, to fulfill the obligations cast on it by these rules, would be obliged not only to have a strong police at all its ports to prevent contraband articles from going out to a belligerent, but to have a powerful navy to scour the seas to intercept vessels which might elude the home authorities and creep out carrying such contraband aid. It must be recollected that not only our Atlantic and Pacific coasts, but our boundary to the north and to the south contains innumerable points at which belligerents can replenish their contraband stores, and that nothing but a standing army or navy greater than those of any European power could prevent such operations. Nor would this be the only difficulty. No foreign war could exist without imposing upon the Governments of neutral states functions in the repression of sympathy with either belligerent which no free Government can exercise without straining its prerogatives to the utmost. It is not strange, therefore, that in view of the hardness of these rules, they should be regarded by European as well as by American publicists as likely to be of only temporary obligation. 'When we come to the subject of neutrality,' says Professor Lorimer, of Edinburgh, a leading member of the Institute of International Law (Institutes of the Law of Nations, by James Lorimer, LL.D., Blackwood & Sons, 1883, p. 52), 'we shall see but too much reason to believe that even the Treaty of Washington of 1871, though professing to determine the relation between belligerents and neutrals permanently, was in reality a compromise by which neutral rights were sacrificed to the extent which, on that occasion, was requisite to avoid a fratricidal war. Before the award of the arbiters who met at Geneva could be applied as a precedent, a new treaty, embodying the famous 'three rules,' would require to be negotiated; and it is extremely unlikely that either England, or any other neutral power, would again agree, beforehand, *to pay damages for the fulfillment of the impossible engagements which these rules impose.*' This view is strengthened by the fact that the British members of the commission

by whom the Treaty of Washington was negotiated inserted in the treaty the following memorandum: 'Her Majesty's Government cannot assent to the foregoing rules as a statement of principles of international law, which were in force at the time when the claims mentioned in Article I arose; but Her Majesty's Government, in order to evince its desire of strengthening the friendly relations between the two countries and of making satisfactory provision for the future, agrees that in deciding the question between the two countries arising out of those claims, the arbitrators should assume that Her Majesty's Government had undertaken to act upon the principles set forth in those rules.' It was proposed, in the treaty of 1871, that the 'three rules' should be submitted to the great powers of Europe. It soon became evident that neither Great Britain nor the United States desired to make such a submission. It may be also added that there was a conviction on the part of both Governments that they would not receive the assent of a single state. Austria and Germany had early stated that their assent would not be given. The 'three rules,' therefore, were agreed to by the United States only provisionally, and are not only in conflict with the principles for which the United States contended down to the late civil war, but give advantages to belligerents which even Great Britain regards as excessive. These rules, repudiated as they have been by the contracting powers, and rejected by all other powers, are to be regarded not only as not forming part of the law of nations, but as not binding either Great Britain or the United States. That the 'three rules' were temporary and exceptional, and were to be only effective in case of ratification by the great powers, which ratification was never given, is maintained by Mr. Fish in his letters to Sir E. Thornton, of May 8 and September 18, 1876, communicated by Mr. Hayes in his message to the Senate of January 13, 1879. The same position was taken in the House of Commons in 1873 by Mr. Gladstone. Sir W. Harcourt, Mr. Disraeli, and the attorney-general."

Wharton. Com. Am. Law, § 244.

"If Great Britain, with her comparatively few ports, failed to prevent the use of these ports for the fitting out of Confederate cruisers, we can learn what would be the doom of the United States in case of a European maritime war in which we occupied the position of neutrals. If war, for instance, should exist between Great Britain and any leading continental power, it would be impossible to prevent such power (*e. g.*, Russia, who has very limited capacity of naval armament), from securing contraband aid in our ports. We obtained $15,000,000 under the Geneva arbitration; if the Geneva rules are to hold good, the payment of this comparatively small sum would make us the insurers of any loss British commerce might incur from cruisers whose coaling or whose repair in our ports we could not prevent, unless by the use of expedients subversive of our institutions. The strain put on the British Government by the attempts of the Confederate States in our late civil war to fit out cruisers in British ports is well told in Mr. Bullock's 'Secret Service of the Confederate States,' New York, 1884. In case of a European naval war, we being neutrals, ingenuity in our ports by either belligerent, far less than was displayed by the Confederate agents in British ports during the late civil war, would make it necessary, if the three rules' be applied to us, either to line our shores with a standing army of almost unlimited extent or to become belligerents ourselves."

*Ibid.*

Indirect claims, it was declared by the arbitrators, "did not constitute, on principles of international law applicable to such cases, good and sufficient foundation for an award of compensation or computation of damages between nations. On the side of Great Britain the solution was a practical one; no damages were to be awarded for this class of claims. On our side the solution was reached in the manner pointed out by the treaty, viz, by the action of the court. On the suggestion of the other side, this unofficial act was then formally entered as an official judgment, in the following language:

"Count Sclopis, on behalf of all the arbitrators, then declared that the said several claims for indirect losses mentioned in the statement made by the agent of the United States on the 25th instant, and referred to in the statement just made by the agent of Her Britannic Majesty, are, and from henceforth will be, wholly excluded from the consideration of the tribunal, and directed the secretary to embody this declaration in the protocol of this day's proceedings."

Report of Mr. J. C. B. Davis to Mr. Fish, Sept. 21, 1872.

As to this part of the rulings of the tribunal there has been no dissent. Thus when the subject of the Geneva award is discussed by Calvo, Droit Int., vol. iii, 411 *ff.*, giving in this respect the opinion of continental publicists, he accepts the position that a belligerent cannot receive from a neutral pecuniary damages for losses which his arms have suffered through such neutral's negligence in not preventing the other belligerent's cruisers from getting to sea. He consequently sustains the tribunal in rejecting the claim for indirect damages.

### IV. *MUNICIPAL STATUTES NOT EXTRA-TERRITORIAL.*

### § 403.

As a general rule, municipal statutes expanding or contracting the law of nations, have no extra-territorial effect.

*Supra*, § 9; *infra*, App., Vol. III, § 403.

"The law of nations secures to neutrals unrestricted commerce with the belligerents, except in articles contraband of war, and trade with blockaded or besieged places. With these exceptions commerce is as free between neutrals and belligerents as if it were carried on solely between neutral nations; and it is difficult to conceive upon what principle an exception can be made and the neutral deprived of the rights secured in regard to the purchase of merchant vessels.

"It is true a regulation of France has been referred to in support of the doctrine avowed by the Imperial Government, but it is hardly necessary to observe that a municipal law of that country can only affect persons under its control, and can have no binding force beyond its territorial limits. The parties who made the contract for the sale and purchase of the ship St. Harlampy were not under the jurisdiction of the municipal law of France; on the contrary, they were both within the jurisdiction of the United States as well as the property which formed the subject of the transaction. The validity or invalidity of the transaction can be determined only by the local or international law. It was a contract authorized by the laws of this country and the law of

nations; and it was supposed to be universally conceded that such a contract would be respected everywhere. Certainly no Government except that under which the contract was made could interpose to destroy or vary the obligations which its provisions impose if not contrary to the law of nations. This is the doctrine of the European publicists, and it is especially sustained by Hautefeuille, whose authority will, I doubt not, be recognized by the Emperor's Government. He says, 'It is impossible to recognize such a right as that claimed by the regulation of France.' 'Commerce,' he adds, 'is free between the neutral and belligerent nations; this liberty is unlimited except [by] the two restrictions relative to contraband of war, and places besieged, blockaded, or invested; it extends to all kinds of provisions, merchandise, and movable objects without exception. Pacific nations can then, when they judge proper, purchase the merchant ships of one of the parties engaged in hostilities, without the other party having the right to complain, without, above all, that it should have power to censure, to annul these sales, to consider and treat as an enemy, a ship really neutral and regularly recognized by the neutral Government as belonging to its subjects. To declare null and without obligation a contract, it is indispensable that the legislator should have jurisdiction over the contracting parties. It is then necessary, in order that such a thing should take place, to suppose that the belligerent possesses the right of jurisdiction over neutral nations. That is impossible; the pretension of the belligerents is an abuse of force, an attempt against the independence of pacific nations, and consequently a violation of the duties imposed by divine law upon nations at war.'

"However long may be the period during which this doctrine has formed part of the municipal code of France, it is manifestly not in harmony with her maritime policy, and it is confidently believed by this Government that France will not assert it not only against the practice of other nations but against the authority of her most enlightened writers on public law."

Mr. Marcy, Sec. of State, to Mr. Mason, Feb. 19, 1856. MSS. Inst., France.

"We hold that the international duty of the Queen's Government in this respect was above and independent of the municipal laws of England. It was a sovereign duty attaching to Great Britain as a sovereign power. The municipal law was but a means of repressing or punishing individual wrong-doers; the law of nations was the true and proper rule of duty for the Government. If the municipal laws were defective, that was a domestic inconvenience, of concern only to the local Government, and for it to remedy or not by suitable legislation as it pleased. But no sovereign power can rightfully plead the defects of its own domestic penal statutes as justification or extenuation of an international wrong to another sovereign power."

Mr. Fish, Sec. of State, to Mr. Motley, Sept. 25, 1869. MSS. Inst., Gr. Brit.

The undertaking of a belligerent to enlist troops of land or sea in a neutral state without the previous consent of the latter is a hostile attack on its national sovereignty. The act of Congress prohibiting foreign enlistments is a matter of domestic or municipal right as to which foreign Governments have no right to inquire, the international offense being independent of the question of the existence of a prohibitory act of Congress.

7 Op., 367, Cushing, 1855.

The measure of a neutral's obligations are to be found in the rules of international law; and it cannot shelter itself by the allegation that its own legislation imparts a laxer standard on its subjects.

4 Pap. Rel. Treat Washington, 12.

"The neutrality statutes, both of Great Britain and of the United States, impose much severer restrictions in this respect on subjects than the law of nations imposes upon sovereigns. The history of legislation and of public opinion in the United States on this topic is of peculiar interest, not only as showing that our legislation imposing neutrality is more stringent than the law of nations, but as marking the extent to which public opinion is swayed to and fro by the varying necessities of epochs. General Washington, in a message of December 3, 1793, said: "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;" and this, in condemning the intrusion of a belligerent on neutral soil for the purpose of fitting out belligerent armaments, is unquestionably a rule of the law of nations. There is nothing in this remarkable message, so often appealed to at home and abroad as giving the true tests of international neutrality, which declares that the fitting out of an armed vessel intended to be delivered to a belligerent in his own port is forbidden by the law of nations. The neutrality act adopted by Congress for the purpose, not of defining the law of nations but of prescribing the duty of citizens to the National Government, undoubtedly made it penal to fit out and arm vessels with intent that they should be employed in the belligerent service of a foreign state; but this statute, passed from excessive caution, for the purpose of keeping the new Republic, as far as possible, out of the tempestuous war then raging in Europe, was never regarded, as we have seen, as determining the duties of the United States when a neutral to foreign belligerents. * * * Our neutrality statutes are again accepted with the interpretation put on them in the Santissima Trinidad, the qualification being acknowledged that they prescribe the duty of our citizens to the United States, not that of the United States to foreign Governments; and even were this not the case, the ruling in that case, that by the law of nations a neutral is not bound to prevent its subjects from selling armed vessels to a belligerent, has never been judicially modified; and the Federal Government has again accepted this view even as determining the scope of our own statutes. We have, as a country, exhaustless mines of iron and coal; and though we may not be able to build steamships as cheaply as they are built in Great Britain, yet the difference is but slight, and there may be many reasons, based in part on patent rights to specific munitions of war, in part on political relations, which might lead a foreign nation to purchase ships in our dockyards rather than in those of Glasgow or Liverpool or Belfast. The

industry is one of importance; it is one of the prime factors of national power; it enables a powerful nation to stand by herself as against the world, and to protect her ports, no matter what may be the invader's naval strength. Now it so happens that since the civil war we have been constantly supplying with armed ships foreign nations in a state of belligerency either actual or prospective. There has not been a single official intimation that sales of this kind are illegal. Were a prosecution to be ordered against parties making such sales, there can be no question that the ruling in the Santissima Trinidad would be repeated, and the defendants in such cases acquitted. And even were it otherwise, and the sales were to be held illegal by our municipal law, that municipal law would not be held to modify the law of nations, and make our Government liable to the offended belligerent for its omission to stop such sales. No doubt to carelessly or knowingly permit an armed cruiser to be manned in a neutral port, and sent out from such port to prey on belligerent commerce, or to form part of a belligerent navy, is a breach of neutrality. * * * But for a neutral to sell a ship, even an iron-clad, to a belligerent, such ship not being manned and armed in a neutral port is no more a breach of neutrality than for a neutral to permit able-bodied men to emigrate to a belligerent state."

Whart. Com. Am. Law, § 241.

"It by no means follows that because, by the law of nations, a neutral state is bound to a certain line of conduct towards belligerents, its subjects are bound by the same line of conduct, and are responsible to their state for any such acts of participation in foreign wars, as by the law of nations it is bound to prevent. A nation, on the one side, may say, 'I do not choose to suppress these acts of participation, or I cannot suppress them, but I will take on myself the consequences, and will make reparation.' Such was the position of President Washington before the passage of the neutrality statute. Prosecutions against the offenders were attempted at common law, and although as we have seen, it was at first held that the Federal courts had common-law jurisdiction of offenses against the law of nations, yet the conclusion was soon reached that without a statute such offenses could not be judicially reached. This conclusion was communicated to the English minister, Mr. Hammond, with the announcement that the United States Government would nevertheless hold itself responsible to foreign nations for any infractions of its international obligations, though it might not be able to proceed penally against its own citizens for such infractions. (*Supra*, § 395*a*, *ff.*) The same attitude was assumed by Great Britain in the Alabama controversy. British legislation might be defective, it was admitted, so far as concerned the power to punish British subjects for breaches of neutrality, but this in no way limited the obligation of the British Government to make good to the United States losses incurred through such misconduct. And, on the other hand, a state may impose by statute on its subjects an abstention much more strict than that which is imposed by international law on itself. If so, its subjects are bound by the statute, and may be convicted of offenses, which, for municipal purposes, it deems breaches of neutrality, though the litigated acts would not be breaches of neutrality by the law of nations."

Whart. Crim. Law (9th ed.), § 1901.

"The nation is primarily responsible to other nations for certain deeds when done by herself or by any of her subjects. This responsibility has

been long since recognized and fixed by international law. In order that she may more promptly and efficiently perform the duties growing out of this responsibility, she passes her neutrality act. But it is a matter wholly of domestic concern. Her liability to her sister nations is not changed one whit thereby; to them it is immaterial what branch of the Government is charged with this performance or what method is taken to secure it. If she relies on the sufficiency of her law she does it at her own risk, not at the risk of another people. If the law proves insufficient it is her misfortune, it is the result of her own faulty judgment, and she remains equally liable to make reparation for the wrong which her law has failed to prevent. It is no answer for her, when called upon to make satisfaction for the wrong, to reply that she is very sorry but must really be pardoned, because her neutrality act was inefficient in the case. What if it were? No one save her own statesmen is responsible for the sufficiency of her neutrality act. It was her own creation, to suit her own requirements, and for her own sole convenience. The other nation does not seek to hold her under this; she is not coming into her courts as a common litigant to abide by the construction of one of her domestic laws. So far as the injured nation is concerned, the other may pass or revoke such statutes, regard or disregard them at her pleasure. But under the general law of nations, according to the well-known principles of the international law of the civilized world, the injury must be answered for. It is out of this code that the liability springs, and according to this it must be met. The defect, then, in the English statute could work no acquittal of England in the case of the Alexandra or in any similar case. We hold her to answer under the law of nations. She may deal with her own statute as she will, and make it efficient or a nullity as she chooses, but her option to do the latter can in no degree affect the relations which exist between herself and the United States as civilized nations."

North Am. Rev., Oct., 1866, 493.

### V. *PERSONS VIOLATING MUNICIPAL STATUTE MAY BE PROCEEDED AGAINST MUNICIPALLY.*

§ 404.

This principle was distinctively applied in trials, during President Washington's administration, for breaches of neutrality by enlisting in, or aiding in fitting out, foreign belligerent cruisers.

See Henfield's case, Whart. St. Tr., 49; Villato's case, *ibid.*, 185; Williams's case, *ibid.*, 652.

Under our neutrality statute either to fit out or to arm is indictable.

U. S. *v.* Guinet, 2 Dall., 321; Whart. St. Tr., 93; U. S. *v.* Quincy, 6 Pet., 445.

Acts of hostility committed by American citizens against such as are in amity with us, being in violation of a treaty and against the public peace, are offenses against the United States when committed within the territory or jurisdiction thereof, and as such are punishable by indictment in the district or circuit courts. The *high seas* being within the jurisdiction of the district and circuit courts, such an offense committed thereon, is cognizable by said courts. Where such an offense

is committed out of the jurisdiction of the United States the offenders must be dealt with abroad, and, after proclamation by the President, will have forfeited all protection from the American Government.

1 Op., 57, Bradford, 1795.

It is a misdemeanor at common law to plot and combine to disturb the peace and tranquillity of the United States and to draw them into a war with a foreign nation.

1 Op., 75, Lee, 1797. But see *contra*, rulings noted in Whart. Crim. Law, § 253.

There is no municipal law in the United States to prevent the organization of combinations to aid and abet rebellion in another country, unless forcible acts be attempted.

8 Op., 216, Cushing, 1856. See *supra*, §§ 390 *ff.*

The Government of the United States cannot undertake to punish its own citizens for disposing in another country of contraband articles in violation of the laws of such country. "Neither our own laws, nor, as is believed, those of any foreign country, make provision for the enforcement of the penal laws of another country, the general rule being that the laws of every nation are competent to vindicate their own authority."

Mr. Clay, Sec. of State, to Mr. Obregon, Apr. 6, 1827. MSS. Notes, For. Leg. See on this topic, Whart. Crim. Law, §§ 271 *ff.*; *supra*, § 15.

Under the act of 1794, made perpetual by the act of 1800, was held the trial of Smith and Ogden for being concerned in the expedition of Miranda against the dominions of the King of Spain, in South America. The defense proposed to establish that the expedition had been instituted with the concurrence, if not at the suggestion, of the Government of the United States, and for that purpose summoned as witnesses the Secretary of State, and other principal members of the Administration. These officers, in a communication to the court, expressed their inability to attend on account of public duties, but proposed that their testimony should be taken by commission, to which the defendants refused to assent, but asked for compulsory process, and that the case might be deferred until their attendance. The court decided that their testimony would be immaterial, inasmuch as the previous knowledge or approbation of the President to the illegal acts of a citizen could afford him no justification for the breach of a constitutional law. The President's duty is faithfully to execute the laws, and he has no such dispensing power. But although the charge of the judge was strongly against the defendants, and there was no question as to the law, the jury returned a verdict of not guilty. (Trial of Smith and Ogden, 237.)

How far General Hamilton was implicated in Miranda's schemes there is now no evidence to determine. In a letter from Hamilton to Miranda, dated August 22, 1798 (8 Hamilton's Writings, by Lodge, 506), Hamilton states, "The sentiments I entertain with regard to that object (the 'object' as to which a gentleman was commissioned to consult with Hamilton) *have been long since in your knowledge*, but I could personally have no participation in it unless patronized by the Government of this country. It was my wish that matters had ripened for a co-operation, in the course of this fall, on the part of this country. But this can now

scarcely be the case." He then foreshadows a joint attack by Great Britain and the United States for the conquest of Spanish America, of which "good work" he declares that he "would be happy in my official station, to be an instrument." He then tells Miranda that "your presence here will, in this case, be extremely essential." But Hamilton's scheme was Government, not private, spoliation of Spain.

The existing law, according to the summary of it as given by Chancellor Kent (1 Kent's Commentaries, 128), and adopted by Wheaton (Lawrence's Wheaton, 729), declares it to be a misdemeanor for any person within the jurisdiction of the United States to augment the force of any armed vessel belonging to one foreign power at war with another power with whom they are at peace; or to hire or enlist troops or seamen for foreign military or naval service, or to be concerned in fitting out any vessel to cruise or commit hostilities in foreign service against a nation at peace with them; and the vessel in the latter case is made subject to forfeiture. The President is also authorized to employ force to compel any foreign vessel to depart, which, by the law of nations or treaties, ought not to remain within the United States, and to employ generally the public force in enforcing the duties of neutrality prescribed by law. (Rev. Stat., §§ 1033 *ff.*)

It is to be noted that it is equally unlawful to fit out ships against an insurgent Government as it is to fit them out for the insurgent.

Merely furnishing to a belligerent, by a citizen of a neutral state, of contraband of war, does not on principle make such citizen penally responsible for a breach of neutrality, or for the consequences which ensue from the use by such belligerent of the articles furnished. The reasons are as follows:

"(1) Between selling arms to a man, and an indictable participation in an illegal act intended by the vendee with such arms, there is no necessary causal relation. 'The miner, the manufacturer, and the merchant,' as has already been said, 'may regard it not only as possible, but probable, that their staples may be used for guilty purposes, but neither miner, manufacturer, nor merchant becomes thereby penally responsible.' 'To enable a gunshot wound to be inflicted, an almost innumerable series of conditions is necessary. It is necessary that the gun should be procured by the assailant. It is necessary that the gun should have been made by the manufacturer. It is necessary that the steel of the gun should have been properly tempered; that the bullet should have been properly cast; that the materials from which bullet, tube, and trigger were made should have been dug from the mine and duly fashioned in the factory. * * * All these are necessary conditions of the shooting, without which the shooting could not have taken place. No one of them, however, is in the eye of the law the cause.' (2) To make the vendor of munitions of war indictable would make it necessary to impose like penal responsibility on the manufacturer; and if on the manufacturer, then on the producer of the raw material which the manufacturer works up. In each case the thing made or sold is one of the necessities of war. In each case the producer or vendor knows that the thing produced or sold will probably be used for this purpose. Hence, in times of war, not merely would neutral sale of munitions of war become penal, but penal responsibility would be attached to the production of any of the materials from which such weapons are manufactured, if such weapons afterward fell into the hands of a belligerent. (3) Nor would this paralysis be limited to periods of war. A prudent

Government, long foreseeing a rupture, or preparing in secret to surprise an unprepared foe, might take an unfair advantage of its adversary, were this permitted, by purchasing in advance of the attack all munitions which neutral states might have in the market; but on the theory before us, a neutral state could not permit this without breach of neutrality, since to permit such sales would be to give a peculiarly unfair advantage to the purchasing belligerent. Hence, if such sales were indictable in time of war, they would *à fortiori* be indictable in time of peace. Why would a foreign nation, it might well be argued, want in time of peace to buy Dahlgren guns, or Armstrong guns, or iron-clads, unless to suddenly pounce down on an unprepared foe? No munitions of war, therefore, could be sold in any country unless to its own subjects, and for its own use; and countries which cannot produce the iron or coal necessary for the manufacture of artillery would have to do without artillery, if it be indictable for a neutral to furnish a belligerent, either present or prospective, with munitions of war. (4) To establish a national police which could prevent the sale of such commodities would impose a burden on neutral states not only intolerable, but incompatible with constitutional traditions. It might be possible in a land-locked province, such as Switzerland; it might be even possible in an island like Great Britain, and with a navy so powerful; but in a country as vast as the United States, and with an ocean frontier so extended, it would be impossible to establish a system of adequate prevention without employing naval and military armaments inconsistent with our settled policy, and imposing on us a pecuniary burden far greater than any corresponding loss to belligerents. (5) The *laissez faire* rule may undoubtedly be pressed too far; but when we say that we will not prohibit the sale of fire-arms to our own citizens because they may be used for homicidal purposes, we cannot be called upon to intervene to prevent their sale to citizens of other states, simply because such citizens may use them in battle."

Whart. Crim. Law (9th ed.), § 1903.

### VI. *POLICY OF THE UNITED STATES IS MAINTENANCE OF NEUTRAL RIGHTS.*

§ 405.

"The policy of the United States is to maintain neutral immunities for the following reasons: (1) The probabilities of war are far less with us than with the great European states. From the nature of things, points of friction between the United States and foreign nations are comparatively few. We have an ocean between us and the great armed camps of the Old World; and while there are innumerable questions as to which one European state may come into collision with another, the only points as to which we would be likely to come into collision with a European state are those concerned in the maintenance of neutral rights. It was to maintain such rights that we went to war in 1812; and, except during the abnormal and exceptional spasm of the late civil war, our national life has heretofore been the life of a neutral and a vindicator of neutral rights, and neutrality, when our system took shape, was arduous. The world was absorbed in the tremendous contest between France, on the one side, and England, with her allies, on the other. At times we were the only civilized power that remained neutral. Threats and blandishments were used both by France

and England to drive us from our position, but that position was not only defined and defended, under General Washington's administration, in papers so able and just as to be the basis of all future proclamations of neutrality, but was adhered to, though necessitating a war for its defense. Our international attitude is, from the nature of things, that of neutrality; and of the rights of neutrals we are, from the necessity of the case, the peculiar champions. (2) Although the richest country in the world, our traditions and temper are averse to large naval and military establishments. (3) The idea of pacific settlement of disputed international questions is one of growing power among us; the horror of war has not been diminished by the experience of the civil war; there is no country in the world where love of order is so great, and in which public peace is kept by an army and navy so small; it would be hard to convince the people of the United States that the immense and exhausting armaments of the great European states are not in part caused by the assigning of undue power to belligerents, and that one of the best ways of inducing a gradual lessening of these armaments would be the reduction of these powers. By belligerents, and especially by Great Britain when engaged in her great naval wars, have these powers been defined in the interest of war; it is important that the definition should be readjusted by neutrals in the interests of peace. (4) It is impossible to overcome the feeling that the sea, like the air, should be free, and that no power, no matter how great its resources, should be permitted to dominate it, so as to enable it, in case of war, to ransack all ships which may be met for the discovery of an enemy's goods. Prizes will become more and more valuable as the wealth traversing the ocean is multiplied; and to sustain belligerent rights in the sense they have been understood by Great Britain, is to place in the hands of that nation, as possessing the most powerful navy in the world, almost unchecked control over this wealth. The position of the United States is that of the power which has more of its produce on the high seas than has any other power, while it has of all great powers the smallest navy; and this position, being that of a nation which has few points to go to war about, is, from the nature of things, so far as concerns neutral rights, antagonistic to that of nations who, with far less wealth on the high seas, possess navies which would enable them, if this right were conceded to them, to overhaul the commerce on the great ocean lanes of travel. (5) It is not right to offer such a premium to preponderance of naval strength as is offered by the theory of belligerent rights as maintained in Great Britain. To allow a belligerent to search neutral ships, and to take out of them whatever a prize court of such belligerent might consider enemy's goods, gives a virtual supremacy to the power whose superiority in naval force enables it to sweep the seas. If the right to seize an enemy's property in neutral ships is hereafter to be claimed by Great Britain, the right of other nations to obtain naval armaments abroad should be conceded. And to prevent the United States, the only country besides Great Britain in which iron can be manufactured so as to be used for steam cruisers, from supplying other nations, when either at war with Great Britain, or when preparing for such war, with iron to be used in naval warfare, is to make Great Britain tyrant of the seas. Such a claim is as inconsistent with the wise and liberal policy of Great Britain in the present generation as it is with the interests and self-respect of the other great states of the civilized world."

Whart. Com. Am. Law, § 242.

The position of the United States as to neutral rights is thus criticised in 1828, in the London Quarterly Review:

"England, more than any other power, has experienced this frigid and exacting temper on the part of the United States, ever since that precious Treaty of Ghent, which gave to them all that they asked, and much more than they had any right to expect. Not contented with this, the Republic has since put forth claims of the most unreasonable nature; and, in the discussions that have taken place, evinced a litigious position on points that can scarcely fail, sooner or later, to bring the two nations into collision. We mean such points as Great Britain never can concede, and which can have no other object, if persevered in, than to serve as so many pretexts to join the enemy against us in any future war, as she did in the last. * * *

"Her ideas of a legitimate blockade agree pretty nearly with our own—that to constitute a legal blockade there must be an efficient force to prevent all ships from entering a blockaded port; that a public notification must be made; that no ship shall be subject to capture for first attempting to pass the blockading force, but be warned off; but if, after being so warned, she again attempts it, she shall be liable to capture. But the American Government has launched a novel proposition of a very singular nature—that belligerents should abstain from commissioning privateers and from capturing private property at sea, which is a pretty considerable enlargement of the principle that she has long endeavored to establish, that the flag of a neutral vessel shall cover all property on board, except contraband of war; for here, in order to ascertain whether a vessel has on board articles contraband of war, it is necessary to examine her; and this being admitted, is conceding the whole question of the right of search. We perceive she has laid down her new doctrine on this point in a treaty with some young Republic on the American continent, which calls itself Guatemala; indeed, no pains are spared to impregnate all the sister Republics of both Americas with the principles of her new code of maritime law, though some of them have not a cock-boat. No matter; it affords the occasion of putting on record American opinions on matters of public law, and the line of policy she is anxious to establish. Her broad proposition is this, that 'war gives the belligerent no natural right to take the property of his enemy from the vessel of his friend,' a convenient doctrine enough, it must be admitted, for one who is ready to be the friend of either or both belligerents as best suits his purpose."

Lond. Quar. Rev., vol. 37, 286. Referred to in Mr. Gallatin to Edward Everett, Aug. 6, 1828. 2 Gallatin's Writings, 400. See *supra*, § 150.

It is worthy of notice that most of the distinctive doctrines here attributed to the United States are now adopted by Great Britain.

# CHAPTER XXII.

## SHIPS' PAPERS AND SEA-LETTERS.

I. Vessels carrying the flag of the United States cannot, in time of peace, be arrested on the high seas, except at the risk of the party making the arrest, § 408.

II. Ships' papers certifying, under the authority of the United States, that the vessel holding them is a vessel of the United States, cannot be tested as to alleged fraudulency by foreign powers. The question of their validity is exclusively for the United States, § 409.

III. Vessels owned by citizens of the United States may carry the flag of the United States on the high seas, and are entitled to the protection of the United States Government, though from being foreign built, or from other causes, they are not and cannot be registered as vessels of the United States, § 410.

### I. *VESSELS CARRYING THE FLAG OF THE UNITED STATES CANNOT, IN TIME OF PEACE, BE ARRESTED ON THE HIGH SEAS, EXCEPT AT THE RISK OF THE PARTY MAKING THE ARREST.*

§ 408.

It has been already seen (*supra*, § 327) that a national flag is *prima facie* evidence, on the high seas, that the nationality of the ship carrying it corresponds to that of the flag. It is true that when there is probable ground to believe that the flag is assumed for piratical purposes, this will excuse the arrest and search of the vessel. But unless there be such probable cause the vessel must be assumed by foreign cruisers to be entitled to the flag she flies.

### II. *SHIPS' PAPERS CERTIFYING, UNDER THE AUTHORITY OF THE UNITED STATES, THAT THE VESSEL HOLDING THEM IS A VESSEL OF THE UNITED STATES, CANNOT BE TESTED AS TO ALLEGED FRAUDULENCY BY FOREIGN POWERS. THE QUESTION OF THEIR VALIDITY IS EXCLUSIVELY FOR THE UNITED STATES.*

§ 409.

A certificate under the authority of the United States must be taken by foreign powers as genuine, and can be impeached by them only by application to the Government of the United States. This has been held as to naturalization certificates (*supra*, § 174*a*); and the same principle, as was held in the Virginius case (*supra*, § 327), applies to papers certifying, under the authority of the United States, that the vessel holding them is a vessel of the United States. If such papers are fraudulent,

the parties forging or wrongfully using them are liable to punishment in the United States; and the United States will not permit them to be employed as a basis of a claim against foreign powers. But the United States must be the sole judge of their validity, so far as concerns proceedings on the high seas. No foreign power can be permitted to determine as to such validity. *Supra*, §§ 325 *ff.*

III. *VESSELS OWNED BY CITIZENS OF THE UNITED STATES MAY CARRY THE FLAG OF THE UNITED STATES ON THE HIGH SEAS, AND ARE ENTITLED TO THE PROTECTION OF THE UNITED STATES GOVERNMENT, THOUGH FROM BEING FOREIGN BUILT OR FROM OTHER CAUSES THEY ARE NOT AND CANNOT BE REGISTERED AS VESSELS OF THE UNITED STATES.*

§ 410.

The protection afforded to non-registered vessels owned by citizens of the United States on the high seas is analogous to that given to persons of foreign birth not naturalized, but domiciled in the United States. We have statutes to the effect that a foreigner can only acquire citizenship of the United States by naturalization, and we have treaties designating such naturalization as the only process by which native allegiance can be divested and an adoptive allegiance acquired. Notwithstanding these statutes, however, a person of foreign birth who acquires a domicil in the United States will be protected by the Government of the United States in the enjoyment of all rights appertaining to domicil (*supra*, § 198 *ff.*), unless limited by treaty. The principle is based on international law, which, as distinguished from municipal law, makes, for international purposes, domicil the basis on which rest personal status, taxation, and succession of movables after death. (*Ibid.* See Whart. Confl. of Laws, § 7, where this question is discussed at large.) So it is with regard to ships at sea. As to them, municipal regulations, unless incorporated in the law of nations, have no extraterritorial force. (*Supra*, § 9.) Ownership is the basis on which nationality rests; ownership is evidenced by bill of sale and guaranteed by the flag the ship carries; foreign nations will not look into the question of title, nor examine how far municipal laws have been complied with so as to enable the ship for municipal purposes to carry the flag; a certificate or passport, therefore, from the sovereign of the flag, or a certificate from one of his consuls, that the vessel is owned by one of his citizens or subjects, will be a sufficient assurance that the flag, for international purposes, is rightfully carried. Sea-letters, as issued by the Government of the United States, are in this view simply an assurance by the Government issuing them, based on ownership, of protection on the high seas. Municipally such letters have no effect. Internationally they merely extend to the ship the protection which each sovereign, when not otherwise bound by treaty, is authorized by international law to give the ships of his subjects or citizens on the high seas. These ships are entitled to no municipal privileges given by statute to registered vessels exclusively, just as a person of foreign birth, domiciled in the United States, is not ordinarily entitled to vote unless naturalized. But just as such persons, so domiciled, will be protected by the United States so far as concerns their relations to foreign states, so non-registered ships on the high seas, owned by citizens of the United States, will be protected by the Government of the United States so far as concerns their relations

to foreign states. And what is said of sea-letters may be said, also, of consular certificates of United States ownership.

"The persons and property of our citizens are entitled to the protection of our Government in all places where they may lawfully go. No laws forbid a merchant to buy, own, and use a *foreign-built* vessel. She is then his lawful property, and entitled to the protection of his nation whenever he is lawfully using her.

"The laws, indeed, for the encouragement of ship-building have given to home-built vessels the exclusive privilege of being registered and paying lighter duties. To this privilege, therefore, the foreign-built vessel, though owned at home, does not pretend. But the laws have not said that they withdraw their protection from the foreign-built vessel. To this protection, then, she retains her title, notwithstanding the preference given to the home-built vessel as to duties. It would be hard, indeed, because the law has given one valuable right to home-built vessels, to infer that it had taken away all rights from those foreign built."

Opinion of Mr. Jefferson, May 3, 1793. 7 Jeff. Works, 624.

"It being necessary in the present state of war among the principal European powers that all ships and vessels belonging to citizens of the United States should be furnished, as soon as possible, with sea-letters, for their more perfect identification and security, you will find within the inclosure ten copies of two several documents of that kind, signed by the President of the United States, and countersigned by the Secretary of the Department of State, which have been received from that Department for the purpose of being transmitted to the several custom-houses. One of each of these letters is to be delivered to every ship or vessel, being actually and *bona fide* the property of one or more citizens of the United States, after the captain shall have duly made oath to the effect, and according to the tenor of the certificate, printed under that which is in Dutch and English, the substance and purport of which oath is comprised in the 10th, 11th, 12th, 13th, 14th, and 15th lines of the said printed certificate. To this the captain is to be duly sworn before some officer qualified to administer oaths. * * *

"The certificate is then to be signed by the magistrate, and the public seal (or if he has no public seal, his private seal) is to be affixed. The blanks are to be filled up both in the English and Dutch copies of the sea-letter by the collector, and in both the English and the Dutch copies of the certificate by the magistrate or judge. * * *

"You will acknowledge the receipt of all sea-letters you shall receive from time to time, and you will keep a record thereof, and of your disposition of them, showing the names of the vessels (with their masters and owners) for which they were issued, the ports of the United States to which the vessels shall belong, the date at which you issue

them, the officer before whom the captain shall be sworn, the burdens or tonnage of the vessels, and the ladings on board of them.

"Of these you will be pleased to make an abstract by way of return, up to the last day of every revenue quarter, and to transmit the same to this office, with a note of the sea-letters received and issued during such quarter, and of the quantity remaining on hand.

"These documents being of great importance to the United States, not only as they regard the benefits to be derived from the state of peace by the owners, navigators, and builders of ships, but also as they affect the importation of our supplies, and the exportation of our produce, at peace charges, you will execute the business in relation to them with proportionate circumspection and care."

Mr. Hamilton, Sec. of Treasury, to Mr. Lamb, collector of customs for New York, May 13, 1793; cited in Sleght *v.* Hartshorne, 2 Johns. N. Y., 535.

"I send you the forms of the passports given here—the one in three columns is that now used, the other having been soon discontinued. It is determined that they shall be given in our own ports only, and to serve but for one voyage. It has also been determined that they shall be given to all vessels *bona fide* owned by American citizens *wholly*, whether built here or not. Our property, whether in the form of vessels, cargoes, or anything else, has a right to pass the seas untouched by any nation, by the law of nations; and no one has a right to ask where a vessel was built, but where is she owned? To the security which the law of nations gives to such vessels against all nations are added particular stipulations with three of the belligerent powers. Had it not been in our power to enlarge our national stock of shipping suddenly in the present exigency, a great proportion of our produce must have remained on our hands for want of the means of transportation to market. At this time, indeed, a great proportion is in that predicament. The most rigorous measures will be taken to prevent any vessel not wholly and *bona fide* owned by American citizens from obtaining our passports. It is much our interest to prevent the competition of other nations from taking from us the benefits we have a right to expect from the neutrality of our flag: and I think we may be very sure that few, if any, will be fraudulently obtained within our ports."

Mr. Jefferson, Sec. of State, to Mr. Morris, June 13, 1793. MSS. Inst., Ministers.

"There is no authority in law warranting an American minister in China 'to grant sea-letters or any documents of a like character to foreign vessels purchased by Americans residing in China, designed to be used in the coasting trade of that country.'"

Mr. Buchanan, Sec. of State, to Mr. Davis, Feb. 17, 1849. MSS. Inst., China.

"The law of nations does not require a register or any other particular paper as expressive of the ship's national character. Laws describing the kind of papers vessels must carry are considered as regu-

lations purely local and municipal, for purposes of public policy, and vary in different countries. As evidence that the vessel has changed owners, the bill of sale is required by the practice of maritime courts, and is generally satisfactory. Sir William Scott says: 'A bill of sale is the proper title to which the maritime courts of all countries would look. It is the universal instrument of transfer of ships in the usage of all maritime countries.'"

Mr. Marcy, Sec. of State, to Mr. Mason, Feb. 19, 1856. MSS. Inst., France.

The Stonewall, a vessel owned in the United States, was sold and delivered to the Japanese Government in American waters. She then became a Japanese vessel, and on her arriving at Japan, during the civil war there raging, was out of the control of the officers of the United States, diplomatic or naval.

Mr. Seward, Sec. of State, to Mr. Valkenburgh, Apr. 30, 1868. MSS. Inst., Japan.

[The Consular Regulations] "stated that foreign-built vessels, purchased and wholly owned by citizens of the United States, whether purchased of belligerents or neutrals, during a war to which the United States are not a party, or in peace, of foreign owners, are entitled to the protection and flag of the United States as the property 'of American citizens.' The same instructions, however, require that the purchase should have been in good faith. The purpose of the authority to consuls in the matter obviously was to enable citizens of the United States residing abroad to buy foreign-built vessels for lawful trade. It was not intended to sanction a simulated purchase of such vessels, to be employed in hostile operations against countries with which the United States are at peace. Although, if the purchase in this instance was a *bona fide* transaction, it may be that a vessel so employed by the purchaser may not have technically violated the neutrality law of the United States, still her employment in the business in which those vessels engaged, while flying the flag of this country, was contrary to the spirit of that act, and at variance with the friendship then existing between the United States and the King of the Two Sicilies. In point of fact, the examination which has been made has given rise to a doubt whether the alleged purchase of the vessels referred to was a *bona fide* transaction for a valuable consideration, or was only simulated in order that the flag of the United States might be used to screen them from capture by the Neapolitan navy on their way to and from Sicily. It cannot be doubtful how far the authority or the countenance of this Government should be employed in behalf of a claim if it should prove to be of this latter character."

Mr. Fish, Sec. of State, to Mr. Marsh, Jan. 29, 1877. MSS. Inst., Italy. See Mr. Fish to Sir E. Thornton, Mar. 7, 1875. MSS. Inst., Gr. Brit.; For. Rel., 1875.

"Mr. Gibbs' dispatch, No. 328, of the 7th ultimo, has been received. It is accompanied by a copy of a circular from the Peruvian foreign

office, which had been addressed to the legation, inquiring, 1st, as to the requisites pursuant to law for a merchant vessel to be regarded as a vessel of the United States; 2d, as to the conditions required by law for a foreign vessel to display in good faith the flag of the United States.

"In view of Mr. Gibbs' dispatch, I have to state that his answer to the first question appears to be in conformity to the provision of the Revised Statutes, to which reference is made. His answer to the second question, in stating that there is no law which permits a foreign vessel to use the flag of the United States, is also correct as far as it goes. It might, however, have been added that there is no prohibition of such use by a foreign vessel beyond the jurisdiction of the United States, or any penalty provided therefor. You are aware that the Consular Regulations provide for the purchase of foreign vessels abroad by citizens, and (§ 220) that if such purchase is in good faith it entitles the vessel to protection as the lawful property of a citizen of the United States. The practice of making such purchases has advantageously been pursued from the origin of this Government. There may have been instances in which it has been abused by collusion between a consul and the parties to the sale. If, however, circumstances justify on the part of that officer an opinion that the sale was honest, and that the vessel has really become the property of a citizen, she may properly fly the flag of the owner's country as an indication of her ownership, and as an emblem of his nationality."

Mr. Evarts, Sec. of State, to Mr. Christiancy, May 8, 1879. MSS. Inst., Peru; For. Rel., 1879.

"It is notorious that a maritime war scarcely ever occurs when at least one of the belligerents does not seek to protect more or less of its shipping by a neutral flag. In some instances this may honestly be done, but sales of vessels of belligerents to neutrals in apprehension of war, or when hostilities may have actually broken out, are always more or less liable to suspicion, and such transactions justify the strictest inquiry on the part of the belligerent who thereby may have been defrauded of his right to capture enemy's property. There are various circumstances tending to show the good faith, or the reverse, of such transfers. Prominent among these is the ability of the alleged purchaser to pay for his bargain.

"If, prior to the sale, he was notoriously incapable of making any such purchase, or if his previous pursuits did not fit him for the use of the property, these and other obvious circumstances will tend to show a want of that good faith which alone can impart the rights of a neutral to a vessel so acquired. I am sorry to say that instances are not wanting where impecunious citizens of the United States have claimed to be the purchasers of foreign craft, and in some of them have actually had the hardihood to apply to this Department for its interposition, when

the terms of their contract may not, in their opinion, have been complied with by the other party.

"The acceptance of the pretended ownership of a foreign-built ship has undoubtedly proved profitable to many American citizens. This was particularly the case during the great wars between maritime states, growing out of the French revolution, when the United States were at peace. Ship-owners of this country, also, probably found a neutral flag a convenient cover for their property during our last war with Great Britain, and especially during the war of the rebellion in this country. It is understood, however, that when these hostilities were brought to a close, Congress rejected the application of parties who asked to have those of their vessels renationalized which had been transferred under the circumstances referred to.

"It may have been the intention of Congress when it prescribed the national flag, that it should be used only by vessels of the United States, as defined by law. No such intention, however, is expressed in any statute. As a citizen is not prohibited from purchasing and employing abroad a foreign-built ship, when such purchase is made in good faith, there is no reason why he should not fly the flag of his country as an indication of ownership. This is frequently and constantly done, especially in Chinese and other Eastern waters. It also appears from Mr. Osborn's letter to you that there are American vessels of foreign build frequenting Chilian ports, which were bought years ago. The right of these vessels to display the flag of the United States will not be questioned by this Department, and probably would be respected by any court of admiralty.

"It must be confessed that the regulations in authorizing a consul to authenticate and record a bill of sale of a foreign-built vessel, bestow a great power and responsibility on that officer in making him, in the first instance, at least, the sole judge of the good faith of the transaction. There must have been, and may be, times and occasions when the temptation to abuse such a power may have been, and may be, irresistible. Although the validity of the transfer may, in the end, be judicially inquired into, much harm might result from a simulated sale, before a final decision on the subject could be reached. Still the possible abuse of power by a consul is not a sufficient reason for abrogating the power, especially if Congress should abstain from forbidding the purchase and use abroad of foreign-built ships by American citizens."

Same to same, May 20, 1879; *ibid.*

"Section 4190 of the Revised Statutes provides that 'no sea-letter or other document certifying or proving any vessel to be the property of a citizen of the United States shall be issued except to vessels duly registered or enrolled and licensed as vessels of the United States, *or to vessels which shall be wholly owned by citizens of the United States*, and furnished with or entitled to sea-letters or other custom house docu-

ments.' This section clearly recognizes the right of American citizens to become the owners of foreign-built vessels.

"There is, however, no law which in express terms permits a foreign vessel so owned by an American citizen to use the flag of the United States, nor, on the other hand, is there any prohibition of such use by a foreign vessel beyond the jurisdiction of the United States, or any penalty provided therefor. * * *

"It is known * * * that there are many vessels thus purchased and owned by citizens of the United States now doing business on the coasts of Chili and Peru and other South American countries, and that while there is no specific provision of law, either permissive or prohibitory on the subject of such vessels carrying the flag of the United States, it has been the long-established practice of these vessels to sail under that flag. Under these circumstances the Department does not feel disposed at the present moment to issue any more or specific instructions on the subject, and especially any that might in any way tend to jeopardize the interests of American citizens owning such property."

Mr. Evarts, Sec. of State, to Mr. Osborne, June 9, 1879. MSS. Inst., Chili.

"Your dispatch No. 77, of November 5, 1879, has been received. You express in it the opinion that the time has arrived for a definite and precise declaration of the principles which are to govern the ministers and consuls of the United States, and more especially our naval officers, in reference to the use of the American flag by foreign-built ships, claimed to have been purchased by American citizens from subjects or citizens of a belligerent power, during the existence of an actual war between such belligerent Government and another belligerent, towards both of which our Government maintains the position of a neutral. You say that if left to your own judgment, you would decide at once and without reserve that any transfer made by citizens of one of the belligerents to a citizen of the United States, during the pending war, so far from being treated as *prima facie* evidence of good faith and validity, should be treated as *prima facie* fraudulent and void; and that it should be so held, as well by our consuls as by our naval officers, until clear and satisfactory evidence of the reality and good faith of the transfer should be produced. You then go on to say that your doubts in regard to the matter arise from the fact that you are informed that this Department has approved not only your views, but also those of the minister of the United States in Santiago and our consul at Valparaiso, which you say are diametrically opposed to yours. You then proceed to state the views of these officers in a manner which, it is necessary to say, is not justified by any dispatches which have been received from them at this Department. You next refer to the case of the Itata, expressing your opinion that that vessel is about to assume again the American flag, and that a large part of the Chilian merchant marine

will arrange itself, by means of the fraudulent transfers, under the same colors. You ask, therefore, for definite instructions in view of these possibilities as to the duty of diplomatic representatives and consular officers, as well as of officers of the United States Navy.

"This Department, in its instructions numbered 7, 11, and 23, to your legation, and in instructions of similar purport, numbered 65 and 67, to the legation in Santiago, has already defined the principles which should guide you in the determination of these questions.

"In reply to your request for further instructions, this Department can do little more than reiterate and reaffirm the leading principles hitherto laid down, relying upon your discretion and judgment for their proper application in matters of detail, as it is manifestly impossible to frame an instruction which shall meet every possible incident as it may arise.

"The right of Americans to buy foreign-built vessels and to carry on commerce with them is clear and undoubted. A reference to paragraphs 220 and 221 of the Consular Regulations will show how perfectly this right is recognized and how clearly the exercise of it is defined. It has existed, as stated in instruction to your legation, No. 11, of May 8, ever since the origin of this Government. The fact that it is possible for collusion to take place between consuls and American merchants in foreign countries in connection with these transactions is not a sufficient reason to invalidate a right which exists independently of statute law and which is advantageous to the interests of American commerce and enterprise. As a consequence and adjunct of this right, the flying of the American flag cannot be absolutely prohibited. As stated before, in the above-mentioned instruction, if circumstances justify on the part of the consular officer an opinion that the sale was honest and that the vessel has really become the property of a citizen, she may properly fly the flag of the owner's country, as an indication of such ownership and an emblem of the owner's nationality.

"The duty of the consul in reference to these transactions is clearly enough indicated in Article XVII of the Consular Regulations. He is forbidden by law to grant any marine document or certificate of ownership, but he may properly make record of the bill of sale in his office, authenticate its execution, and deliver to the purchaser a certificate to that effect, and also certify that the owner is a citizen of the United States. A considerable discretion and responsibility rests upon consuls in regard to determining the good faith of such transactions. They are not to conclude, as a matter of course, that all such transactions are genuine and honest. They are to take notice of any circumstances which would indicate that the transfer is fraudulent, and in all such cases it is their duty to refuse the certificates referred to. But, on the other hand, they are certainly not required to consider the mere fact of the transfer of a foreign-built vessel to an American citizen as an evidence of bad faith. The presumption is rather on the other side, as in

all transactions in civilized countries. In the absence of any indications of fraud, a sale in the regular way, with the usual business formalities, is to be regarded by the consul as made in good faith.

"When such transactions have been perfected, and when a consul, thoroughly satisfied of the good faith of the parties, has given his certificate of the transfer of a foreign-built vessel to an American citizen, and a vessel furnished with such consular certificate has been regularly cleared from the port where the consul referred to is stationed, and has come within the jurisdiction of another consular officer or diplomatic representative of the United States, it should require very strong evidence of fraud to induce the second consular officer to deny the American character of the vessel, to refuse the regular and necessary clearance to enable the vessel to pursue its voyage, and still more, to insist upon such a vessel hauling down its flag. In cases where a consular officer or diplomatic representative is thoroughly convinced that a vessel has no right to an American certificate of sale, and consequently no right to the use of the American colors, he will be justified in going to the extent indicated; but this discretionary power should be used with the utmost caution and reserve.

"Vessels in these circumstances, of course, cannot claim the privileges and immunities and the thorough protection which are accorded to regularly registered American vessels plying between ports of the United States and those of foreign countries. The American owners domiciled abroad, engaging in business of this sort, take upon themselves all the risks incident to such traffic. If they are seized by the war vessels of one or the other belligerent and carried into courts of admiralty as prizes, they have no right to demand from the diplomatic officers of the United States that they shall be accorded anything more than fair treatment in such courts; that is to say, the fact that they are provided with consular certificates of American ownership secures for them only a presumption that such is the fact, and they are not necessarily for that reason entitled to demand from the legations of the United States anything more than that protection afforded to every other species of property belonging to American citizens domiciled in foreign countries.

"In the absence of any statutory provisions in regard to these important and delicate matters, it seems to be the duty of the executive branch of the Government to prevent as far as possible any damage or danger to American interests, and, in addition, to guard and cherish to the extent of its power the right of neutrals to carry on honest commerce between nations engaged in hostilities, reducing to the least possible degree the hindrances to neutral trade which inevitably arise from a state of war.

"You will, therefore, in all cases that may arise, keep these considerations constantly in sight, and apply them with that judgment and discretion which have hitherto won the approval of the President. Your action and that of your predecessor, in the matter of the Itata, has

been commended, because there seemed sufficient reason to doubt the regularity of the transfer, in virtue of which she was displaying the American flag. If, as you intimate, that vessel and her consorts are now about to resume our flag, and other merchant vessels are preparing to pursue the same course, it will be the duty of the consul, under the direction of the legation, in that country where these ships first display American colors, to inquire strictly into the circumstances of the alleged transfers, and refuse or grant clearances, according to the merits of each particular case. This being done, it is obvious that the act of one American consul or minister should not be challenged or reversed by another except upon the strongest proof of mistake or collusion."

Mr. Evarts, Sec. of State, to Mr. Christiancy, Dec. 26, 1879. MSS. Inst., Peru; For. Rel., 1879. Duplicated to Mr. Osborne. MSS. Inst., Chili.

"I regret to have to instruct you to bring to the attention of His Imperial Majesty's Government a case of wrong inflicted by Russian subjects upon a vessel owned by an American citizen, and entitled under our laws to fly the flag of the United States in foreign waters and claim its protection there.

"The facts are briefly these:

"In 1880 a small schooner of some 75 tons burden was built at a foreign ship-yard, at Yokohama, Japan, and when completed was sold to an American citizen, Mr. Lorenz Heinrich Petersen, a German by birth, but naturalized as an American citizen at San Francisco, August 11, 1871. The schooner was sold under the name of the Diana, in virtue of a regular bill of sale, executed and acknowledged before the United States consul-general at Kanagawa on the 21st of April, 1881. In conformity with the United States law and with the regulations prescribed by this Department, the consul-general certified the bill of sale, thus evidencing the American ownership of the vessel, and giving her the right to fly the United States flag.

"Four days after her sale to Mr. Petersen, and under the command of that gentleman as captain, the Diana sailed from Yokohama under the American flag, on the 25th of April, 1881, on her first voyage, for the purpose of hunting otter and seal in the North Pacific Ocean and in the Bering, China, and Japan Seas. Her crew, as shipped before the consul-general, consisted, besides the captain, of a German mate, named Charles Robert Conrad, a German mate and hunter, named Friedrich von Well; a Norwegian hunter, named William Smith; a Japanese cook, and eighteen Japanese seamen. She hunted for otter and seal among the Kurile group of islands, belonging to Japan, until the beginning of October, 1881, when rough weather came on and checked her operations.

"On the 25th of October, the Diana, having then sailed northeasterly to the vicinity of the Copper Islands (Medvo or Medoi), a Russian possession, three boats were sent ashore to find a landing and secure a provision of wood and water. When the boats had come within some

fifty yards of the shore, they were fired upon by unseen persons from the cliffs of the island. Three men, all of them Japanese seamen, were killed, and five men were wounded, of whom three were Japanese, the others being the German, von Well, and the Norwegian, Smith, each of whom was in command of a boat. The survivors fled to the Diana, which, after taking them on board, raised the United States flag at half-mast, displayed a signal of distress, and awaited some less hostile demonstration on the part of the natives on shore. No response was made to the signals, and the Diana set sail for the nearest port, Petropavloosk, in search of surgical aid and supplies. She arrived there on the 30th of October, and the wounded men received prompt and considerate treatment in the Government hospital.

"Captain Petersen at once reported to the governor of Petropavloosk the outrage perpetrated by the natives of Copper Island, and urged that a vessel should be sent thither to ascertain the facts and punish the offenders. The request was not complied with, on the ground that, as alleged, the lateness of the season made navigation dangerous, and no steps whatever appear to have been taken to investigate the occurrence.

"On the 5th of November, the governor summoned Captain Petersen before him, and inquired where he had captured his fur-seal. Captain Petersen replied that the skins on board had been obtained in Japanese waters, at the Kurile groups. The governor, however, apparently not satisfied with the explanation, ordered the seal-skins to be sent ashore, because, as he said, they might possibly have been taken in Russian waters, where, by a proclamation (which has heretofore been the occasion of instructions to your legation), the capture of fur-seal by foreign vessels is prohibited. To this order, founded, as would seem, on mere suspicion, and one which the vessel's own log of her cruise in the Kurile Islands would probably have shown to be unwarranted, Captain Petersen very naturally demurred, whereupon force was employed, 14 soldiers were sent on board the schooner, and five hundred and seventy-two skins were seized and carried on shore. For these the governor gave Captain Petersen a receipt, and, it is stated, referred him for redress to the Russian consul at Yokohama, to whom he said the receipt might be shown in support of any claim Captain Petersen might advance.

"The Diana was then allowed to sail for Yokohama, and on arriving there, Captain Petersen made formal complaint to the United States consul-general, filing with him a sworn statement in support of his claim, with affidavits of the European members of his crew as to the truth of the facts alleged. A duplicate original of Captain Petersen's petition and copies of the other depositions mentioned are herewith transmitted.

"You will observe that Captain Petersen claims indemnification to the amount of $36,000 from the Russian Government. In estimating

the loss, the gravity of the outrage committed upon the defenseless boats of the Diana by the inhospitable natives of Medvoi, the breaking up of the voyage of the vessel, joined to the actual seizure of valuable seal-skins lawfully taken outside of Russian jurisdiction, are items to be considered. Without further investigation, this Department is not prepared to state whether the amount of Captain Petersen's claim is reasonable or not. Further inquiry is now being made on this subject, the result of which will be communicated to you.

"In addition to the claim on behalf of the captain, inasmuch as the seamen on board of the vessel were in actual service under the United States flag, this Government must ask due indemnity for the five wounded men and for the families of the three men who were murdered.

"You will lose no time in making earnest representation of this case to the Government of His Majesty the Czar, through the ministry for foreign affairs. You will, while stating the facts and asking an immediate and searching investigation thereof, express the deep regret of the President on learning of this savage attack committed upon inoffensive seafarers by the subjects of a power whose just and generous treatment of strangers on its coasts have been so often and of late so strikingly manifested. You will say that the President deems the occasion one for the Russian Government not only to visit its severe displeasure on the savages who, by this barbarous act have brought discredit upon the Russian name, but to tender also to Captain Petersen such reparation as will insure the return of the property taken from him on groundless suspicion or its fair value, as well as make good to him the loss and injury sustained through the deplorable event. And you will further say that this Government looks to that of Russia for suitable and just indemnification in the case of the killed and wounded seamen who at the time of the attack were under the protection of the flag of the United States, and that this simple and appropriate redress is asked for each and all of the sufferers in the firm confidence that the demand will commend itself to the sense of justice of the Russian Government, and that its response will be prompt and adequate."

Mr. J. Davis, Acting Sec. of State, to Mr. Hunt, Aug. 18, 1882. MSS. Inst., Russia.

On January 12, 1884, Mr. Frelinghuysen instructed Mr. Hunt to refrain from further pressing this claim, the reason being want of a proper case on the merits.

"I have received and read with care your number 501, of the 4th ultimo, detailing the transfer of the Chinese Merchants Steam Navigation Company's vessels to the American flag, July 31 last. The transaction appears to have been discreetly arranged, and the appropriateness of the vessels in question reverting under the flag which they first bore before the line passed under Chinese control is apparent."

Mr. Frelinghuysen, Sec. of State, to Mr. Young, Oct. 23, 1884. MSS. Inst., China.

This instruction refers to the sale, during the French-Chinese war then pending, of certain Chinese vessels to Russell & Co., citizens of the United States.

An examination of Mr. Young's dispatch No. 501, and of the voluminous papers thereto attached, gives no indication that these vessels or any of them, were built in the United States, or registered as such.

"The recent purchase by citizens of the United States of a large trading fleet, heretofore under the Chinese flag, has considerably enhanced our commercial importance in the East. In view of the large number of vessels built or purchased by American citizens in other countries and exclusively employed in legitimate traffic between foreign ports under the recognized protection of our flag, it might be well to provide a uniform rule for their registration and documentation, so that the *bona fide* property rights of our citizens therein shall be duly evidenced and properly guarded."

President Arthur, Fourth Annual Message, 1884.

In a dispatch from Mr. Smithers, of the Chinese legation, to the Secretary of State, No. 58, dated August 28, 1885, we are informed of the resale of the vessels to China. The closing paragraph of this dispatch is as follows: "In this connection I may remark that Mr. Drummond, an English barrister at law at Shanghai, who was the counsel of the Chinese company at the time the transfer took place to Russell & Co., has recently stated, over his own signature, that the sale of the ships was a perfectly honorable transaction, and that there was no obligation of any kind on the part of the Russells to return them to the Chinese. The fact is, as I have been credibly informed, after the refusal of the Chinese Government to continue the Rice subsidy to the American firm, the property was not only unremunerative, but would have proved disastrous to the holders."

For instructions to Mr. Smithers, see *supra*, § 393.

As to this resale, see Mr. Bayard, Sec. of State, to Mr. Smithers, Apr. 20, 1885. MSS. Inst., China; For. Rel., 1885; with inclosure, given at large, *supra*, § 393.

"Was the Arctic such a vessel [a vessel of the United States, entitled to carry the flag]? It is conceded that she was not registered as such, and that she could not have been so registered, as her master was not a citizen of the United States and she was built abroad. On the other hand, she was owned by a citizen of the United States, and she belongs to a numerous class of vessels navigating the waters of Japan, China, and the North Pacific, which, carrying the flag of the United States, owned by citizens of the United States, and augmenting largely, if indirectly, the resources of the United States, are not registered as United States vessels. It has been ruled more than once by me, following in this a long line of precedents in this Department, that such vessels, so owned, and thus carrying the flag of the United States, are entitled to the protection of the United States, and that the United States will permit no foreign nation to question the regularity of the papers of such vessels, assuming that they are owned by citizens of the United

States, and are, without molestation to others, traversing the high seas. A marked illustration of this may be cited in the case of an otter and seal hunting vessel, the Diana, a vessel built in a foreign ship-yard, commanded by a German captain, but owned by a citizen of the United States. The Diana, when engaged in her particular business on the North Pacific, was attacked, when in the neighborhood of the Copper Island (Medoi) by Russian residents of that island. This Department at once demanded redress from Russia, and the position was taken, in instructions to Mr. Hunt, August 18, 1882, that, as the Diana, though built abroad and commanded by a German subject, was sold to a citizen of the United States 'in virtue of a regular bill of sale, executed and acknowledged before the United States consul-general at Kanagawa on the 21st of April, 1881,' and as the consul-general, 'in conformity with the United States law, and with the regulations of this Department, certified the bill of sale, thus evidencing the American ownership of the vessel, and giving her the right to fly the United States flag,' she was entitled to the protection of the Government of the United States. This position I now reaffirm in reference to the Arctic."

Mr. Bayard, Sec. of State, to Mr. Garland, Oct. 20, 1886. MSS. Dom. Let.

"Ships or vessels of the United States are the creations of the legislation of Congress. None can be denominated such, or be entitled to the benefits or privileges thereof, except those registered or enrolled according to the act of September 1, 1789, and those which, after the last day of March, 1793, shall be registered or enrolled in pursuance of the act of 31st December, 1792, and must be wholly owned by a citizen or citizens of the United States, and to be commanded by a citizen of the same.

"And none can be registered or enrolled unless built within the United States before or after the 4th of July, 1776, and belonging wholly to a citizen or citizens of the United States, or, not built within said States, but on the 16th of May, 1789, belonging, and thence continuing to belong, to a citizen or citizens thereof; or ships or vessels captured from the enemy, in war, by a citizen, and lawfully condemned as prize, or adjudged to be forfeited for a breach of the laws of the United States, and being wholly owned by a citizen or citizens thereof. (1 Stat. L., § 2, 288.)

"Ships or vessels not brought within these provisions of the acts of Congress, and not entitled to the benefits or privileges thereunto belonging, are of no more value as American vessels than the wood and iron out of which they are constructed. Their substantial if not entire value consists in their right to the character of national vessels, and to have the protection of the national flag floating at their mast's head.

"Congress having created, as it were, this species of property, and conferred upon it its chief value under the power given in the Constitu-

tion to regulate commerce, we perceive no reason for entertaining any serious doubt but that this power may be extended to the security and protection of the rights and titles of all persons dealing therein. The judicial mind seems to have generally taken this direction."

Nelson, J., White's Bank *v.* Smith, 7 Wall., 655, 656.

The point decided in this case was that under the act of July 29, 1850, the recording of a mortgage in the office of a collector of the vessel's home port has the effect, irrespective of State legislation, of giving the mortgagee a preference over a subsequent purchaser or mortgagee. It was further held that the home port of the vessel is the port in which the bill of sale, mortgage, etc., should be recorded.

"The first section of the act of 1817 prohibits the importation of any goods or wares from any foreign port into the United States except in two cases:

"1st. They may be imported in vessels of the United States; or,

"2d. In such foreign vessels as truly and wholly belong to the citizens or subjects of the country of which the goods are the production, or from which they are most usually first shipped for transportation.

"The claimant's answer does not bring him within either of these classes:

"1. The Merritt is not a vessel of the United States. The information alleged—it was not denied, and that is all the case contains upon the subject—that the Merritt was the property of citizens of the United States, and that she was a foreign-built vessel. That she was owned by citizens of the United States did not make her a vessel of the United States. By the statute of 1792 only ships which have been registered in the manner therein prescribed shall be denominated or deemed vessels of the United States, entitled to the benefits or privileges appertaining to such ships. There is no allegation that the Merritt had been so registered. Indeed, she could not have been under the provisions of the act last referred to.

"2. The cargo of the Merritt was iron and lumber, the production of the British provinces of Canada, while her owners were citizens of the United States. She did not, therefore, come within the second description of the statute of 1817, as a foreign vessel truly and wholly belonging to citizens of the country of which the cargo was the growth or production. On the contrary, it is conceded by the pleadings that her owners were American citizens. The Merritt, therefore, falls within the prohibition of the act, and is liable to forfeiture; she was neither a vessel of the United States nor a foreign vessel wholly belonging to citizens of the country of which her cargo was the production.

"But the claimant seeks the benefit of the proviso of the act, viz: 'That this regulation shall not extend to the vessels of any foreign nation which has not adopted, and shall not adopt, a similar regulation.' He alleges that neither the Kingdom of Great Britain nor the province of Canada has adopted similar regulations.

"The case does not show that the Merritt has any of the evidences of being a British ship. She produces no register, or certificate, or document of any kind to entitle her to make that claim. The fact that she is foreign built does not prove it. Proof even that she was built in Great Britain would not establish it. Pirates and rovers may issue from the most peaceful and friendly ports. The documents a vessel carries furnish the only evidence of her nationality. Of these the Merritt is entirely destitute, so far as the case shows. There is nothing, therefore, to bring her within the terms of the proviso."

Hunt, J., The Merritt, 17 Wall., 585 *ff.*

In this case it was held that a vessel built in Canada, but owned by citizens of the United States, and loaded with Canada products, cannot be regarded either as a vessel of the United States, or as a foreign vessel belonging to citizens of the country of which the cargo was the growth. It was held, therefore, that if she was engaged in transporting the products of Canada into the ports of the United States, she was subject to forfeiture under the act of March 1, 1817. (3 Stat. L., 351.) It is to be observed that, according to the statement of Judge Hunt, the Merritt had "no register, certificate, or document of any kind" to show her nationality. It was, however, conceded by the pleadings that her owners were citizens of the United States.

"It is to be understood that every vessel of the United States which is afloat is bound to have with her, from the officers of her home port, either a register or an enrollment. The former is used when she is engaged in a foreign voyage or trade, and the latter when she is engaged in domestic commerce, usually called the coasting trade. If found afloat, whether by steam or sail, without one or the other of these, and without the right one with reference to the trade she is engaged in, or the place where she is found, she is entitled to no protection under the laws of the United States, and is liable to seizure for such violation of the law, and in a foreign jurisdiction, or on the high seas, can claim no rights as an American vessel."

Miller, J., Badger *v.* Gutierez, 111 U. S., 736, 737.

In this case it is held that a collector who detains a ship's papers, when the ship is not under seizure, and when her papers are not deposited with him for the purposes of entry and clearance, subjects himself to an action for damages.

As to the statutes regulating the duties of consuls in respect to registered vessels, the following rulings of Attorneys-General may be cited:

Section 4309, Revised Statutes, does not require the papers of an American vessel in a foreign port to be delivered to the consul, except in cases where it is necessary to make an entry at the custom-house.

4 Op., 390, Mason, 1845

The master of a vessel, on her "arrival" in a foreign port, is not compellable to deposit her papers with the consul, unless the arrival be such as involves entry in the custom-house and clearance.

6 Op., 163, Cushing, 1853; 9 *ibid.*, 256, Black, 1858.

Masters of American vessels are subject to suit for forfeiture in the name of the consul for omission to deposit with him the papers according to law, but not to indictment. (Rev. Stat., § 4310.)

7 Op., 395, Cushing, 1855.

The master of an American vessel sailing to or between ports in the British North American provinces is required, on arriving at any such port, to deposit his ship's papers with the American consul.

11 Op., 72, Bates, 1866.

Section 1720, Revised Statutes, does not change or affect the duties of masters of American vessels running regularly by weekly or monthly trips or otherwise, to or between foreign ports, as imposed by act of 1803. (2 Stat. L., 203; Rev. Stat., § 4309.)

*Ibid.*

If an American vessel is obliged by the law or usage prevailing at a foreign port to effect an entry, and she does enter conformably to the local law or usage, her coming to such foreign port amounts to an arrival within the meaning of section 2 of the act of 1803 (2 Stat. L., 203; Rev. Stat., § 4309), independently of any ulterior destination of the vessel, or the time she may remain or intend to remain at such port, or the particular business she may transact there.

*Ibid.*

The question of port jurisdiction of consuls over seamen and shipping has been already discussed.

*Supra*, § 124.

"I have the honor to state to you that I have carefully considered the questions presented for your opinion by Hon. Hamilton Fish, Secretary of State, in his letter to you of the 20th of November last, which letter was referred by you to me, with the direction that I should prepare an opinion on the same, and I beg to report the following as my opinion:

"The first question submitted by the Secretary of State is as follows:

"'Is a foreign-built vessel, not a registered vessel of the United States, but wholly owned by citizens of the United States, entitled to bear the flag of the United States?'

"And to this question my answer is yes.

"I do not find that any statute law of the United States in any way declares what vessels shall or what vessels shall not carry the flag of the United States; but the so-called navigation laws declare, to speak generally, that only vessels built in the United States and owned by citizens of the United States can be registered as vessels of the United

States, and further, that no other than registered vessels shall be denominated and deemed ships or vessels of the United States, entitled to the benefits and privileges appertaining to such ships or vessels. (See act of 31st Dec., 1792, 1 Stat. L., p. 287.)

"The benefits and privileges reserved by the act above cited to registered vessels of the United States do not, in my opinion, restrict the right to carry the flag of the United States, but refer particularly to certain commercial benefits and privileges which, by various laws of the United States, are given to registered vessels of the United States; that is, to vessels built in the United States, in order that ship-building in the United States may be encouraged.

"While the navigation laws give such commercial privileges to vessels built in the United States, they in no way forbid citizens of the United States to own vessels built in other countries, nor is the protection of the United States in any way denied to such foreign-built vessels if they are owned by citizens of the United States.

"So held Mr. Cushing, in 1854 (6 Op., 638), and so held Mr. Talbot, Acting Attorney-General, on August 31, 1870. (See opinion, not printed.) The question submitted to Mr. Cushing by Mr. Marcy, referred directly to the right of a foreign-built vessel owned by citizens of the United States to carry the flag of the United States, and Mr. Cushing replied: 'Upon full consideration, therefore, of all the relations of the subject, there remains no doubt in my mind as to the right of a citizen of the United States to purchase a foreign ship of a belligerent power, and this anywhere, at home or abroad, in a belligerent port or a neutral port, or even upon the high seas, provided the purchase be made *bona fide*, and the property be passed absolutely and without reserve, and the ship so purchased becomes entitled to bear the flag and receive the protection of the United States.'

"Mr. Cushing's opinion is in terms limited to vessels purchased from belligerents, but if foreign-built vessels so purchased by citizens of the United States are entitled to the protection of the United States, still more are vessels purchased from foreign nations in time of peace entitled to such protection.

"You will notice that Mr. Cushing directly answers the first question of Mr. Fish, for he declares that the ship so purchased becomes entitled to bear the flag of the United States, and I should now simply refer to this opinion as an answer to the question submitted by Mr. Fish had not Mr. Talbot in a certain way dissented therefrom.

"In answer to questions submitted to him by Mr. Creswell, Postmaster-General, Mr. Talbot says: 'I have no hesitation in giving my opinion that this class of property, namely, vessels once foreign and now owned by citizens of the United States, are, in the words of your question, entitled to the protection of the Government of this country; the word protection here being used in its primitive sense, and signifying protection from depredation or injury to foreign Governments or powers.' So far he agrees with Mr. Cushing, but farther on he says; 'I refrain from expressing concurrence with Mr. Cushing's opinion that such vessels are entitled to bear the flag of the United States. While it might be true in a certain sense, yet I hesitate to assent to it as a truth having practical force. I doubt the propriety of declaring a vessel entitled to bear the flag of a nation when she can have on board no document known to international law as witnessing that title, and I apprehend belligerent cruisers upon the sea and prize courts upon the shore would give effect to this doubt.'

"Thus Mr. Talbot agrees with Mr. Cushing that any ship owned by citizens of the United States is entitled to the protection of the United States, but while Mr. Cushing would give to any such ship the right to carry the flag of the United States, Mr. Talbot hesitates to give the right to carry that flag to any ship not registered, that is, to speak generally, to any foreign-built ship. Mr. Cushing regards the bill of sale as the true evidence of American ownership, the one best known to international law, while Mr. Talbot regards the register as the only document recognized by prize courts.

"I cannot think that Mr. Talbot was right. A flag is but the outward symbol which a ship carries to show her nationality, and this nationality is recognized by the law of nations as determined by the nationality of her owners. A ship's flag therefore should properly correspond with her actual ownership. Frequently in prize courts questions arise as to the ownership of a certain vessel, but when that question is determined the nationality of the ship is determined and the court practically say, this vessel is owned by citizens of a certain country, she is entitled to the protection of that country, she should carry the flag of that country, and must be condemned or released as the property of citizens of that country.

"The court may examine various papers and witnesses to ascertain the true ownership, and when there is a register that document may be among these papers, but in the words of Lord Stowell, 'a bill of sale is the proper title to which the maritime courts of all countries would look. It is the universal instrument of the transfer of ships in the usage of all maritime countries.' (The Sisters, 5 C. Rob., 155; see 3 Kent's Com., 130.)

"The flag, then, the outward symbol of ownership, should properly correspond with the bill of sale, the universal instrument of the actual ownership of a vessel.

"So has the flag come to be regarded as the outward symbol of nationality that even in solemn treaties it is spoken of as if it were the conclusive evidence of such nationality, and in this way the word flag is used in the rules laid down in the declaration of Paris, for example:

"The 2d article provides that the neutral flag (*le pavillon neutre*) covers enemy's goods, with the exception of contraband of war.

"And again, the 3d article provides that neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag (*sous pavillon ennemi*).

"These rules release neutral goods in an enemy's ship in certain cases, but still the ship may be condemned because she carries the enemy's flag, that is, because she is owned by citizens of an enemy's country, and this irrespective of the fact that she was built in another country.

"If, then, vessels must be protected and may be condemned because they are owned by citizens of the United States, certainly they must not, except by express statute, be held as forbidden to carry the flag of the United States, which is but the sign they show to give notice that they are entitled to that protection. Without doubt Congress could have forbidden any foreign-built ship to carry the flag of the United States, but it has not done so. Previous to 1854, the registry laws of Great Britain were very similar to those of the United States, but the courts of Great Britain held that though a foreign-built ship could not be entitled to a British register, yet if wholly owned by British subjects such a ship was entitled to British protection. (See cases cited by Mr. Cushing.)

"By the act of 17 and 18 Victoria, ch. 104 (Aug. 10, 1854), all ships, wherever built, became entitled to receive a British register, provided they were owned by subjects of Great Britain. Formerly a British register was an evidence that a ship was built and owned in Great Britain; now a British register is simply evidence that a ship is owned in Great Britain, and is, as it were, but confirmatory evidence of the bill of sale. Formerly a foreign-built ship could not be registered as a British ship, but was entitled to the protection of the British flag, provided she was owned by British subjects. Now every vessel owned by British subjects can have a British register, and the statute denies the right to use the British flag to any vessel which does not have a British register, that is, which does not have the official evidence that she is owned by British subjects.

"While the British registry law has changed, the United States law remains the same. The British law gives no exclusive privileges to vessels built in Great Britain, but denies the right to carry its flag to any vessel not having an official register as the evidence of her British ownership, while the United States does not deny its flag or protection to any vessel owned by citizens of the United States, but restricts the privileges and benefits of its commerce to those vessels which carry an official register as the evidence that they were built and owned in the United States. A British built vessel, owned by citizens of the United States, cannot be registered either in Great Britain or in the United States; she cannot carry the British flag; she is entitled to the protection of the United States; the flag of the United States is but the outward sign that she is entitled to that protection; no statutes forbid her to carry that flag, and without such express statute I cannot think that right should be denied her.

"Under the present laws, in my opinion, any vessel wholly owned by citizens of the United States is entitled to carry the flag of the United States.

"I am aware that this opinion might, under existing laws, if generally acted upon, be the source of some embarrassment, for the United States may be called upon to protect a vessel carrying its flag without possessing any official evidence that such vessel is entitled to that protection; but still more embarrassment would seem to me to result from the opinion of Mr. Talbot, should the United States be called upon to protect a vessel owned by citizens of the United States though sailing under a foreign flag.

"I pass on to consider the second question proposed by Mr. Fish, which is as follows:

"'Which of the below-mentioned acts of Congress are applicable to foreign-built vessels which are not registered vessels of the United States, but which are wholly owned by citizens of the United States?

"'Act of 28th February, 1803; 2 Stat. L., 203, particularly the 2d and 3d sections. (See Consular Regulations 1870, 212.)

"'Act of 20th July, 1840; 5 Stat. L., 394. (See Consular Regulations 1870, 217.)

"'Act of 29th July, 1850; 9 Stat. L., 440, section 6. (See Consular Regulations 1870, 222.)

"'Act of August 18, 1856; 11 Stat. L., 52, particularly the sections 25 to 28, inclusive. (See Consular Regulations 1870, 239.)

"'Act of August 5, 1861; 12 Stat. L., 315. (See Consular Regulations 1870, 254.)

"'Act of February 19, 1862; 12 Stat. L., 340. (See Consular Regulations 1870, 255.)

"'Act of April 29, 1864; 13 Stat. L., 61. (See Consular Regulations 1870, 262.)

"'Act of June 28, 1864; 13 Stat. L., 201. (See Consular Regulations 1870, 264.)

"'Act of June 29, 1870; 16 Stat. L., 169. (See Consular Regulations 1870, 271.')

"This second inquiry of Mr. Fish refers in the first place to the 2d and 3d sections of the act of 28th February, 1803.

"The 1st section of this act provides what shall be done by the master of any vessel bound on a foreign voyage before a clearance be granted to her, and what he shall do on his arrival at the first port of the United States.

"The 2d section makes it the duty of every master or commander of a ship or vessel belonging to citizens of the United States, who shall sail from any port of the United States, on his arrival at a foreign port, to deposit his register, sea-letter, etc., with the consul, which register, sea-letter, etc., it shall be the duty of the consul to deliver to such master or commander on his producing to him a clearance from the proper officer of the port where the ship or vessel may be.

"The 3d section provides that whenever a ship or vessel belonging to a citizen of the United States shall be sold in a foreign country and her company discharged, or when a seaman or mariner, a citizen of the United States, shall, with his own consent, be discharged in a foreign country, three months' pay over and above the wages which may then be due to all mariners or seamen on board who may be designated as citizens of the United States shall be paid to the United States consul by the master or commander of that vessel.

"In 1831 some questions arose as to whether the act of 1803 (particularly the first three sections thereof) was applicable to the mercantile marine of a foreign nation or people on which American seamen were employed or in which American citizens were interested as owners.

"The matter being referred to Mr. Berrien, he wrote to the Secretary of State (2 Op., 448), that in his opinion this act was confined 'to vessels owned by citizens of the United States and constituting a part of her mercantile marine by sailing under her flag.'

"In terms this opinion of Mr. Berrien would make these sections (quoting Mr. Fish) 'applicable to vessels which are not registered vessels of the United States, but which are wholly owned by citizens of the United States,' for, if my opinion before given is correct, such vessels may sail under the flag of the United States and so, in a certain sense, constitute part of her mercantile marine.

"It is not probable, however, that Mr. Berrien particularly considered the question as to whether any foreign-built vessel could carry the flag of the United States, but he evidently was of the opinion that the act of 1803 was confined to vessels that had a United States register, for he interpreted the same according to the terms of the 1st and 2d sections thereof, which sections are evidently confined to vessels that have a United States register. Therefore, while Mr. Berrien confined this act in terms to vessels constituting a part of the mercantile marine of the United States by sailing under her flag, it is evident from the argument he used that so far as he considered the question he regarded the words 'constituting a part of her mercantile marine by sailing under her flag,' as synonymous with the words 'having a United States register.'

"Mr. Berrien must therefore be held to have construed this act as not properly applicable to any vessels that did not have a United States

register, and as therefore not applicable to the class of vessels described in the 2d question of Mr. Fish.

"Nor do the 2d and 3d sections of this act seem to me to be applicable to the class of vessels described by Mr. Fish, for although, in my opinion, such vessels are entitled to carry the flag of the United States, yet the 2d section clearly applies only to registered vessels, and though the 3d section, if standing alone, might be considered as applicable to vessels owned by citizens of the United States whether registered or not, yet when taken in connection with the first two sections of the act, I think this third section is more properly to be construed as applicable only to registered vessels of the United States, and therefore as not applicable to foreign-built vessels which are not registered vessels of the United States.

"The 2d inquiry of Mr. Fish refers, in the second place, to the act of 20th July, 1840, which act relates particularly to the shipping and discharge of seamen and to the duties of consuls in relation thereto. This act is in fact in extension of, and supplementary to, the act of 28th February, 1803, already considered, and must be construed like that act as not applicable to the class of vessels described by Mr. Fish, but only to registered vessels of the United States.

"The 2d inquiry of Mr. Fish refers, in the third place, to the 6th section of the act of 29th July, 1850, which section is but an amendment to the 12th section of the act of 20th July, 1840, already considered, and does not alter the construction I have already put upon that act.

"The 2d inquiry of Mr. Fish refers, in the fourth place, to sections 25 to 28, inclusive, of the act of 18th of August, 1856, which act is the general act of that date, to regulate the diplomatic and consular systems of the United States, and as far as sections 25 to 28, inclusive, are concerned is in amendment of the acts of 1803 and 1840, already considered, and like them must be construed as not applicable to the class of vessels described by Mr. Fish.

"The 2d inquiry of Mr. Fish, in the fifth place, refers to the act of 5th of August, 1861, which act declares that American vessels running regularly by weekly or monthly trips, or otherwise, to or between foreign ports shall not be required to pay fees to consuls for more than four trips in a year, anything in the law or regulations respecting consular fees to the contrary notwithstanding.

"In the several acts already considered vessels having a register of the United States are generally described as 'vessels of the United States,' and in this act of August, 1861, the words 'American vessels' are used in the same sense, as appears from the connection of this act with the earlier acts already considered.

"The words 'American vessels' and the words 'vessels of the United States' are in the statutes used interchangeably and perhaps somewhat loosely, and they were so used in the act submitted to Mr. Talbot for his opinion as above stated, but he was unable to give any meaning to the words 'American vessel' which did not imply that they meant a vessel having a United States register, and so the same words must be construed in the act of August 5, 1861.

"The 2d inquiry of Mr. Fish, in the sixth place, refers to the act of the 19th of February, 1862, which in exact terms is particularly applicable to vessels registered, enrolled, or licensed within the United States, the act being entitled 'An act to prohibit the coolie trade by American citizens in American vessels.'

"The 2d inquiry of Mr. Fish, in the seventh place, refers to the act of the 29th of April, 1864, which act is entitled An act to provide for the collection of hospital dues from vessels of the United States sold or transferred in foreign ports or waters, and must be construed, like the acts of 1803 and 1840, relating to the same subject and already considered, as applicable only to registered vessels of the United States.

"The 2d inquiry of Mr. Fish refers, in the eighth place, to the act of 28th of June, 1864, which act repeals that portion of 'An act for the regulation of seamen on board the public and private vessels of the United States,' approved the 3d of March, 1813, which made it not lawful to employ on board any of the public or private vessels of the United States any person or persons, except citizens of the United States, etc. This act, under the construction already given to the words 'vessels of the United States,' is only applicable to registered vessels of the United States.

"The 2d inquiry of Mr. Fish, in the last place, refers to the act of June 29, 1870, which act provides that from the master or owners of every vessel of the United States arriving from a foreign port, or of registered vessels employed in the coasting trade, the sum of forty cents per ton shall be collected by the collectors of customs at the ports of the United States, and for each and every seaman who shall have been employed on said vessel since she last entered at any port of the United States, etc.

"This act in terms so distinctly relates to registered vessels of the United States that it seems to confirm all the constructions I have put upon the acts previously considered, viz, that like this act they are only applicable to 'vessels of the United States,' or 'American vessels'; that is, to registered vessels of the United States.

"I then arrive at the conclusion that any vessel wholly owned by citizens of the United States is entitled to the protection of the United States, and can carry the flag of the United States, but that none of the acts, or parts of acts, referred to by Mr. Fish are applicable to any vessel that does not have a United States register.

"If this conclusion is right, a vessel owned by citizens of the United States, but not built in the United States, though entitled to its protection, would yet be under no relation thereto or to its consuls, from which that vessel, in a certain way, would be compelled to bear part of the cost of that protection by the payment of the fees due under existing statutes from registered vessels to the collectors, the consuls, and divers other officers of the United States, but she would sail the ocean flying the flag of the United States, entitled to demand protection from the Navy and the consuls of the United States, but yet without any official papers on board from officers of the United States which would present *prima facie* and official evidence that she was entitled to carry that flag and to receive that protection.

"While I have been unable to arrive at any other conclusion than above stated, I have not failed to see the difficulties that might arise if under existing statutes the citizens of the United States should engage in foreign commerce in foreign-built ships, and I judge that the Secretary of State contemplated that the existing laws might be defective when he asked for your official opinion, so that, 'if necessary, Congress may at the coming session be called in to pass further legislation in the matter.'

"As I interpret the existing statutes, they seem to me to be defective. These defects, however, though existing for now many years,

have only recently, by the great commercial changes that have taken place, come to be apparent and of considerable magnitude.

"The navigation act of 1792, on which all the acts hereinbefore considered are based, was enacted when United States citizens were engaged in no commerce which did not contemplate a voyage from and to a part of the United States. At that time England had practically closed her domestic and export commerce to vessels not built and owned in Great Britain. Under these circumstances Congress made laws which practically closed the domestic and export commerce of the United States to any but registered vessels of the United States, and generally enacted that no vessels should be registered as vessels of the United States except they were built in the United States.

"This legislation was doubtless intended to prevent, and did practically prevent, citizens of the United States from owning vessels not built in the United States, but it so prevented them, not by express enactment to that effect, but from the fact that in such vessels United States citizens could not in consequence of that act carry on any commerce with the United States, and no other commerce was open to them.

"To-day, however, the situation has changed, though the United States law remains the same.

"England opens her ports to the vessels of all nations, but of greater importance than this, China and Japan and other nations present a new field for commerce.

"Meanwhile the expense of building vessels in the United States has greatly increased; it is now possible, practicable, and profitable for citizens of the United States to carry on commerce in the Pacific Ocean in vessels owned by them, but which vessels have no need to come to bring freight to or to export it from the ports of the United States.

"Under these circumstances the laws of the United States cease to be effective to prevent citizens of the United States from owning vessels which are built out of the United States and are not registered in the United States, and it does not seem to me strange, then, to find that the laws of the United States have not as yet fixed any duties upon the owners of these vessels which never come to the United States, and so never have need of an American register to give them the privileges of the domestic and export commerce of the United States. If such vessels should come to the United States they must bear all the burdens placed upon foreign vessels, and, knowing this, they remain engaged in foreign commerce, entitled to the protection of the United States, but under no special relations to the consuls of the United States.

"Congress under these circumstances should, in my judgment, either forbid any vessel to carry the flag of the United States which is not a registered vessel of the United States, or should provide for the giving of some official certificate to vessels wholly owned by citizens of the United States wherever built, and should fix the status of such vessels in foreign ports and before the consuls of the United States.

"I quote from Mr. Cushing (6 Op., 653): 'The question of what particular document, if any, shall be issued from the Treasury or State Department to a foreign-built ship lawfully owned by a citizen of the United States in the absence of any special legislation on the subject, seems to me a proper one for the consideration of the Executive and of Congress.'

"Commenting on these words of Mr. Cushing, Mr. Talbot, says: 'That is, of the law-making power. Congress might undoubtedly authorize

the issuing of such papers, but as it was at the date of Mr. Cushing's opinion so is it now, Congress has not conferred the authority in question.'

"Since Mr. Talbot's opinion Congress has passed no further legislation on this matter, and the want of some legislation is still felt.

"What that legislation should be is to a great extent a question of policy.

"Should Congress think best to prevent the citizens of the United States from engaging in commerce, even between foreign countries, except in vessels built in the United States, it can practically do so by enacting that no vessel shall be entitled to carry the flag of the United States unless under existing laws she is a registered, enrolled, or licensed vessel of the United States.

"On the other hand, should Congress while reserving the domestic commerce of the United States to vessels built in the United States think it wise to allow the citizens of the United States in any vessels owned by them to compete for the profits of foreign commerce, it can do so by some enactment which shall furnish the means by which an official certificate of American ownership can be given to a vessel wholly owned by citizens of the United States and by which a vessel with such a certificate, her owners, charterers, officers, and crew shall be declared subject to the same duties and entitled to the same privileges in foreign countries and before a consul of the United States that they would be subject or entitled to were they duly registered vessels of the United States.

"In the same enactment Congress might also provide that no vessel except a duly registered vessel of the United States, or a vessel possessing a proper certificate that she was wholly owned by citizens of the United States, should be entitled to carry the flag of the United States."

Opinion of Mr. Beaman, Solicitor of Department of State, and Examiner of Claims, Jan. 5, 1872; approved by Mr. Akerman, Attorney-General, on same day. Misc. Letters, Dept. of State, 1872. See criticism *infra*, App., § 410.

"As far as the records of the Department of State show, it was at first the usage of the Government to issue what were called 'Mediterranean letters,' a form of which is hereunto annexed. These letters were based, not on registry, but on alleged ownership by citizens of the United States, and authorized the vessels to which they were granted to sail under the flag of the United States. Subsequently, what were called 'sea-letters' were issued, a form of one of which is annexed.

"These letters, granted to vessels which are foreign built, and therefore not entitled to registry under our navigation laws, are well known in maritime practice. We find, for instance, in Bouvier's Law Dictionary, the following statement:

"'Sea-letter, or sea-brief (mar. law), is a document which should be found on board of every neutral ship. It specifies the nature and quantity of the cargo, the place from whence it comes, and its destination. Chit. Law of Nat., 197.'

"Revised Statutes, section 4190, clearly leaves this practice undisturbed. This section, whose history is given by Mr. Cushing in an opinion to be presently quoted, is as follows:

"'No sea-letter or other document certifying or proving any vessel to be the property of a citizen of the United States shall be issued, except to vessels duly registered or enrolled and licensed as vessels of the United States, *or to vessels which shall be wholly owned by citizens of*

*the United States*, and furnished with or entitled to sea-letters or other custom-house documents.'

"You will observe that, under this section, sea-letters may be granted to vessels *which shall be wholly owned by citizens of the United States*, though not registered. * * *

"The question was brought before Mr. Cushing when Attorney-General, and in an opinion dated August 7, 1854 (6 Op., 638), the topic is discussed by him with his usual exhaustiveness. From this opinion the following passages are taken:

"'The statutes of the United States recognize the following classes of sea-going vessels, namely:

"'1. Ships built in the United States, wholly owned by citizens thereof, employed in foreign commerce, which are entitled to be registered, and as such to enjoy all the rights and privileges conferred by any law on ships of the United States. (Act of December 31, 1792, 1 Stat. L., 287.)

"'Such a ship, of course, loses her privileges as a registered ship on being sold to a foreigner, and is thereafter treated forever as foreign-built, even though she be purchased back by the original owner or any other citizen of the United States. (See opinion March 16, 1854, *ante*, 383.)

"'2. Vessels built in the United States, and wholly owned by citizens thereof, employed in the coasting trade or fisheries, which are entitled to be enrolled and licensed as such, and to enjoy all the privileges, in their particular employment, conferred by law on vessels of the United States. (Act of February 18, 1793, 1 Stat. L., 305.)

"'3. Ships built in the United States, but owned wholly or in part by foreigners, which are entitled to be recorded, but not in general to be registered or enrolled and licensed. (Act of December 31, 1792, *ubi supra*.)

"'4. *Ships not built in the United States, but owned by citizens thereof, of which more in the sequel.*

"'5. Ships built out of the United States, and not owned by citizens thereof.

"'6. Special provisions exist in regard to the steamboats belonging to companies engaged in the transportation of ocean mails, as well as in regard to those navigating the bays and rivers of the country, which provisions relax the registry or enrollment laws, so as to admit ownership, under certain regulations, of persons not citizens of the United States.

"'The registry and enrollment statutes of the United States are in imitation of those of Great Britain, *in pari materia*, and for the same objects, namely, to promote the construction and ownership of ships in the country, and to facilitate the execution of local or public law. They are classified with reference to the business they may pursue; their character is authenticated, and they enjoy various advantages from which other vessels are wholly excluded, or to which these are partially admitted, according to the interests and policy of the Government. (Abbott on Shipping, p. 158.)

"'It is with vessels of the fourth of the above classes that we have more immediate concern.

"'It is observable, in the first place, that there is nothing in the statutes to require a vessel to be registered or enrolled. She is entitled to registry or enrollment under certain circumstances, and, receiving it, she thereupon is admitted to certain duties and obligations; *but if*

*owned by a citizen of the United States, she is American property, and possessed of all the general rights of any property of an American.*

"'Secondly, the registry or enrollment or other custom-house document, such as sea-letter, is *prima facie* evidence only as to the ownership of a ship in some cases, but conclusive in none. The law even concedes the possibility of the registry or enrollment existing in the name of one person, whilst the property is really in another. Property in a ship is a matter *in pais*, to be proved as fact by competent testimony like any other fact. (U. S. *v.* Pirates, 5 Wheat., 187, 199; U. S. *v.* Amedy, 11 *ibid.*, 409; U. S. *v.* Jones, 3 Wash. C. C. R., 209; Taggart *v.* Loring, 16 Mass., 336; Wendover *v.* Hogeboom, 7 Johnson, 308; Bass *v.* Steele, 3 Wash. C. C. R., 381; Leonard *v.* Huntington, 15 Johnson, 298; Ligon *v.* New Orleans Navigation Company, 7 Martin's R. (N. S.), 678; Brooks *v.* Bondsey, 17 Pickering, 441.) * * *

"'This Government has not, as yet, followed the example of that of Great Britain so far as to admit foreign-built vessels to registry, but such vessels may be lawfully owned by Americans.

"'Upon full consideration, therefore, of all the relations of the subject, there remains no doubt in my mind as to the right of a citizen of the United States to purchase a foreign ship of a belligerent power, and this anywhere, at home or abroad, in a belligerent port or a neutral port, or even upon the high seas, provided the purchase be made *bona fide*, and the property be passed absolutely and without reserve; and the ship so purchased becomes entitled to bear the flag and receive the protection of the United States.'

"The question was again referred to the Department of Justice in 1872, and on January 5, 1872, the views of Mr. Cushing were affirmed by Mr. Akerman, Attorney-General, adopting a very able report made to him on the topic by Mr. Beaman, examiner of claims. (This report is given above.) On June 19, 1880 (16 Op., 533), the same conclusion was stated by Mr. Devens, then Attorney-General, in an opinion from which the following passages are extracted:

"'The provisions of the navigation laws are commercial in their character, and intended mainly for the protection of American commerce and property upon the high seas. The vessel in question is a British-built vessel, had a British register, and upon the facts as they appear before me has now been sold to an American citizen and is his property. By the sale to an American citizen she has forfeited her British registry, as I understand the British law upon that subject.

"'The inquiry is, therefore, Is a foreign-built vessel, owned entirely by American citizens and having no foreign registry, entitled to carry the American flag?

"'*I am of opinion that such vessel is entitled to carry the American flag, and in this way to assert her own nationality and her claim upon the American Government for protection.*

"'The haste in which I am required to answer this question prevents me from entering into any reasoning on the subject. I refer, however, to an opinion of Attorney-General Cushing upon the subject (6 Op., 638), and also to an opinion of Mr. Beaman, of this Department, approved by Attorney-General Akerman January 5, 1872.'"

[Here follow extracts from Mr. Evarts' instructions to Mr. Osborne, and also from other instructions above quoted.]

"The Consular Regulations issued by this Department in 1874, section 225, cited above by Mr. Evarts, affirm broadly that 'the right of American citizens to acquire property in foreign ships has been held to be a neu.

tral right, independent of statutory law, and such property is no more or less entitled to protection by the United States than any other property of an American citizen.' This is qualified by section 226; but section 225 without this qualification is reissued in the edition of the Consular Regulations of 1881. In this edition the following new sections appear:

"'339. The existing general regulations of the Treasury Department under the customs and navigation laws (Customs Regulations, 1874) recognize the right of property in vessels of this character, and declare them to be entitled to the protection of the authorities and to the flag of the United States, although no register, enrollment, license, or other marine document prescribed by the laws of the United States can lawfully be issued to such vessels whether they are American or foreign built. The former practice of issuing sea-letters in the case of the purchase abroad of American or foreign vessels by citizens of the United States is no longer authorized, and will not be permitted.

"'340. To enable, however, the owners of a vessel so situated to protect their rights, if molested or questioned, a consular officer, though forbidden by law to grant any marine document or certificate of ownership, may lawfully make record of the bill of sale in his office, authenticate its execution, and deliver to the purchaser a certificate to that effect, certifying also that the owner is a citizen of the United States. Before granting such certificate, the consular officer will require the tonnage of the vessel to be duly ascertained in pursuance of law, and insert the same in the description of the vessel in his certificate. (See Form No. 35.) These facts thus authenticated, if the transfer is in good faith, entitle the vessel to protection as the lawful property of a citizen of the United States; and the authentication of the bill of sale and of citizenship will be *prima facie* proof of such good faith.

"'344. The privilege of carrying the flag of the United States is under the regulation of Congress, and it may have been the intention of that body that it should be used only by regularly-documented vessels. No such intention, however, is found in any statute. And as a citizen is not prohibited from purchasing and employing abroad a foreign ship, it is regarded as reasonable and proper that he should be permitted to fly the flag of his country as an indication of ownership, and for the due protection of his property. The practice of carrying the flag by such vessels is now established. The right to do so will not be questioned, and it is probable that it would be respected by the courts.'

"By a series of treaties the international authority of sea-letters and of passports is recognized. (These treaties are referred to *infra* in detail.) It must be remembered that those treaties are not only, from their nature, declaratory of international law, but are as much a part of the supreme municipal law of the United States as are its statutes. And it also must be remembered that the term 'sea-letter,' as used in these treaties, was accepted, so far as the United States was concerned, in the sense, which with us it always bore, of a passport to a vessel owned by citizens of the United States, irrespective of the question of registry. * * *

"Keeping in mind the section of the Revised Statutes above quoted, and the construction assigned to it, as above stated, not only in this Department, but in the Department of Justice, I have no hesitation in saying that vessels owned by citizens of the United States, but foreign built, are entitled to carry the flag of the United States, and to obtain, when such vessels are purchased abroad, the certificate speci-

fied in section 340 of the Consular Regulations above quoted. Vessels of this class, it is true, cannot have in our ports the privileges given by statute to registered vessels; but there is no reason why they should not engage in foreign trade, and when in this trade carry the flag and enjoy the protection of the United States. It was under sea-letters or similar letters, based not on our registration laws but on the principle of the law of nations, that ships owned by citizens of a country are entitled to the flag and protection of that country, that a large part of the carrying trade of the world was done, during the Napoleonic wars, under the flag of the United States, nor was the rightfulness of this title and this protection ever questioned by England during those bitter and terrible struggles, when she questioned almost every other maritime right we possessed. The English courts, as well as the courts of the continent of Europe, united in the principle, since then asserted by us on more than one important occasion, that while municipal laws expanding or contracting the law of nations, bind municipally, they do not bind internationally, and that while a nation may municipally impose peculiarly stringent rules on its own subjects, it does not, so far as concerns its own liability, bind its subjects to observe those rules in their dealings with foreigners or with foreign states. But it is not necessary to invoke this principle for the determination of the present issue. I hold that even by our own legislation, documents of the character specified in section 340 of the Consular Regulations, and in section 94 of the Treasury regulations, can be granted to vessels owned by citizens of the United States entitling them to fly the United States flag, and to receive the protection of the United States. And I see no reason, under our present legislation, why, in case of the United States being a neutral during a war between maritime powers, this Department should not resume the practice of issuing sea-letters to foreign built ships owned by citizens of the United States; though such sea-letters might not confer on the vessels holding them any immunities beyond those conferred in similar cases at present by consular or customs certificates of sale."

Opinion of Mr. Wharton, Solicitor of Department of State and Examiner of Claims, Nov. 30, 1885. See *infra*, App., § 410.

*Extracts from treaties between the United States and various nations, as to national character and documentation of vessels.*

ALGIERS.

(1795.)

ART. VIII. Any citizen of the United States of North America, having bought any prize condemned by the Algerines, shall not be again captured by the cruisers of the Regency then at sea, although they have not a passport; a certificate from the consul resident being deemed sufficient until such time [as] they can procure such passport.

(1815.)

ART. VII. Proper passports shall immediately be given to the vessels of both the contracting parties, on condition that the vessels-of-war belonging to the Regency of Algiers, on meeting with merchant vessels belonging to the citizens of the United States of America, shall not be permitted to visit them with more than two persons besides the rowers; these only shall be permitted to go on board without first obtaining leave from the commander of said vessel, who shall compare the passport, and immediately permit said vessel to proceed on her voyage; and should any of the subjects of Algiers insult or molest the commander or any other person on board a

vessel so visited, or plunder any of the property contained in her, on complaint being made by the consul of the United States residing in Algiers, and on his producing sufficient proof to substantiate the fact, the commander or rais of said Algerine ship or vessel of war, as well as the offenders, shall be punished in the most exemplary manner.

All vessels-of-war belonging to the United States of America, on meeting a cruiser belonging to the Regency of Algiers, on having seen her passports and certificates from the consul of the United States residing in Algiers, shall permit her to proceed on her cruise unmolested and without detention. No passport shall be granted by either party to any vessels but such as are absolutely the property of citizens or subjects of the said contracting parties, on any pretense whatever.

In the treaty of 1816 the same clause is repeated. This treaty was terminated by French conquest, 1831; *supra*, § 137*a*.

ARGENTINE CONFEDERATION.

(1853.)

ART. VII. The contracting parties agree to consider and treat as vessels of the United States and of the Argentine Confederation all those which, being furnished by the competent authority with a regular passport or sea-letter, shall, under the then existing laws and regulations of either of the two Governments, be recognized fully and *bona fide* as national vessels by that country to which they respectively belong.

BELGIUM.

(1858.)

ART. X. The high contracting parties agree to consider and to treat as Belgian vessels, and as vessels of the United States, all those which, being provided by the competent authority with a passport, sea-letter, or any other sufficient document, shall be recognized, conformably with existing laws, as national vessels in the country to which they respectively belong.

Repeated in Art. IX of treaty of 1875.

BOLIVIA.

(1858.)

ART. V. For the better understanding of the preceding article, and taking into consideration the actual state of the commercial marine of the Republic of Bolivia, it is stipulated and agreed that all vessels belonging exclusively to a citizen or citizens of said Republic, and whose captain is also a citizen of the same, though the construction or the crew are or may be foreign, shall be considered, for all the objects of this treaty, as a Bolivian vessel.

ART. XXII. To avoid all kind of vexation and abuse in the examination of the papers relating to the ownership of the vessels belonging to the citizens of the two contactiug parties, they agree that, in case one of them should be engaged in war, the ships and vessels belonging to the citizens of the other must be furnished with sea-letters or passports, expressing the name, property, and bulk of the ships, as also the name and place of habitation of the master and commander of said vessel, in order that it may thereby appear that said ship truly belongs to the citizens of one of the parties; they likewise agree that such ships being laden, besides the said sea-letters or passports, shall also be provided with certificates, containing the several particulars of the cargo, and the place whence the ship sailed, so that it may be known whether any forbidden or contraband goods be on board the same; which certificates shall be made out by the officers of the place whence the ship sailed in the accustomed form;

without such requisites said vessels may be detained, to be adjudged by the competent tribunal, and may be declared legal prize, unless the said defect shall prove to be owing to accident, and supplied by testimony entirely equivalent.

BRAZIL.

(1828.)

ART. IV (final clause). The Government of the United States, however, considering the present state of the navigation of Brazil, agrees that a vessel shall be considered as Brazilian when the proprietor and captain are subjects of Brazil and the papers are in legal form.

ART. XXI. To avoid all kind of vexation and abuse in the examination of the papers relating to the ownership of the vessels belonging to the citizens and subjects of the two contracting parties, they have agreed, and do agree, that in case one of them shall be engaged in war, the ships and vessels belonging to the citizens or subjects of the other must be furnished with sea-letters or passports, expressing the name, property, and bulk of the ship, as also the name and place of habitation of the master or commander of said vessel, in order that it may thereby appear that the ship really and truly belongs to the citizens or subjects of one of the parties; they have likewise agreed, that such ships being laden, besides the sea-letters or passports, shall also be provided with certificates containing the several particulars of the cargo, and the place whence the ship sailed, so that it may be known whether any forbidden or contraband goods be on board the same; which certificates shall be made out by the officers of the place whence the ship sailed, in the accustomed form; without such requisites said vessel may be detained, to be adjudged by the competent tribunal, and may be declared legal prize, unless the said defect shall be proved to be owing to accident, and be satisfied or supplied by testimony entirely equivalent.

This treaty terminated Dec. 12, 1841, by notice given by Brazil. See *supra*, §§ 137*a*, 143.

CHILI.

(1832.)

ART. XIX. To avoid all kind of vexation and abuse in the examination of the papers relating to the ownership of the vessels belonging to the citizens of the two contracting parties, they have agreed, and do agree, that in case one of them shall be engaged in war, the ships and vessels belonging to the citizens of the other must be furnished with sea-letters or passports, expressing the name, property, and bulk of the ship, as also the name and place of habitation of the master or commander of of said vessel, in order that it may thereby appear that the ship really and truly belongs to the citizens of one of the parties; they have likewise agreed that, such ships being laden, besides the sea-letters or passports, shall also be provided with certificates containing the several particulars of the cargo, and the place whence the ship sailed, so that it may be known whether any forbidden or contraband goods be on board the same; which certificates shall be made out by the officers of the place whence the ship sailed, in the accustomed form; without which requisites said vessel may be detained, to be adjudged by the competent tribunal, and may be declared legal prize, unless the said defect shall be proved to be owing to accident, and be satisfied or supplied by testimony entirely equivalent.

This treaty terminated Jan. 20, 1850. See *supra*, § 137*a*.

COLOMBIA.

(1824.)

ART. XIX. To avoid all kind of vexation and abuse in the examination of the papers relating to the ownership of the vessels belonging to the citizens of the two

contracting parties, they have agreed, and do agree, that in case one of them should be engaged in war, the ships and vessels belonging to the citizens of the other must be furnished with sea-letters or passports, expressing the name, property, and bulk of the ship, as also the name and place of habitation of the master or commander of said vessel, in order that it may thereby appear that the ship really and truly belongs to the citizens of one of the parties; they have likewise agreed that such ships being laden, besides the said sea-letters or passports, shall also be provided with certificates containing the several particulars of the cargo, and the place whence the ship sailed, so that it may be known whether any forbidden or contraband goods be on board the same; which certificates shall be made out by the officers of the place whence the ship sailed in the accustomed form; without which requisites said vessel may be detained to be adjudged by the competent tribunal, and may be declared legal prize, unless the said defect shall be satisfied or supplied by testimony entirely equivalent.

This treaty terminated by limitation, Oct. 3, 1836. See *supra*, §§ 137*a*, 145.

DOMINICAN REPUBLIC.

(1867.)

ART. VIII. For the better understanding of the preceding stipulations, it has been agreed that every vessel belonging exclusively to a citizen or citizens of the Dominican Republic, and whose captain is also a citizen of the same, such vessel having also complied with all the other requisites established by law to acquire such national character, though the construction and crew are or may be foreign, shall be considered, for all the objects of this treaty, as a Dominican vessel.

ART. XVI. In time of war the merchant ships belonging to the citizens of either of the contracting parties, which shall be bound to a port of the enemy of one of the parties, and concerning whose voyage and the articles of their cargo there shall be just grounds of suspicion, shall be obliged to exhibit, as well upon the high seas as in the ports or roads, not only their passports, but likewise their certificates, showing that their goods are not of the quality of those which are specified to be contraband in the thirteenth article of the present convention.

ECUADOR.

(1839.)

ART. V. For the better understanding of the preceding article, and taking into consideration the actual state of the commercial marine of Ecuador, it has been stipulated and agreed that all vessels belonging exclusively to a citizen or citizens of said Republic, and whose captain is also a citizen of the same, though the construction or the crew are or may be foreign, shall be considered, for all the objects of this treaty, as an Ecuadorian vessel.

ART. XXII. To avoid all kind of vexation and abuse in the examination of the papers relating to the ownership of the vessels belonging to the citizens of the two contracting parties, they have agreed, and do agree, that in case one of them should be engaged in war, the ships and vessels belonging to the citizens of the other must be furnished with sea-letters or passports, expressing the name, property, and bulk of the ships; as also the name and place of habitation of the master and commander of said vessel, in order that it may thereby appear that said ship truly belongs to the citizens of one of the parties. They have likewise agreed that such ships, being laden, besides the said sea-letters or passports, shall also be provided with certificates containing the several particulars of the cargo, and the place whence the ship sailed, so that it may be known whether any forbidden or contraband goods be on board the same; which certificates shall be made out by the officers of the place whence the ship sailed, in the accustomed form; without such requisites said vessels may be detained,

to be adjudged by the competent tribunal, and may be declared legal prize, unless the said defect shall be proved to be owing to accident, and satisfied and supplied by testimony entirely equivalent.

FRANCE.

(1778.)

ART. XXV. To the end that all manner of dissensions and quarrels may be avoided and prevented, on one side and the other, it is agreed that in case either of the parties hereto should be engaged in war, the ships and vessels belonging to the subjects or people of the other ally must be furnished with sea-letters or passports, expressing the name, property, and bulk of the ship, as also the name and place of habitation of the master or commander of the said ship, that it may appear thereby that the ship really and truly belongs to the subjects of one of the parties, which passport shall be made out and granted according to the form annexed to this treaty; they shall likewise be recalled every year, that is, if the ship happens to return home within the space of a year. It is likewise agreed that such ships being laden are to be provided not only with passports as above mentioned, but also with certificates, containing the several particulars of the cargo, the place whence the ship sailed, and whither she is bound, that so it may be known whether any forbidden or contraband goods be on board the same; which certificate shall be made out by the officers of the place whence the ship set sail, in the accustomed form; and if any one shall think it fit or advisable to express in the said certificates the person to whom the goods on board belong, he may freely do so.

(1800.)

ART. XVI. The merchant ships belonging to the citizens of either of the contracting parties, which shall be bound to a port of the enemy of one of the parties, and concerning whose voyage and the articles of their cargo there shall be just grounds of suspicion, shall be obliged to exhibit, as well upon the high seas as in the ports or roads, not only their passports, but likewise their certificates, showing that their goods are not of the quality of those which are specified to be contraband in the thirteenth article of the present convention.

As to the termination of these treaties, see *supra*, §§ 137*a*, 148 *ff*, 248.

GUATEMALA.

(1849.)

ART. XXI. To avoid all kind of vexation and abuse in the examination of the papers relating to the ownership of the vessels belonging to the citizens of the two contracting parties, they have agreed, and do agree, that in case one of them should be engaged in war, the ships and vessels belonging to the citizens of the other must be furnished with sea-letters or passports expressing the name, property, and bulk of the ship, as also the name and place of habitation of the master or commander of said vessel, in order that it may thereby appear that the ship really and truly belongs to the citizens of one of the parties. They have likewise agreed that such ships, being laden, besides the said sea-letters or passports, shall also be provided with certificates containing the several particulars of the cargo and the place whence the ship sailed, so that it may be known whether any forbidden or contraband goods be on board the same; which certificates shall be made out by the officers of the place whence the ship sailed, in the accustomed form; without which requisites said vessel may be detained to be adjudged by the competent tribunal, and may be declared legal prize, unless the said defect shall be satisfied or supplied by testimony entirely equivalent.

This treaty terminated Nov. 4, 1874; see *supra*, § 137*a*.

HANOVER.

(1840.)

ART. II. The privileges secured by the present article to the vessels of the respective high contracting parties shall only extend to such as are built within their respective territories, or lawfully condemned as prize of war, or adjudged to be forfeited for a breach of the municipal laws of either of the parties, and belonging wholly to their citizens or subjects respectively, and of which the master, officers, and two-thirds of the crew shall consist of the citizens or subjects of the country to which the vessel belongs.

(1846.)

ART. V. The privileges secured by the present treaty to the respective vessels of the high contracting parties shall only extend to such as are built within their respective territories, or lawfully condemned as prize of war, or adjudged to be forfeited for a breach of the municipal laws of either of the high contracting parties, and belonging wholly to their citizens or subjects.

It is further stipulated that vessels of the Kingdom of Hanover may select their crews from any of the states of the Germanic Confederation, provided that the master of each be a subject of the Kingdom of Hanover.

Hanover was absorbed in Germany in 1866. See *supra*, § 137*a*.

HANSEATIC REPUBLICS.

(1827.)

ART. IV. In consideration of the limited extent of the territories of the Republics of Lubeck, Bremen, and Hamburg, and of the intimate connection of trade and navigation subsisting between these Republics, it is hereby stipulated and agreed, that any vessel which shall be owned exclusively by a citizen or citizens of any or either of them, and of which the master shall also be a citizen of any or either of them, and provided three-fourths of the crew shall be citizens or subjects of any or either of the said Republics, or of any or either of the states of the Confederation of Germany, such vessel, so owned and navigated, shall, for all the purposes of this convention, be taken to be and considered as a vessel belonging to Lubeck, Bremen, or Hamburg.

See, as to absorption in Germany, *supra*, § 137*a*.

HAYTI.

(1864.)

ART. XXIII. To avoid all kind of vexation and abuse in the examination of the papers relating to the ownership of the vessels belonging to the citizens of the contracting parties, it is hereby agreed that when one party shall be engaged in war, and the other party shall be neutral, the vessels of the neutral party shall be furnished with passports, that it may appear thereby that they really belong to citizens of the neutral party. These passports shall be valid for any number of voyages, but shall be renewed every year.

If the vessels are laden, in addition to the passports above named they shall be provided with certificates, in due form, made out by the officers of the place whence they sailed, so that it may be known whether they carry any contraband goods. And if it shall not appear from the said certificates that there are contraband goods on board, the vessels shall be permitted to proceed on their voyage. If it shall appear from the certificates that there are contraband goods on board any such vessel, and the commander of the same shall offer to deliver them up, that offer shall be accepted and a receipt for the same shall be given, and the vessel shall be at liberty to pursue her

voyage unless the quantity of contraband goods be greater than can be conveniently received on board the ship-of-war or privateer, in which case, as in all other cases of just detention, the vessel shall be carried to the nearest safe and convenient port for the delivery of the same.

In case any vessel shall not be furnished with such passport or certificates as are above required for the same, such case may be examined by a proper judge or tribunal; and if it shall appear from other documents or proofs, admissible by the usage of nations, that the vessel belongs to citizens or subjects of the neutral party, it shall not be confiscated, but shall be released with her cargo (contraband goods excepted), and be permitted to proceed on her voyage.

ITALY.

(1871.)

ART. XVII. All vessels sailing under the flag of the United States, and furnished with such papers as their laws require, shall be regarded in Italy as vessels of the United States, and reciprocally, all vessels sailing under the flag of Italy, and furnished with the papers which the laws of Italy require, shall be regarded in the United States as Italian vessels.

MECKLENBURG-SCHWERIN.

(1847.)

ART. V. The privileges secured by the present treaty to the respective vessels of the high contracting parties shall only extend to such as are built within their respective territories, or lawfully condemned as prizes of war, or adjudged to be forfeited for a breach of the municipal laws of either of the high contracting parties, and belonging wholly to their subjects or citizens.

It is further stipulated that vessels of the Grand Duchy of Mecklenburg-Schwerin may select their crews from any of the states of the Germanic Confederation, provided that the master of each be a subject of the Grand Duchy of Mecklenburg-Schwerin.

As to absorption in Germany, see *supra*, § 137*a*.

MEXICO.

(1831.)

ART. XXIII. To avoid all kinds of vexation and abuse in the examination of the papers relating to the ownership of vessels belonging to the citizens of the two contracting parties, they have agreed, and do agree, that in case one of them should be engaged in war, the vessels belonging to the citizens of the other must be furnished with sea-letters or passports, expressing the name, property, and bulk of the vessel, and also the name and place of habitation of the master or commander of said vessel, in order that it may thereby appear that the said vessel really and truly belongs to the citizens of one of the contracting parties; they have likewise agreed that such vessels, being laden, besides the said sea-letters or passports, shall also be provided with certificates containing the several particulars of the cargo and the place whence the vessel sailed, so that it may be known whether any forbidden or contraband goods be on board the same; which certificate shall be made out by the officers of the place whence the vessel sailed, in the accustomed form; without which requisites the said vessel may be detained, to be adjudged by the competent tribunal, and may be declared legal prize, unless the said defect shall be satisfied or supplied by testimony entirely equivalent to the satisfaction of the competent tribunal.

This treaty terminated Nov. 30, 1881. See *supra*, § 137*a*.

MOROCCO.

(1836.)

ART. IV. A signal, or pass, shall be given to all vessels belonging to both parties, by which they are to be known when they meet at sea; and if the commander of a ship-of-war of either party shall have other ships under his convoy, the declaration of the commander shall alone be sufficient to exempt any of them from examination.

NETHERLANDS.

(1782.)

ART. XXV. To the end that all dissension and quarrel may be avoided and prevented, it has been agreed, that in case that one of the two parties happens to be at war, the vessels belonging to the subjects or inhabitants of the other ally shall be provided with sea-letters or passports, expressing the name, the property, and the burden of the vessel, as also the name and the place of abode of the master or commander of the said vessel, to the end that thereby it may appear that the vessel really and truly belongs to subjects or inhabitants of one of the parties; which passports shall be drawn and distributed according to the form annexed to this treaty; each time that the vessel shall return she should have such her passport renewed, or at least they ought not to be of more ancient date than two years before the vessel has been returned to her own country.

It has been also agreed that such vessels, being loaded, ought to be provided, not only with the said passports or sea-letters, but also with a general passport, or with particular passports or manifests, or other public documents, which are ordinarily given to vessels outward bound in the ports from whence the vessels have set sail in the last place, containing a specification of the cargo, of the place from whence the vessel departed, and of that of her destination, or, instead of all these, with certificates from the magistrates or governors of cities, places, and colonies from whence the vessel came, given in the usual form, to the end that it may be known whether there are any effects prohibited or contraband, on board the vessels, and whether they are destined to be carried to an enemy's country or not; and in case any one judges proper to express in the said documents the persons to whom the effects on board belong he may do it freely, without, however, being bound to do it; and the omission of such expression cannot and ought not to cause a confiscation.

As to how far this treaty continues operative see Mr. Fish, Sec. of State, to Mr. De Westenberg, Apr. 9, 1873, quoted *supra*, § 137; and see also *supra*, § 137*a*. *Cf.* comments of Judge Story in the Amiable Isabella, 6 Wheat., 74.

(1839.)

ART. IV. The contracting parties agree to consider and treat as vessels of the United States and of the Netherlands all such as, being furnished by the competent authority with a passport or sea-letter, shall, under the then existing laws and regulations, be recognized as national vessels by the country to which they respectively belong.

NEW GRANADA.

(1846.)

ART. XXII. To avoid all kind of vexation and abuse in the examination of the papers relating to the ownership of the vessels belonging to the citizens of the two contracting parties, they have agreed, and do hereby agree, that in case one of them should be engaged in war, the ships and vessels belonging to the citizens of the other must be furnished with sea-letters or passports, expressing the name, property, and bulk of the ship, as also the name and place of habitation of the master and commander of

the said vessel, in order that it may thereby appear that the ship really and truly belongs to the citizens of one of the parties; they have likewise agreed that when such ships have a cargo, they shall also be provided, besides the said sea-letters or passports, with certificates containing the several particulars of the cargo and the place whence the ship sailed, so that it may be known whether any forbidden or contraband goods are on board the same; which certificates shall be made out by the officers of the place whence the ship sailed, in the accustomed form; without which requisites said vessel may be detained, to be adjudged by the competent tribunal, and may be declared lawful prize, unless the said defect shall be proved to be owing to accident and shall be satisfied or supplied by testimony entirely equivalent.

See *supra*, § 145.

OTTOMAN EMPIRE.

(1862.)

ART. X. All vessels which, according to the laws of the United States, are to be deemed vessels of the United States, and all vessels which, according to Ottoman laws, are to be deemed Ottoman vessels, shall, for the purposes of this treaty, be deemed vessels of the United States and Ottoman vessels respectively.

See as to this treaty, *supra*, § 165.

PARAGUAY.

(1859.)

ART. VII. All vessels which, according to the laws of the United States of America, are to be deemed vessels of the United States of America, and all vessels which, according to the laws of Paraguay, are to be deemed Paraguayan vessels, shall, for the purposes of this treaty, be deemed vessels of the United States of America and Paraguayan vessels, respectively.

PERU.

(1870.)

ART. XXV. Both contracting parties likewise agree that when one of them shall be engaged in war the vessels of the other must be furnished with sea-letters, patents, or passports, in which shall be expressed the name, burden of the vessel, and the name and place of residence of the owner and master, or captain thereof, in order that it may appear that the vessel really and truly belongs to citizens of the said other party. It is also agreed that such vessel, being laden, besides the sea-letters, patents, or passports, shall be provided with manifests or certificates containing the particulars of the cargo, and the place where it was taken on board, so that it may be known whether any part of the same consists of contraband or prohibited articles; which certificate shall be made out in the accustomed form by the authorities of the port whence the vessel sailed; without which requisites the vessel may be detained, to be adjudged by the competent tribunals, and may be declared good and legal prize, unless it shall be proved that the said defect or omission was owning to accident, or unless it shall be satisfied or supplied by testimony equivalent in the opinion of the said tribunals, for which purpose there shall be allowed a reasonable length of time to procure and present it.

This treaty terminated March 31, 1886; see *supra*, § 137*a*.

PRUSSIA.

(1785.)

ART. XIV. And in the same case where one of the parties is engaged in war with another power, that the vessels of the neutral party may be readily and certainly

known, it is agreed that they shall be provided with sea-letters or passports, which shall express the name, the property, and burden of the vessel, as also the name and dwelling of the master; which passports shall be made out in good and due forms (to be settled by conventions between the parties whenever occasion shall require), shall be renewed as often as the vessel shall return into port, and shall be exhibited whensoever required, as well in the open sea as in port. But if the said vessel be under convoy of one or more vessels-of-war belonging to the neutral party, the simple declaration of the officer commanding the convoy, that the said vessel belongs to the party of which he is, shall be considered as establishing the fact, and shall relieve both parties from the trouble of further examination.

This treaty terminated Oct., 1796, by its own limitation. See *supra*, § 137*a*.

(1799.)

ART. XIV. To insure to the vessels of the two contracting parties the advantage of being readily and certainly known in time of war, it is agreed that they shall be provided with the sea-letters and documents hereafter specified:

1. A passport, expressing the name, the property, and the burden of the vessel, as also the name and dwelling of the master, which passport shall be made out in good and due form, shall be renewed as often as the vessel shall return into port, and shall be exhibited whensoever required, as well in the open sea as in port. But if the vessel be under convoy of one or more vessels-of-war, belonging to the neutral party, the simple declaration of the officer commanding the convoy, that the said vessel belongs to the party of which he is, shall be considered as establishing the fact, and shall relieve both parties from the trouble of further examination.

As to this clause, see comments by Judge Story in the Amiable Isabella, 6 Wheat., 72.

As their production ought to be exacted only when one of the contracting parties shall be at war, and as their exhibition ought to have no other object than to prove the neutrality of the vessel, its cargo, and company, they shall not be deemed absolutely necessary on board such vessels belonging to the neutral party as shall have sailed from its ports before or within three months after the Government shall have been informed of the state of war in which the belligerent party shall be engaged. In the interval, in default of these specific documents, the neutrality of the vessel may be established by such other evidence as the tribunals authorized to judge of the case may deem sufficient.

Terminated by limitation June 22, 1810; see *supra*, §§ 137*a*, 149.

SAN SALVADOR.

(1870.)

ART. XXII. To avoid all kinds of vexation and abuse in the examination of the papers relating to the ownership of the vessels belonging to the citizens of the two contracting parties, they have agreed, and do hereby agree, that in case one of them should be engaged in war, the ships and vessels belonging to the citizens of the other must be furnished with sea-letters or passports expressing the name, property, and bulk of the ship, as also the name and place of habitation of the master and commander of the said vessel, in order that it may thereby appear that the ship really and truly belongs to the citizens of one of the parties. They have likewise agreed that when such ships have a cargo, they shall also be provided, besides the said sea-letters or passports, with certificates containing the several particulars of the cargo and the place whence the ship sailed, so that it may be known whether any forbidden or contraband goods are on board the same; which certificates shall be made out by the officers of the place whence the ship sailed, in the accustomed form; without which requisites said

vessel may be detained to be adjudged by the competent tribunal, and may be declared lawful prize, unless the said defect shall be proved to be owing to accident, and shall be satisfied or supplied by testimony entirely equivalent.

The same provision is in treaty of 1850.

SPAIN.

(1795.)

ART. XVII. To the end that all manner of dissensions and quarrels may be avoided and prevented on one side and the other, it is agreed, that in case either of the parties hereto should be engaged in a war, the ships and vessels belonging to the subjects or people of the other party must be furnished with sea-letters or passports, expressing the name, property, and bulk of the ship, as also the name and place of habitation of the master or commander of the said ship, that it may appear thereby that the ship really and truly belongs to the subjects of one of the parties, which passport shall be made out and granted according to the form annexed to this treaty. They shall likewise be recalled every year, that is, if the ship happens to return home within the space of a year.

It is likewise agreed that such ships, being laden, are to be provided not only with passports as above mentioned, but also with certificates, containing the several particulars of the cargo, the place whence the ship sailed, that so it may be known whether any forbidden or contraband goods be on board the same; which certificates shall be made out by the officers of the place whence the ship sailed in the accustomed form. And if any one shall think it fit or advisable to express in the said certificates the person to whom the goods on board belong, he may freely do so: Without which requisites they may be sent to one of the ports of the other contracting party, and adjudged by the competent tribunal, according to what is above set forth, that all the circumstances of this omission having been well examined, they shall be adjudged to be legal prizes, unless they shall give legal satisfaction of their property by testimony entirely equivalent.

In the Amiable Isabella, 6 Wheat., 1, it was held that the first clause of the above treaty is inoperative, from the failure of the treaty to annex the form of passport.

A note as to this omission is given in its place, *supra*, § 161.

SWEDEN.

(1783.)

ART. XI. In order to avoid and prevent on both sides all disputes and discord, it is agreed that, in case one of the parties shall be engaged in a war, the ships and vessels belonging to the subjects or inhabitants of the other shall be furnished with sea-letters or passports, expressing the name, property, and port of the vessel, and also the same and place of abode of the master or commander of the said vessel, in order that it may thereby appear that the said vessel really and truly belongs to the subjects of the one or the other party. These passports, which shall be drawn up in good and due form, shall be renewed every time the vessel returns home in the course of the year. It is also agreed that the said vessels, when loaded, shall be provided not only with sea-letters, but also with certificates containing a particular account of the cargo, the place from which the vessel sailed, and that of her destination, in order that it may be known whether they carry any of the prohibited or contraband merchandises mentioned in the 9th article of the present treaty; which certificates shall be made out by the officers of the place from which the vessel shall depart.

TWO SICILIES.

(1855.)

ART. IX. The national character of the vessels of the respective countries shall be recognized and admitted by each of the parties, according to its own laws and special rules, by means of papers granted by the competent authorities to the captains or masters. And no vessels of either of the contracting parties shall be entitled to profit by the immunities and advantages granted in the present treaty, unless they are provided with the proper papers and certificates, as required by the regulations existing in the respective countries, to establish their tonnage and their nationality.

This country has been absorbed in Italy. See *supra*, §§ 137*a*, 152.

TRIPOLI.

(1796.)

ART. IV. Proper passports are to be given to all vessels of both parties, by which they are to be known. And considering the distance between the two countries, eighteen months from the date of this treaty shall be allowed for procuring such passports. During this interval the other papers belonging to such vessels shall be sufficient for their protection.

See Article VI, treaty of 1805.

TUNIS.

(1797.)

ART. IV. On both sides sufficient passports shall be given to vessels, that they may be known and treated as friendly; and, considering the distance between the two countries, a term of eighteen months is given, within which term respect shall be paid to the said passports, without requiring the congé or document (which, at Tunis, is called testa), but after the said term the congé shall be presented.

VENEZUELA.

(1836.)

ART. V. For the better understanding of the preceding article, and taking into consideration the actual state of the commercial marine of the Republic of Venezuela, it has been stipulated and agreed that all vessels belonging exclusively to a citizen or citizens of said Republic, and whose captain is also a citizen of the same, though the construction or crew are or may be foreign, shall be considered, for all the objects of this treaty, as a Venezuelan vessel.

Repeated in Art. VIII, treaty of 1860.

ART. XXII. To avoid all kind of vexation and abuse in the examination of the papers relating to the ownership of the vessels belonging to the citizens of the two contracting parties, they have agreed, and do agree, that in case one of them should be engaged in war, the ships and vessels belonging to the citizens of the other must be furnished with sea-letters, or passports, expressing the name, property, and bulk of the ships, as also the name and place of habitation of the master or commander of said vessel, in order that it may thereby appear that said ship really and truly belongs to the citizens of one of the parties; they have likewise agreed that such ship, being laden, besides the said sea-letters, or passports, shall also be provided with certificates containing the several particulars of the cargo, and the place whence the ship sailed, so that it may be known whether any forbidden or contraband goods be on board the same; which certificates shall be made out by the officers of the place whence the

ship sailed, in the accustomed form. Without such requisites said vessels may be detained, to be adjudged by the competent tribunal, and may be declared legal prize, unless the said defect shall be proved to be owing to accident, and satisfied or supplied by testimony entirely equivalent.

This treaty terminated by notice Jan., 1851; see *supra*, §§ 137*a*, 165*a*.

(1860.)

ART. XVI. And that captures on light suspicions may be avoided, and injuries thence arising prevented, it is agreed that, when one party shall be engaged in war, and the other party be neutral, the ships of the neutral party shall be furnished with passports, that it may appear thereby that the ships really belong to the citizens of the neutral party; they shall be valid for any number of voyages, but shall be renewed every year—that is, if the ship happens to return home in the space of a year. If the ships are laden, they shall be provided, not only with the passports above mentioned, but also with certificates, so that it may be known whether they carry any contraband goods. No other paper shall be required, any usage or ordinance to the contrary notwithstanding. And if it shall not appear from the said certificates that there are contraband goods on board, the ships shall be permitted to proceed on their voyage. If it shall appear from the certificates that there are contraband goods on board any such ship, and the commander of the same shall offer to deliver them up, the offer shall be accepted, and a receipt for the same shall be given, and the ship shall be at liberty to pursue its voyage, unless the quantity of the contraband goods be greater than can conveniently be received on board the ship-of-war or privateer; in which case, as in all other cases of just detention, the ship shall be carried into the nearest safe and convenient port for the delivery of the same.

If any ship shall not be furnished with such passport or certificates as are above required for the same, such case may be examined by a proper judge or tribunal; and if it shall appear from other documents or proofs, admissible by the usage of nations, that the ship belongs to the citizens or subjects of the neutral party, it shall not be confiscated, but shall be released with her cargo (contraband goods excepted), and be permitted to proceed on her voyage.

If the master of a ship, named in the passport, should happen to die, or be removed by any other cause, and another put in his place, the ship and cargo shall, nevertheless, be equally secure, and the passport remain in full force.

This treaty terminated by notice, Oct. 22, 1870. See *supra*, § 137*a*.

The above clauses are cited, not as establishing as a principle of the law of nations that sea letters or passports are proof of a ship's nationality, but as showing that they were at the time generally recognized as having this effect.

"No sea-letter or other document certifying or proving any vessel to be the property of a citizen of the United States shall be issued, except to vessels duly registered, or enrolled and licensed as vessels of the United States, or to vessels which shall be wholly owned by citizens of the United States, and furnished with or entitled to sea-letters or other custom-house documents." [Act Mar. 20, 1810.]

Rev. Stat., § 4190.

"ART. 14. Marine documents consist of certificates of registry and enrolment, and licenses. R. S., 4312 and 4319.

"ART. 15. In addition to these, sea-letters and passports for vessels may be issued through collectors, on application, to registered vessels

engaged in the foreign trade by sea, as an additional protection and evidence of nationality. They are to be in all cases surrendered with the certificate of registry at the expiration of the voyage. R. S., 4306 and 4307.

"ART. 93. Foreign-built or denationalized vessels purchased and wholly owned by citizens of the United States, whether purchased of belligerents or neutrals during a war to which the United States are not a party, or in peace, of foreign owners, are entitled to the protection of the authorities and flag of the United States, as the property of American citizens, although no register, enrolment, license, or other marine document, prescribed by the laws of the United States, can be lawfully issued to such vessels.

"ART. 94. To enable, however, the owners of a vessel so circumstanced, to protect their rights, if molested or questioned, the collector of the customs, though forbidden by law to grant any marine document, may lawfully make record of the bill of sale in his office, authenticate its validity in form and substance, and deliver to the owner a certificate to that effect, certifying, also, that the owner is a citizen of the United States.

"These facts, thus authenticated, if the transfer was in good faith, entitle the vessel to protection as the lawful property of a citizen of the United States; and the authentication of the bill of sale and of citizenship will be *prima facie* proof of such good faith."

Treasury Regulations, 1884.

In U. S. *v.* Rogers, 3 Sumner, 342 (1838), it may be inferred from Judge Story's opinion that a ship without proper municipal papers is not an "American vessel" under the statute of March 3, 1835, Rev. Stat., § 5359, making revolt indictable. S. P. U. S. *v.* Jenkins, 1 N. Y. Leg. Obs., 344. But in U. S. *v.* Peterson, 1 Wood. and M., 305 (1846), it was held by Judge Woodbury that an indictment in such case could be sustained on proof that the vessel was owned by American citizens and sailed from an American port. And in U. S. *v.* Seagrist, 4 Blatch., 420 (1860), it was held that proof of American ownership alone was sufficient. "The objection that no documentary proof, such as a bill of sale or registry, was put in establishing the national character of the vessel, cannot avail the defendants. The master testified that she was owned in this city, by American citizens, and it was only necessary for the prosecution to prove that she was American property to support the indictment. It was not, in any way, an issue, on the trial, whether she was entitled to the privileges of an American bottom, under our revenue laws. The only fact involved was whether she was American property, and of this there can be no doubt. (3 Kent's Com., 130, 132, 150)."

Betts, J., U. S. *v.* Seagrist, 4 Blatchf., 421.

"In Marshall (p. 317) a distinction is made between a passport and a sea-letter. The former is defined to be a permission from a neutral to a master of a ship to proceed on the voyage proposed, and usually con-

tains his name and residence, the name, description, and destination of the ship, with such other matters as the practice of the place requires. This document he describes as essentially necessary for the safety of every ship. * * *

"It has been the policy of the United States, in common with other commercial nations, to encourage their own ships. Our navigation act enumerates and describes certain vessels, and emphatically denominates them ships or vessels of the United States. Their distinguishing characteristics are that they are built, owned, and commanded by citizens of this country. They are registered with the collector and are entitled to a certificate called a register. This register is of itself considered a competent document to prove the ship American, and would in most cases serve as a sufficient protection against capture. But cases occur wherein this register is not granted to vessels owned by citizens of the United States. The principal case is where the vessel is built out of the country. In such case the collector cannot grant a register; but it being proper and necessary that the owner should have some document to protect his property against the rapacity of cruisers on the ocean, and to establish his neutrality, a formula has been devised and is granted, called a certificate of ownership. With a view to the encouraging of ship-building in this country a discrimination is also made in the duties of tonnage. Ships of the United States pay at the rate of 6 cents per ton; ships built within the United States after a certain period, but belonging wholly, or in part, to foreigners, 30 cents per ton; and all other ships 50 cents a ton. Hence, under both heads of ownership and the place of building all vessels are considered, by our laws, under four distinct views: (1) Vessels of the United States. (2) Vessels built in the United States owned by foreigners. (3) Vessels built out of the United States owned by citizens. (4) Vessels built out of the United States owned by foreigners.

"Vessels of the first and third classes, being owned by citizens, are entitled to the protection of the Government. The second and fourth classes, being owned by foreigners, cannot receive any documents which would in the least protect them from capture. To encourage our own ship-building, vessels of the United States pay but a small duty of 6 cents; vessels built and owned here by foreigners, pay a duty of 30 cents; and if our citizens will go into foreign countries to build, or to purchase vessels, they are put on the same footing as foreigners, owning foreign vessels, with regard to the rate of duties, although as citizens they have a right to demand the protecting hand of the Government for their property. Hence arises the division of vessels owned by citizens into two classes, vessels of the United States or registered vessels, and vessels belonging to the citizens of the United States, certificated but not registered. The owners of the latter description of vessels, considering this certificate of ownership as a sufficient shield for neutral property, denominated it a sea-letter; and it may have obtained that appellation at the time our first navigation act was passed, which was in the year 1789, some years before the letter from the Secretary of the Treasury set forth in the bill of exceptions, was written. This term was at a subsequent period ingrafted into our statute book, as I shall presently show.

"In the year 1793, when a general war was kindled in Europe, the President of the United States, in order that our vessels might enjoy the benefits stipulated by treaties and be generally protected against the depredations of the belligerents, ordered documents to be furnished from the custom-houses to all ships and vessels belonging to citizens

of the United States. This document is denominated in the letter of the Secretary of the Treasury a sea-letter, and is the formula of the passport adopted in the treaties, and was given to certificated as well as to registered vessels. This was a mere Executive regulation unauthorized by any existing statute, and so it continued until the 1st of June, 1796, when an act was passed directing the Secretary of State to prepare a form which, when approved by the President, should be deemed the form of a passport for ships and vessels of the United States. The form adopted was the same as described in the treaties. It was so constructed in order that we might have the benefit of those treaties. The passports exhibited by the plaintiffs were issued subsequent to 1796, and, although conformable to the formulas prescribed in the treaties, they emanated from this statute. And here two remarkable circumstances occurred; the term sea-letter in the treaties was dropped in the statute, and the word passport adopted; and the passport was only authorized to be granted to registered vessels. This must have been considered as a negation of the rights of the Executive heretofore exercised of granting passports to certificated vessels. Hence, the certificate of American ownership being their only guard, this certificate was emphatically denominated their sea-letter or protection.

"The case before us occurred in the year 1798, two years after the passing of the statute authorizing the granting of passports only to registered ships. Inconveniences having been sustained from this discrimination, and certificated ships being thus deprived of so important a document, a law was passed on the 2d day of March, 1803, and directing that every unregistered ship or vessel owned by a citizen or citizens of the United States, and sailing with a sea-letter, going to any foreign country, should be furnished with a passport, prescribed in the former act, for ships and vessels of the United States. This statute is one of the only two that contain the term sea-letter, and that it is used here in the sense of a certificate of ownership cannot be doubted. A passport is to be granted to a vessel owned by a citizen sailing with a sea-letter. The passport authorized by a former statute is precisely the same with the sea-letter or passport of the treaties. If, then, by the term sea-letter in this statute, is intended the sea-letter or passport of the treaty, the provision is superfluous and idle, because it provides for what already exists; and changing the terms to the construction insisted on by the defendants, the statute would read thus: 'That every unregistered ship, sailing with a sea-letter, and owned by a citizen of the United States, shall be furnished with a sea-letter,' that is, provided with what it already possessed. The only way to escape from this absurdity is to adopt the certificate of ownership as the true and legitimate sea-letter But this is not all. Another statute was passed on the 14th day of April, 1802, where the word sea-letter is used precisely in the sense now contended for. The statute declares that 'the second section of the act to retain a further sum or drawback for the expenses incident to the allowance and payment thereof, and in lieu of stamp duties or debentures,' shall not be deemed to operate on unregistered ships or vessels owned by citizens of the United States at the time of passing the said act in those cases where such ship or vessel at that time possessed a sea-letter or other regular document, issued from a custom-house of the United States, proving such a ship or vessel to be American property. This provision is intended to operate in favor of unregistered vessels owned by citizens. And the term sea-letter is used as synonymous with a regular document issued by a custom-house of the United States to certificated vessels.

"I consider, therefore, the term sea-letter, although variously understood on former occasions, yet as now adopted, naturalized, and legitimated in our statute book, and its meaning perfectly defined, in the sense contended for by the plaintiffs. Though mentioned in certain treaties as synonymous with passports, yet by statutes subsequently created, the term passport is exclusively used, and the word sea-letter transferred and attached to a different idea. The court ought, therefore, to have decided that the legal, technical sea-letter, contemplated by the supreme legislature, and spoken of in our statutes, was the certificate of ownership granted to unregistered vessels belonging to citizens of the United States."

Sleght *v.* Hartshorne, 2 Johns. (N. Y.), 531, 543. Clinton, Senator, giving opinion of majority of court.

"The insurance was upon 'the good American ship, called the Rodman.' These words amount to a warranty that the ship was American, according to the settled construction of the phrase both in this and in the English courts. (1 Johns. Cas., 341; 2 *ibid.*, 168; 3 Bos. & Pull., 201, 506, 510, 514, 531; 6 East's Rep., 382.) A warranty that the property is American undoubtedly means that it is not only so in fact, but that it shall be clothed with the requisite evidence of its American character, for the purpose of protection, and in reference the law of nations, under the sanction of which the voyage in question was to be conducted. (1 Johns. Cas., 365; 2 *ibid.*, 148.) It was proved that the ship was owned by the plaintiff, and that he was an American citizen; and, from the case, we are to conclude that the ship had all the papers requisite for an American vessel, except an American register. The case is somewhat equivocal upon that point; but this we think to be the better construction of it. If she had not the documents required by our treaties, it ought to have been made a distinct, substantive ground of objection at the trial. The case states 'that the defendants' counsel moved for a non-suit, on the ground that the vessel was warranted by the policy to be an American vessel, and that the plaintiff had produced no proof of her being such; but that, on the contrary, it appeared, from the testimony in the cause, that she was only a sea-letter vessel, without an American register.' This was an admission that she was a sea-letter vessel, though the competent proof of that fact is not disclosed in the case, and the defendants evidently placed their motion for a non-suit on the single ground of the want of a register. If anything was wanted to show a compliance with the warranty, except the register, it ought to have been expressly so stated. The presumption must be, after verdict, and upon this case, that every objection was supplied. We are then reduced to this single point: Was the want of a register a breach of the warranty? At the time the policy was underwritten, there were two kinds of American vessels, the one registered, and the other unregistered and carrying a sea-letter, or an official certificate of ownership, and both kinds were recognized by law as American vessels, though the former was entitled to higher privileges under the laws of Congress. (6 Laws U. S., 72.) But in reference to the law of nations, and to security upon the high seas, both species of vessels were equally entitled to protection as American property. There was no use in requiring a register for any object within the purview of the warranty. The want of it did not enhance the risk. 'It is a known and established rule,' says Sir William Scott, in the case of the Vigilantia (1 Rob., 113), 'that if a vessel is navigating under the pass of a foreign

country, she is considered as bearing the national character of that nation under whose pass she sails; she makes a part of its navigation, and is in every respect liable to be considered as a vessel of that country.' What was said by Lord Alvanley in Bearing *v.* Claggett (3 Bos. & Pull., 201) is not applicable, nor does it affect this doctrine. He considered that the warranty of a ship to be American required an American register, under our navigation act and the French treaty, and that the privilege of carrying the American flag, as a safe-conduct among belligerent powers, was to be denied to all ships not sailing under a compliance with that act. The act he referred to was passed in 1792 (2 Laws U. S., 131), and declared that none but registered vessels should be deemed vessels of the United States entitled to the benefits and privileges appertaining to such vessels. He was not then apprised of the distinction between registered and unregistered vessels, and of the legislative recognition of the latter as American vessels, entitled to privileges in port as such, under the act of 1802. The act of 1792, to which he referred, seems, by its terms, to have left unregistered vessels as alien vessels, and without the protection of the United States. Whether that was or was not the condition of such vessels at that time is not now a material inquiry, since the vessel in question, at the time of the warranty, was not only American property in fact, but entitled, by her sea-letter, under our law and under the law of nations, to the immunities of the American flag. This was equivalent to what was termed by Sir William Scott a national pass, and so it was considered in the court of errors, in the case of Sleght *v.* Hartshorne (2 Johns. Rep., 531)."

Kent, Ch. J., Barker *v.* Phœnix Ins. Co., 8 Johns. Rep., 307, 319.

"There are two kinds of American vessels, registered and unregistered. The former are entitled to greater privileges within the United States than the latter; they pay less tonnage, and the goods imported in them pay less duties. The counsel for the defendant contended, in the first place, that the words of the insured are to be taken most strongly against himself, and therefore a registered vessel which is entitled to the highest privileges must be intended. This is pushing the matter too far. Where the words are doubtful they are to be taken most strongly against the speaker. But not so where they are sufficiently clear. There being two kinds of American bottoms, if I engage that a certain vessel is an American bottom, generally, my engagement is complied with if she is an American bottom of either kind, unless it can be shown that such construction involves consequences at variance with the object of the agreement. We are then to consider the object of this warranty. It was to insure to the underwriters that protection to which neutrals are entitled. Now, if this object is answered without a register, and if the use of a register is principally to obtain privileges of a domestic nature, there is no ground for asserting that the warranty contemplated a registered vessel exclusively. But if, as has been argued by the defendants, an unregistered vessel, though owned by citizens of the United States, was at the time of this insurance unprotected by the Government and deprived of those documents to which foreign nations look, as proof of neutrality, then, indeed, there will be strong reason for saying that the warranty required a registered vessel. It is necessary therefore, to examine what was the situation of a vessel sailing under a sea-letter at the date of this insurance. A good deal will depend on ascertaining with precision the nature of a sea-letter, concerning which there has been a considerable difference of opinion, occasioned princi-

pally, as it appears to me, by confounding it with a different instrument, called a certificate of ownership. It is provided by the 25th article of our treaty with France that the ships and vessels of the people of both nations shall be furnished with sea-letters or passports. From this expression it seems that a sea-letter and a passport were considered as the same. I presume that during the Revolutionary War our vessels were furnished with this document according to treaty. During the peace that succeeded, it is probable that it was omitted, as there was no danger of capture. But when war broke out again between France and England, it became a matter of importance that our vessels should be so documented as to afford them protection in their navigation. Accordingly we find that the attention of our Government was very early turned to this subject. In a circular letter from the Secretary of the Treasury to the several collectors, of the 13th of May, 1793, he mentions the necessity of furnishing 'all ships and vessels belonging to citizens of the United States with sea-letters, for their more perfect identification and security.' This letter was accompanied with sea-letters according to the form prescribed by the Government, and not materially different from that which had been used in the Revolutionary War. It is under the hand of the President and seal of the United States, countersigned by the Secretary of State, and contains the name and burden of the vessel, with the nature of her cargo, the name of her master, and the voyage on which she is bound, with permission to depart and proceed on the voyage. It contains also a declaration that oath has been made by the master, proving the vessel to be the property of citizens of the United States only. Underneath the signature of the Secretary of State is a certificate, signed by the collector of the port from whence the vessel sails, that oath has been made before him by the master that the said vessel is owned by citizens of the United States only. This certificate is addressed to all foreign kings and potentates, and prays that the said master may be received and treated with kindness and friendship, etc. This sea-letter being furnished to all vessels, registered or unregistered, belonging to citizens of the United States, afforded the same protection to both. It was a passport within the meaning of our treaties with France, Spain, Holland, etc., nor have we any reason to suppose that its efficacy was called in question by either of them. Lord Alvanley appears, therefore, to have been mistaken when he said, in the case of Baring, etc., *v.* Claggett (3 Bos. & Pull., 213), that our unregistered vessels were not protected from capture by our treaty with France. It is true by the registering act of the 31st of December, 1792, it is declared that none other than registered vessels 'should be denominated and deemed vessels of the United States entitled to the benefits and privileges appertaining to such vessels.' But those benefits and privileges were of a municipal nature, with which foreign powers had no concern. On the 1st of June, 1796, an act was passed directing the Secretary of State, with the approbation of the President, to prepare a form of passport for ships and vessels of the United States going to foreign countries. And by a supplement to this act, passed the second of March, 1803, every unregistered ship or vessel, owned by citizens of the United States and sailing with a sea-letter, going to any foreign country, is entitled to one of the passports created by the original law. Hence it has been concluded by the counsel for the defendants that unregistered vessels were unprovided with a passport during the interval between the passing of the acts of June, 1796, and March, 1803; that they carried in fact noth-

ing but a certificate of ownership, which obtained, in common parlance, the name of sea-letter, but did not operate as a passport. But in this I think they are mistaken. During all that period sea-letters (which were passports) were granted to unregistered vessels, and the passports under the act of June, 1796, were what are commonly called Mediterranean passports, rendered necessary by our treaty with the Dey of Algiers, on the 5th of September, 1795, by the fourth article of which eighteen months were allowed for furnishing the ships of the United States with passports. The sea-letters which operated as passports among the European nations are printed in the English, French, Spanish, and Dutch languages. But the Mediterranean passports are in the English language only, ornamented with an engraving and indented at the top, so that the Algerines might easily distinguish them by the eye, and by an examination of the indented part. Mr. Dallas' argument has thrown light upon the subject of passports and sea-letters. From a careful examination of the acts and papers to which he referred, I am satisfied that his view of the subject was correct. The result of all this is, that when the insurance in question was made, the brig Rosina was furnished with all the documents which an American unregistered vessel ought to have, and with all the documents necessary to protect her against the European belligerents. As to the Algerines, we were at peace with them. At any rate it is not to be supposed that danger from that quarter could have been apprehended in a voyage from New Orleans to Philadelphia, and therefore it is entitled to no consideration in the construction of the warranty. Upon the whole I am of opinion that the warranty was complied with, and therefore judgment should be entered for the plaintiff.

Tilghman, C. J., in Griffith *v.* Ins. Co., 5 Binn. (Pa.), 464, 466 *ff.* (1813).

"It is the usage of American vessels to take sea-letters in voyages to Europe, but to the West Indies and coastwise, they most generally sail with a certificate only."

Hoffman, arguendo, in Sleght *v.* Rhinelander, 1 Johns., 197.

"The title to a ship acquired by purchase passes by writing. A bill of sale is the true and proper muniment of title to a ship, and one which the maritime courts of all nations will look for, and in their ordinary practice require. In Scotland a written conveyance of property in ships has, by custom, become essential; and in England it is made absolutely necessary by statute with regard to British subjects. Possession of a ship and acts of ownership will, in this, as in other cases of property, be presumptive evidence of title, without the aid of documentary proof, and will stand good until that presumption is destroyed by contrary proof; and a sale and delivery of a ship without any bill of sale, writing, or instrument will be good at law as between the parties."

3 Kent Com., 130, citing The Sisters, 5 C. Rob., 155; 1 Mason, 139; Weston *v.* Penniman, 1 *ibid.*, 306; 2 *ibid.*, 435; Ohl *v.* Eagle Ins. Co., 4 *ibid.*, 390; Code de Commerce, art. 195. Robertson *v.* French, 4 East, 130; Sutton *v.* Buck, 2 Taunt., 302; Taggard *v.* Loring, 16 Mass., 336; Wendover *v.* Hogleboom, 7 Johns., 308; Bixby *v.* Franklin Ins. Co., 8 Pick., 86. Abbott on Ship., 113; The Amelie, 6 Wall., 18, 30; Rice *v.* McLaren, 42 Me., 157, 166; McMahon *v.* Davidson, 12 Minn., 357, 369, 370; The Active, Olcott, 286; Fontaine *v.* Beers, 19 Ala., 722.

As to policy of navigation laws, see Reeve's Hist. of Law of Shipping; 3 Kent Com. 139.

"The pass or passport, and the sea-letter (sea-brief), as Röding, in his Marine Lexicon, additionally names it, seems to be a term of doubtful and ambiguous interpretation in the law; for the sea-brief, or sea-letter, according to Marshall (p. 317), is a different document from the passport, relating, as he says, to the nature and quantity of the cargo, the place from whence it comes, and its destination; whereas the passport, according to the same authority, is more particularly intended to protect the ship and to sanction the voyage proposed; while from the author's text above it will be perceived that the pass there spoken of extends equally to the protection of ship and cargo, and is, from the reference to Röding, indiscriminately termed passport or sea-letter. In our treaties with France, Holland, and Spain the terms are used synonymously, and there relate solely to the vessel. Yet in Johns. (N. Y.) Reports, volume 1, page 192, and volume 2, page 531, where 'a vessel was warranted to sail under a sea-letter without a register, it was successfully contended that a certificate of property, which relates only to the cargo, was in its commercial import a sea-letter, when, at the time of the trial of the cause, such papers as a sea-letter and a certificate of property appear to have been distinctly known and used, the certificate of ownership to prove the property in regard to the custom-house, and the sea-letter to evince the nationality of the vessel and to protect the cargo from being detained by a belligerent. This perplexity seems to arise from acts of Congress subsequent to the above treaties, in which the term sea-letter is mostly abandoned and the word passport adopted; and in one of the only two in which the term is used, the act of the second of March, 1803, supplementary to an act providing passports for the ships and vessels of the United States, it cannot be doubted that it is not to be understood in the sense in which it is applied in the above treaties; for, by that act, vessels owned by a citizen of the United States, and sailing with sea-letters, are to be furnished with passports of the form prescribed by the act, to which this is a supplement. *Per curiam* in the above case: 'The passport authorized by the former act is precisely the same with the sea-letter or passport of the treaties. If, then, by the term sea-letter in this statute is intended the sea-letter or passport of the treaty, the provision is superfluous and idle, because it provides for what already exists. The only way to escape from this absurdity is to adopt the certificate of ownership as the true and legitimate sea-letter. Though mentioned in certain treaties as synonymous with passport, yet, by statutes subsequently created, the term passport is exclusively used, and the word sea-letter transferred and attached to a different idea.' See also an act of Congress of the 14th of April, 1802, in which the word sea-letter is used in the same sense.

"What understanding is, then, to prevail with regard to the distinct and relative meaning of the terms passport, sea-letter, and certificate of property? We are inclined to believe that the passport and sea-letter are essentially the same, intended to evidence the nationality of the vessel and protect the cargo from belligerents, while the certificate of property differs from it in deriving its importance and validity from the usage of the custom-house alone, not being prescribed by any law.

"The act of Congress of 1796 directs the Secretary of State to prepare a form of a passport for the ships and vessels of the United States. It is probable that the term passport was here intended to signify the same paper which had been spoken of in our treaties with foreign powers, and which is indiscriminately termed sea-letter or passport; for the

Secretary, in the execution of this duty, called the papers, which he forwarded to the custom-houses, sea-letters. In the act of 1803 unregistered vessels, sailing with a sea-letter, are directed to be furnished on application with a passport. The word, when used in this statute, means, as we conceive, a Mediterranean pass, a paper entirely of domestic creation, and differing essentially from those papers required to be on board by the general law of nations. The object of the law of 1803 then becomes manifest, viz, to extend to vessels foreign built, but owned in this country, the benefit of being protected under a Mediterranean passport. But the use of the same word to express in the first act a sea-letter and in the second a Mediterranean pass has created the obscurity which has prevailed upon this subject.

"We subjoin an extract from a circular of the Hon. A. J. Dallas, of February 25, 1815, then Secretary of the Treasury, to the collectors of customs of the United States, in which these documents among others are referred to, and our view of their relation to each other partly sustained:

"'1. *The certificate of registry.*—This document is created by our own laws, and belongs exclusively to vessels American built and owned, or such particular vessels as are expressly adopted by the registering act. It is an instrument which the vessel must carry, in order to entitle her to the privileges of vessels of the United States.

"'2. *The sea-letter.*—This document is an instrument of the maritime law of nations, and under the denomination of a passport, as well as of a sea-letter, treaties sometimes require it to be carried by the merchant vessels belonging to the contracting parties. It is an instrument which gives no privilege as to duties of import; but simply declares the American ownership, and recommends the vessel to the comity of nations. Vessels are under no legal obligations to carry a sea-letter; and indeed it is only necessary for neutral vessels in a time of war.

"'3. *The Mediterranean passport.*—This instrument having been described under the general denomination of "passport" in some acts of Congress has been occasionally confounded with the sea-letter which has also been denominated a passport. The form was introduced soon after the treaty with Algiers, which called for the instrument; and it is intended as a protection for American vessels against the Barbary Powers.'"

Jacobson's Sea Laws, 66; note by William Frick, the editor.

"*The passport, sea-brief, sea-letter, or pass.*—This is a certificate granted by authority of the neutral state, giving permission to the master of the ship to proceed on the voyage proposed, and declaring that while on such voyage the ship is under the protection of the neutral state. It is indispensable to the safety of a neutral ship; and no vessel is permitted to disown the national character therein ascribed to her."

Arnould's Marine Ins. (1872), 569.

"On entend par lettre marine la passe de mer."

Ortolan Regles de Mer, i, 195.

It is not competent for one sovereign to determine as to the municipal regularity or adequacy of the ship's papers issued by another sovereign. It is enough if such papers are in the shape of a protection

or passport, and emanate from the sovereign of the owners of the ship, or from one of his subalterns.

Kaltenborn, Grundsätze des praktischen Europäischen Seerechts, Berlin, 1851, §§ 45 *ff;* Lewis, Deutsche Seerecht, Leipsic, 1877, I, 14.

Wharton's Law Dict. (London, 1883), quoting 1 Marsh. on Ins., c. 9, s. 6, speaks of passports, sea briefs, and sea letters as papers "required by the law of nations to be on board neutral ships."

"If we look to the origin of the mercantile flag, it would appear to be a regulation of the municipal law of individual states, and not to be an institution of the general maritime law. The passport or sea-letter, as the case may be, is the formal voucher of the ship's national character. The passport purports to be a requisition on the part of the Government of a state to suffer the vessel to pass freely with her company, passengers, goods, and merchandise without any hindrance, seizure, or molestation as being owned by citizens or subjects of said state. 'The first paper,' says Sir William Scott, 'which we usually look for, as proof of property, is the pass.' The same learned judge elsewhere observes: 'It is a known and well-established rule, with respect to a vessel, that if she is navigating under the pass of a foreign country, she is considered as bearing the national character of that nation under whose pass she sails. She makes a part of its navigation, and is in every respect liable to be considered as a vessel of that country.' The pass or sea-letter, was until very recent times indispensable for the security of a neutral ship from molestation by belligerent cruisers, and it was the only paper to which any respect was paid by the cruisers of the Barbary states, as warranting the vessel to be within the protection of their respective treaty engagements with the European powers. If a vessel be furnished with a pass or sea-letter, it is immaterial whether she has any mercantile flag on board or not. The latter by itself is not a criterion of the national character of the owners of the vessel."

Twiss, Law of Nations, as to war (2d ed.), 172.

To this passage is appended the following note:

"The best account of the passport is given by D'Abreu (part i, ch. 22), who justly observes that it covers sometimes the cargo as well as the ship, but that it invariably named the ship, its build, the captain, and his residence. D'Abreu also gives an account of the sea-letter, which he describes as being in the same form as the pass. The difference between them would seem to consist in this, that whilst the pass is issued in the name of a sovereign power or state, the sea-letter is issued in the name of the civil authorities of the port from which the vessel is fitted out. The form of a sea-letter is annexed to the treaty of the Pyrenees (A. D. 1659), under which it was provided that free ships should make free goods. It is termed 'literæ salvi conductus,' and the force and effect of it is thus described in the XVII Article of the treaty itself: 'Ex quibus non solum de suis mercibus impositis, sed etiam de loco domicilii et habitationis, ut et de nomine tam Domini et magistri navis, quam navigii ipsius constare queat: quo per duo hæcce media cognoscatur, an merces vehant de contrebande, et sufficienter tam de qualitate quam de Domino et magistro dicti navigii constet. His literis salvi conductus et certificationibus plena fides habebitur.' In the Treaty of Copenhagen concluded July 11, 1670, between Great Britain and Denmark, the sea-letter is termed a certificate; and it is provided

that the ships of either confederate shall carry letters of passport and a certificate, of which the forms are set forth in the body of the treaty. This sea-letter or certificate extended to the cargo."

"Les nations maritimes sont libres de fixer les conditions auxquelles elles reconnaissent la nationalité des navires étrangers dans les eaux dépendant de leur territoire; mais les égards que les nations se doivent entre elles exigent que ces conditions ne soient pas de nature à entraver la libre navigation et le commerce maritime.

"En tout cas le navire doit être mis à même de fournir la preuve de sa nationalité au moyen de documents authentiques ou de certains signes distinctifs permettant de vérifier à première vue à quelle nation il appartient.

"Le pavillon est le signe apparent du caractère national d'un navire. Chaque État a des couleurs particulières, sous lesquelles naviguent ses nationaux et qui ne peuvent être arborées sans sa permission.

"Se servir du pavillon d'un État étranger sans l'autorisation de cet État est un acte qui est considéré comme une infraction au droit international, comme une manœuvre frauduleuse et attentatoire à l'honneur de l'État étranger. L'État dont on a usurpé abusivement le pavillon et celui à l'égard duquel on se sert d'un faux pavillon ont l'un et l'autre le droit d'exiger la punition des coupables et, suivant les circonstances, de les punir eux-mêmes.

"Le pavillon ne suffit pas à lui seul prouver la nationalité du navire; il offre trop de facilités à l'abus et aux usurpations. Pour avoir un moyen de contrôle plus certain les nations maritimes sont convenues que tout navire marchand doit être pourvu de papiers de bord ou lettres de mer, que le capitaine est tenue de produire chaque fois qu'il en est légitimement requis. Ces papiers de bord consistent le plus ordinairement dans un acte indiquant le signalement du navire, ses dimensions, son nom, des détails sur sa constructiou, dans uu passeport ou patente de navigation, l'acte autorisant le navire à porter le pavillon national, un rôle de l'équipage mentionnant les noms et la nationalité des matelots, et un acte d'achat ou de propriété. Du reste ces papiers donnent lieu à une grande diversité d'usages entre les nations; leur nombre, leur nature et leur libellé varient d'ailleurs à l'infini d'un pays à l'autre, et sont régis par les codes ou les lois intérieures de chaque État."

Calvo, droit international, tome ii, §§ 873, 874, 875.

D'Abreu (Pressas de Mar, 1st ed., 1746), 18 *ff.*, enumerates nine documents that ought to be found on board a merchant ship upon the high seas:

1. El passaporte (the passport).
2. Las letras de mar (sea-letter).
3. El libro derrater (the book of charts).
4. La certificacion ó patente de sanidad (the bill of health).
5. La pertenencia del navio (bill of sale or certificate of ownership).
6. El libro de sobordo.
7. La carta-partida (the charter-party).
8. El conocimento (the bill of lading).
9. La factura (the invoice).

"El primer instrumento con que debe navegar todo navio mercantil, es el passaporte, y no es otra cosa, que una licencia de el soberano, del capitan, ó dueño del navio, para que este navegue, el qual se concede,

unas veces por tiempo limitado, y otras sin limitacion. Se nombra en él el puerto á donde es el destino, y se refieren por mayor las mercaduerias, que conduce; bien, que otras veces, ni se señala tiempo, ni lugar ni carga; pero siempre el capitan, y navio, y la naturaleza, domicilio ó residencia de aquel.

"Este instrumento es tan precisso y necessario para la navegacion, que el navio, que se halláre sin él, puede ser legitimamente apressado; como consta del Artículo 6 de la Ordinanza de Corso, en estas terminos: 'Han de ser de buena pressa todos los navios pertenecientes á enemigos, y los mandados por piratas corsarios, y otra gente, que corriere la mar sin Despacho de algun Principe, ni Estado Soberano.' Cuya disposicion conforma mucho con lo que observaban los Romanos en los passaportes de que usaban, para comerciar libre, y seguramente, y que registraban solamente los *agentes in rebus;* (2) porque sin los Despachos, que llamaban '*Evectiones* ó *Tractatorias*,' (3) no se podia conducir cosa alguna; y aunque algunos Interpretes al Codigo son de sentir, que estos Despachos eran con los que se assistia á los Correos, para que les diessen los Caballos necessarios á su viage; y otros los entienden de los que se libraban á los ministros, para el carruage, y utensilios, que se les mandaba dár en sus jornadas, no tenemos duda en que dichos Despachos, deben extenderse á los passaportes dados para el comercio de las mercaderias; (4) fuera de que en qualquiera inteligencia, que se les quiera dár, es constante, que quanto se comerciare, ha de ser ajustado á las ordenes, y Despachos, que previenen las Leyes; de suerte, que los efectos que se encontraren en navios mercantiles que navegaran sin passaporte, han ser de buena Pressa.

"El segundo instrumento es, las Letras de Mar, por las quales debe constár no solamente de la carga del navio, sino tambien de el lugar de su habitacion, residencia, y nombre, assi del maestre y patrón, como del navio mismo, para que de este modo se pueda reconocer, si lleva mercaderias de contravando, á cuyas Letras de Mar se debe dár entera fee y credito. Este instrumento lo creemos tambien absoluta é indispensablemente necesario para la navegacion, pues el Articulo 17 de Tratado de los Pirineos, despues de equipararlo con los passaportes, previene que se lleve; y al fin de dicho Tratado, se encuentra su formulario, que es el siguiente:

"'A todos los que las presentes vieren, nuestros los regidores, consules y magistrados de la villa de ———, hazémos saber á quien tocare, que N——, maestre del navio ———, pareció ante nos, y debaxo de juramento solemne declaró, que el navio, llamado N——, de porte de —— toneladas, poco mas, ó menos, del qual es maestre al presente, es navio francés; y deseando nosotros, que dicho maestre de navio sea ayudado en sus negocios, pedimos en general y en particular á todas las personas, que encontraren dicho navio, y á todos los lugares donde llegare con sus mercaderías, tengan por agradable de admitirle favorablemente, tratarle bien, y recibirle en sus puertos, bahias y dominos, ó permitirle fuera en sus riveras, mediante el pagamento de derechos de peage y los demás acostumbrados, dexandole navegar, passar, frequentar y negociar alli, ó en qualesquiera otras partes, que le pareciere á proposito, cosa que nosotros reconoceremos gratamente, en fee de lo qual havemos firmado las presentes, y selladolas con el sello de nuestra villa.' Aunque el Articulo de los Pirineos arriba citado, prescribe indispensablemente que todo navio mercantil, que navegue, trayga las Letras de Mar, no creemos, sin embargo, que por la falta de este instrumento, deba reputarse el navio por de buena Pressa,

siempre que trayga el passaporte de su Soberano, pues equivale este en substancia á las Letras de Mar."

D'Abreu, Pressas de Mar, 18 *ff.*

EXHIBIT A.—*Form of Mediterranean letter in use in the Department of State when Mr. Jefferson was Secretary.*

[Cut of full-rigged ship, and under it view of a harbor.]

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

To all persons whom these may concern:

Suffer the ———, ——— master or commander, of the burthen of —— tons or thereabouts, mounted with ——— guns, navigated with ——— men, to pass with her company, passengers, goods, and merchandise, without any hindrance, seizure, or molestation, the said ——— appearing by good testimony to belong to one or more of the citizens of the United States, and to him or them only.

Given under my hand and the seal of the United States of America, the —— day of ———, in the year of our Lord —— thousand —— hundred and ——.

By the President:

Number —.

———— ————,
*Secretary of State.*

STATE OF ———,
District of ———.

Countersigned by

———— ————.

As to sea-letters, see more fully *infra*, App., § 410.

JAMES A. GARFIELD,

PRÉSIDENT DES ÉTATS-UNIS D'A

*A tous ceux qui les présentes verro*

QU'IL SOIT NOTOIRE que facu
mission ont été accordées à
maître ou co
du navire appelé
de la ville de

JAMES A. GARFIELD,

ESIDENT VAN DE VEREENIGDE STAATEN VAN AMERICA.

*n alle de geenen, die deeze teegen woordige zullen, salut :*

OEN TE WEETEN, dat by deezen vry-
den en permissie gegeeven
rd aen Schipper en

# CHAPTER XXIII.

## LETTERS ROGATORY.

*PRACTICE AS TO SUCH LETTERS.*

§ 413.

Letters rogatory, in their general relations, are discussed in Wharton's Confl. of Laws, § 723. In this chapter will be given notes of rulings in this relation by the executive and judicial departments of the Government of the United States.

The certificate and seal of the British minister resident in Hanover is not a proper authentication of the proceedings of an officer of that country in taking depositions. It is not in any way connected with the functions of the minister, and his certificate and seal can only authenticate those acts which are appropriate to his office.

Stein *v.* Bowman, 13 Pet., 209.

The circuit court will issue letters rogatory for the purpose of obtaining testimony when the Government of the place where the evidence is to be obtained will not permit a commission to be executed.

Nelson *v.* U. S., 1 Pet. C. C., 235.

In this case a form of such letters is given. See also Mexico *v.* De Arangois, 5 Duer, 634; Kuchling *v.* Leberman, 9 Phila., 160.

A commission was issued by a judge in Cuba to the Spanish consul in New York to take testimony to be used in a criminal prosecution for swindling, and the consul thereupon applied to the district court for a summons to compel the witness to appear and testify. It was ruled that the court had no power to issue the summons asked for, the only provisions made by Congress on the subject of enforcing the giving of testimony in judicial proceedings pending in a foreign country being those found in the acts of 2 March, 1855 (10 Stat., 630), and of 3 March, 1863 (12 Stat., 769; Rev. Stat., 4071), neither of which acts applies to the case proposed.

Matter of the Spanish Consul, 1 Benedict, 225.

"Letters rogatory for the purpose of taking the testimony of persons residing in the United States, which may be material in suits pending in the courts of foreign countries, are frequently sent to this Department, usually with a note from the minister for foreign affairs of the foreign country or from its diplomatic representative here, requesting that the business may be attended to. It is not, however, the province of the Department of State to dispose of matters of this kind. Frequently witnesses whose testimony is sought reside in places far from this city, rendering it impracticable to have the testimony taken within the time at which it is required in order to make it available.

"It is, therefore, deemed advisable to issue this circular, to which are appended the acts of Congress regulating the taking of testimony in such cases. Other information upon the subject, which will be found useful to persons interested, is contained in the following—

"DIRECTIONS.—Both circuit and district courts of the United States are held in each of the States at the following points:

"In Alabama, at Huntsville, Birmingham, Montgomery, and Mobile; in Arkansas, at Little Rock; in California, at San Francisco and Los Angeles; in Colorado, at Denver, Pueblo, and Del Norte; in Connecticut, at New Haven and Hartford; in Delaware, at Wilmington; in Florida, at Tallahassee, Pensacola, Jacksonville, Key West, and Tampa; in Georgia, at Atlanta, Savannah, and Macon; in Illinois, at Chicago, Springfield, and Cairo; in Indiana, at New Albany, Evansville, Indianapolis, and Fort Wayne; in Iowa, at Dubuque, Fort Dodge, Sioux City, Keokuk, Council Bluffs, and Des Moines; in Kansas, at Fort Scott, Leavenworth, and Topeka; in Kentucky, at Frankfort, Covington, Louisville, and Paducah; in Louisiana, at New Orleans, Opelousas, Alexandria, Shreveport, and Monroe; in Maine, at Portland; in Maryland, at Baltimore; in Massachusetts, at Boston; in Michigan, at Port Huron, Detroit, Grand Rapids, and Marquette; in Minnesota, at Saint Paul; in Mississippi, at Aberdeen, Oxford, and Jackson; in Missouri, at Saint Louis, Jefferson City, and Kansas City; in Nebraska, at Lincoln and Omaha; in Nevada, at Carson City; in New Hampshire, at Portsmouth and Concord; in New Jersey, at Trenton; in New York, at Canandaigua, Albany, Syracuse, Utica, New York, and Brooklyn; in North Carolina, at Raleigh, Greensborough, Statesville, Asheville, and Charlotte; in Ohio, at Cleveland, Toledo, Cincinnati, and Columbus; in Oregon, at Portland; in Pennsylvania, at Philadelphia, Erie, Pittsburg, Williamsport, and Scranton; in Rhode Island, at Newport and Providence; in South Carolina, at Charleston and Columbia; in Tennessee, at Knoxville, Chattanooga, Nashville, Jackson, and Memphis; in Texas, at Graham, Dallas, Waco, Galveston, Tyler, Jefferson, Austin, San Antonio, Brownsville, and El Paso; in Vermont, at Burlington, Windsor, and Rutland; in Virginia, at Richmond, Alexandria, Norfolk, Lynchburgh, Abingdon, Harrisonburgh, and Danville; in West Virginia, circuit court at Parkersburg, district court at Wheeling, Clarksburgh, and Charleston; in Wisconsin, at Milwaukee, Oshkosh, Madison, Eau Claire, and La Crosse.

"In some of the States, district courts are held at other points in addition to those above specified.

"The clerks of the courts of the United States are authorized to take depositions, and may be designated as commissioners for that purpose in letters rogatory, which, when returned, are to be used in the courts of foreign countries.

"The letters rogatory may be addressed to the judge of either the circuit court of the United States for the State of ———, or the district court of the United States for the district of ——— (naming the State), praying the judge of that court to name and appoint the commissioner; or such letters may be addressed to the commissioner directly."

"The letter or package should in all cases be directed to the clerk of the district or circuit court to which the letters rogatory are addressed. The clerk's office is at the place where the court holds its session."

Mr. Fish, Sec. of State, circular to diplomatic and consular officers, Apr. 15, 1872; Consular Regulations, 1881, Appendix No. IV.

An act to facilitate the taking of depositions within the United States, to be nsed in the courts of other countries, and for other purposes. Approved March 3, 1863.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the testimony of any witness residing within the United States, to be used in any suit for the recovery of money or property depending in any court in any foreign country with which the United States are at peace, and in which the Government of such foreign country shall be a party or shall have an interest, may be obtained to be used in such suit. If a commission or letters rogatory to take such testimony shall have been issued from the court in which said suit is pending, on producing the same before the district judge of any district where said witness resides or shall be found, and on due proof being made to such judge that the testimony of any witness is material to the party desiring the same, such judge shall issue a summons to such witness, requiring him to appear before the officer or commissioner named in such commission or letters rogatory, to testify in such suit. Such summons shall specify the time and place at which such witness is required to attend, which place shall be within one hundred miles of the place where said witness resides or shall be served with said summons.

SEC. 2. *And be it further enacted*, That if any person shall refuse or neglect to appear at the time and place mentioned in the summons issued, in accordance with this act, or if, upon his appearance, he shall refuse to testify, he shall be liable to the same penalties as would be incurred for a like offense on the trial of a suit in the district court of the United States.

SEC. 3. *And be it further enacted*, That every witness who shall appear and testify, in manner aforesaid, shall be allowed and shall receive from the party at whose instance he shall have been summoned, the same fees and mileage as are allowed to witnesses in suits depending in the district courts of the United States.

SEC. 4. *And be it further enacted*, That whenever any commission or letters rogatory issued to take the testimony of any witness in a foreign country, in any suit in which the United States are parties or have an interest, shall have been executed by the court or the commissioner to whom the same shall have been directed, the same shall be returned by such court or commissioner to the minister or consul of the United States nearest the place where said letters or commission shall have been executed, who, on receiving the same, shall indorse thereon a certificate, stating the time and place, when and where the same was received; and that the said deposition is in the same condition as when he received the same; and he shall thereupon transmit the said letters or commission, so executed and certified, by mail to the clerk of the court from which the same issued, in the manner in which his official dispatches are transmitted to the Government. And the testimony of witnesses so, as aforesaid, taken and returned shall be read as evidence on the trial of the suit in which the same shall have been taken, without objection as to the method of returning the same.

An act to prevent mis-trials in the district and circuit courts of the United States in certain cases. Approved March 2, 1855.

* * * * * * *

SEC. 2. *And be it further enacted*, That where letters rogatory shall have be [been] addressed from any court of a foreign country to any circuit court of the United States, and a United States commissioner designated by said circuit court to make the examination of witnesses in said letters mentioned, said commissioner shall be empowered to compel the witnesses to appear and depose in the same manner as to appear and testify in court.

See letter of Mr. Fish, Sec. of State, to Mr. Stetson, Nov. 15, 1872. MSS. Dom. Let. See further as to practice in such cases, Mr. Seward, Sec. of State, to Mr. Gana, Mar. 16, 1867; Mr. Seward to Mr. Fontecilla, Oct. 12, 1868. MSS. Notes, Chili.

"Referring to Mr. Bancroft's dispatch, No. 599, inclosing a copy of a note addressed to him by Mr. von Bülow in reference to an order issued out of the district court for the southern district of New York, naming certain consuls of the United States to take testimony in an action therein pending in behalf of the Government, against the firm of S. N. Wolff & Co., and to your dispatch, No. 9, inclosing a second note from Mr. von Bülow on the same subject, I now inclose you a copy of a letter addressed to this Department by the Attorney-General, with a copy of a letter from Mr. Bliss, the United States district attorney at New York, in reference to the question, and a copy of the order complained of.

"It appears to this Department that the German Government has labored under a serious misapprehension in the matter.

"The minister of foreign affairs objects to the taking of the desired testimony by the consuls, under the commission in question, on the ground that it is an exercise of functions by consular officers in the German Empire not warranted by Article IX of the German-American convention of December 11, 1871.

"Under our system of jurisprudence, where the testimony of persons beyond the limits of the United States is desired by either party to an action pending in the courts, the same is taken on commission. For this purpose application is made to the court in which the action is pending, and when granted, a person is agreed on by the parties, or named by the court, to take the evidence, and an order is entered in the court to that effect.

"Questions are prepared by each party, which are propounded to the witnesses by the person so named, or an oral examination is sometimes provided for, at which both parties are represented by counsel.

"The answers to the questions are taken, and the evidence thus taken is certified by the commission named, and returned to the court to be read at the trial.

"No claim is made that a consul of the United States, as such, has, by treaty or by convention, the right to take such testimony. It is no part of his official duty, nor does he act as consul in so doing. He acts in the matter as a private individual, at the request of the parties or the appointment of the court. The Government in no case takes any part in these appointments; they are made by the courts in the independent discharge of their functions as a matter of practice, and with the sole view of the administration of justice and the ascertainment of the facts of the case at issue between the parties litigant. The person named may be a subject of the German Empire, an American citizen, or may belong to any other nationality. He is selected in each particular case as an individual, who, from character, residence, or other qualification, will fairly propound the questions and certify the answers. His services are purely ministerial and entirely voluntary. He has no power to compel the attendance of witnesses or to punish them for contempt. No authority is given except to put questions and certify

answers, and no other is claimed for him. The same proceedings are taken and the same rule applies in every case, whoever the parties to the action may be. The fact that the Government is a party or has an interest in the action in no respect alters the rule. It is a proceeding in the interest of justice to arrive at the truth between disputed facts in an action pending in the court.

"The testimony in any particular case may be necessary to save a private person, whether German or American, from penalties to which he would otherwise be liable. On the other hand, it may be required in the interest of good government here or elsewhere to punish attempted frauds upon the public revenue.

"These are objects of common interest to all commercial powers, which the Government of Germany from its well-known character will be the first to appreciate and to vindicate.

"Upon an examination of the particular order in question, it will be seen that it provides for the taking of testimony for the benefit of either party, and from this fact and from the letter of the district attorney it will be found to be an order made for the benefit of both parties, and obtained by consent or upon their joint application.

"So far as any objection may be made to the execution of this particular commission, therefore, by the branch house of the defendants in Germany, it appears that the order was made on the solicitation or consent of the house in New York. Any obstacle thrown in the way of the taking of this testimony by the German Government amounts to a refusal to permit two parties to ascertain the truth to be used for their mutual benefit in a legal proceeding.

"It is confidently believed that an explanation of the matter will be entirely satisfactory to the German Government.

"The United States has no desire to obtain for its consuls in Germany any authority or functions except such as rightly belong to them; and at the same time this Government will be extremely reluctant to admit that a person becoming a consul of the United States is thereby excluded from privileges which are allowed to unofficial persons, or becomes disqualified for the discharge of duties to his fellow-citizens which may be performed by any other reputable person, of whatever nationality, but which are likely to be asked of him by reason of his official position, making him more likely than others to be known to those needing such services.

"You will fully explain this matter to the minister of foreign affairs, and it is confidently hoped and expected that on this full explanation all objection to the action of the consuls in question will be withdrawn, and that the German Government will view it as an act of comity, and in aid of the proper administration of government and justice, to facilitate the ascertainment of the facts in the case now at issue between this Government and the Messrs. Wolff. A continued objection or ob.

struction to such ascertainment would be the cause of very serious regret to this Government.

"You may, in your discretion, read and give a copy of this dispatch, to this point, to the minister of foreign affairs, for the purpose of explanation.

"Under the circumstances set out in your No. 9, your action in intimating to the several consuls the difficulties which might arise from action on their part until the matter should be adjusted, was a wise precaution, and is approved.

"Should the German Government withdraw the objections now raised, you will so inform the several consuls, and inform this Department by telegraph. You will also instruct the consuls, in executing any such commission, to assume no authority as consuls, and to be careful in their action to give as little offense to the German Government and to its subjects as possible."

Mr. Fish, Sec. of State, to Mr. N. Fish, Aug. 18, 1874. MSS. Inst., Germ.; For. Rel., 1874.

[Inclosures in the above instruction.]

DEPARTMENT OF JUSTICE,
*Washington, August* 4, 1874.

SIR: Referring to your letter of the 20th ultimo, inclosing a dispatch from the minister of the United States at Berlin, and other papers, I now have the honor to inclose, for your information, a copy of a letter addressed to this Department, under date of the 27th ultimo, by the United States attorney for the southern district of New York, and a copy of the *dedimus potestatem* issued by the district court of the United States for that district in the case of the United States *v.* S. N. Wolff *et al.*, of Neidheim, authorizing United States consuls and their representatives to take testimony in said case.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS,
*Attorney-General.*

Hon. HAMILTON FISH,
*Secretary of State.*

—

OFFICE OF THE DISTRICT ATTORNEY OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK,
*New York, July* 27, 1874.

SIR: I beg to acknowledge the receipt of your favor of 21st, transmitting a copy of letter of the Secretary of State and a copy of a dispatch addressed by the minister of the United States at Berlin to the State Department, the several papers relating to an order to take testimony issued by the district court for this district.

In reply to your inquiry, I beg to say that the United States has a suit pending against the firm of Wolff & Co., to recover about $75,000 penalties for alleged undervaluation in the importation of goods to this port. In that suit both parties desire to procure the testimony of persons residing in various places in Europe. It was therefore agreed between the respective attorneys that an order should be entered, allowing the testimony to be taken orally at places named. It has long been the practice in this district to designate as commissioners to take testimony in foreign parts the persons who, from time to time, happen to be the consuls of the United States at the places where the testimony is to be taken, and in this case the parties agreed that this course should be followed. The consuls are not, in such case, supposed to act as con-

suls, but to act as commissioners, agreed upon by the parties, having, of course, no power to compel the attendance of witnesses, unless the head authorities choose to grant it, which some countries do and others do not.

I inclose a copy of the order issued in this case. You will perceive that it is an *authority* to the persons named to take the testimony. Nothing is *required* of them, as seems to be supposed, and they can, of course, refuse to act. As they are paid for their services, they are, however, usually quite willing to act.

I may be permitted to add that, though the order is, in form, issued upon my motion, it was really issued by consent of parties.

Your obedient servant,

GEORGE BLISS,
*United States Attorney.*

HON. GEO. H. WILLIAMS,
*Attorney-General.*

—

ORDER OF THE COURT.

At a stated term of the United States district court for the southern district of New York, held at the United States court building in the city of New York, on the 13th day of April, 1874: Present, the honorable Samuel Blatchford, the district judge.

THE UNITED STATES
*v.*
S. N. WOLFF *et al.*

On reading and filing affidavit of plaintiff's attorney and notice of motion, with proof of due service thereof on attorneys for the defendant, Alphonse de Riesthal, who only has appeared herein, George Bliss, esq., appearing for the plaintiff, and W. J. A. Fuller, esq., for the defendant, Alphonse de Riesthal.

It is, on motion of George Bliss, esq., United States attorney, ordered that a *dedimus potestatem* be issued in this cause out of this court, directed to the United States consul and to such deputy or representative of said consul as may be authorized by him to act in his place and stead, at the following-named places, respectively, viz: To E. P. Beanchamp, United States consul at Aix-la-Chapelle (Aachen), Germany, and his deputy or representative; to W. P. Webster, United States consul at Frankfort-on-the-Main, and his deputy or representative; to H. Kreisman, United States consul at Berlin, Prussia, and his deputy or representative; to J. A. Stuart, United States consul at Leipzic, Germany, and his deputy or representative; to Daniel McM. Gregg, United States consul at Prague, Austria, and his deputy or representative; to S. H. M. Byers, United States consul at Zurich, Switzerland, and his deputy or representative; to examine the following-named persons under oath as witnesses herein, viz: A. Amberg and the person or persons composing the firm of A. Hirsch & Co., of Cassel, Germany; S. N. Wolff, of Neidheim, near Cassel aforesaid; the person or persons composing the firm of Lüttger Brothers, of Petersmühle, near Solingen, Germany; Carl Aufermann, of Losenbach, near Liedenscheid, Germany; V. T. Pospichel, of Wiesenthal, Bohemia; and the person or persons composing the firm of Leopold Czech & Co., of Haida, Bohemia; the person or persons comprising the firm of E. Kreimer & Co., Berlin, Prussia; W. Wagner, jr., of Plattenberg, Switzerland, and T. L. Lurman, and J. W. Maes, of Iserlohn, Germany.

It is further ordered that the examination above provided for shall take place during the months of July and August, 1874, and at such times within said months as is hereinafter designated.

It is further ordered that either party to this action shall have liberty to examine not only the witnesses herein named, but any other witnesses that either party may desire to examine at the aforesaid places of Aix-la Chapelle, Frankfort-on-the-Main, Berlin, Leipzic, Prague, or Zurich, before either of the persons herein authorized to

take testimony; provided, however, that the names of said witnesses and their places of residence shall be give to the attorney of the opposite side in New York, before June 6, 1874, or such notice be given in Europe to the opposite counsel acting there for either party to this action, in either of the aforesaid places of Aix-la-Chapelle, Frankfort-on-the-Main, Berlin, Leipzic, Prague, or Zurich, where such other witnesses are to be examined, two days before such examination.

It is further ordered, that prior to June 6, 1874, the attorneys for the respective parties shall give notice in New York, each to the other, of the names and European address, for the last week in June, 1874, of the counsel for the respective parties who are to take testimony under this commission.

It is further ordered that the examination of witnesses shall be had at the following places, in the following order, and not otherwise, viz: First at Aix-la-Chapelle, next at Frankfort-on-the-Main, next at Berlin, next at Leipzic, next at Prague, and last at Zurich; that four weeks shall elapse between the examination of witnesses at Prague and Zurich; that the examination shall commence at Aix-la-Chapelle on the 6th day of July, 1874, or within two days thereafter; and that no examination shall be had of witnesses at any place after the examination has been finished at that place, or the examination of witnesses commenced at another place.

It is further ordered that the counsel for the plaintiff shall have with him at any and all said examinations of said witnesses, or either of them, all the original invoices mentioned in the declaration herein, or copies or duplicates thereof, and which are in the possession of the plaintiff, and that counsel for defendant shall have full and free inspection thereof, and liberty to take copies of the same.

It is further ordered that all directions herein contained as to time, place, order, and manner of examination of said witnesses may be changed or modified by the written consent of the counsel for the respective parties in Europe or in New York.

It is further ordered that the examination of all witnesses under this commission shall be oral, and taken by question and answer, in the usual manner of taking oral depositions, by examination, cross-examination, and redirect examination; that the testimony given under such examination shall be reduced to writing, signed by the witnesses, and certified by the commissioners, respectively, and by them transmitted by mail to the clerk of this court at the city of New York, unless otherwise mutually agreed upon by said counsel for both parties.

It is further ordered that all testimony taken under the commission provided for herein shall be taken subject to all legal objections at the trial of this action.

SAM. BLATCHFORD.

"Your No. 33, under date of the 20th of October last, narrating your interview with Mr. von Bülow at the foreign office in relation to the objection interposed by the German Government to allowing consuls of the United States to serve as commissioners to take testimony to be used in judicial proceedings pending in this country, has been received.

"Your representations to the minister are approved.

"Although Mr. von Bülow stated to you that instructions on the subject had been sent to Mr. von Schlözer a fortnight prior to your interview and conversation, nothing has been heard from that gentleman in this connection. The objection interposed by the German Government to the obtaining of testimony in Germany to be used in the courts of this country is much to be regretted, and as appears from the admission made to you by Mr. von Bülow, the Germans whose interests led them to resist the taking of the testimony, and who invoked the interposition of their Government to prevent it, are now known to have been in the

wrong. It would have been quite as satisfactory to this Government had the reply of the German Government on a subject presented to their consideration, through the representative of this Government at Berlin, been communicated also through him, and, as is shown, some delay which has occurred might have been avoided.

"As Mr. von Schlözer has not communicated the answer of his Government, it will not be amiss that you inform Mr. von Bülow that we are still without any reply. You will call his attention to the fact that the suit in which the testimony is sought is one in which the Government of the United States is itself a party.

"I inclose herewith copies of existing statutes (which are embodied in sections 4071, 4072, 4073, and 4074 of the Revised Statutes of the United States) enacted by this Government to insure to other powers the opportunity of obtaining testimony in this country in any suit for the recovery of money or property depending in any court in any foreign country with which the United States are at peace, and in which the Government of such foreign country shall be a party or shall have an interest.

"In these enactments, which have long been in force in this country, this Government has manifested its friendship to other powers, as well as its desire to aid in the administration of justice in all foreign countries with which it may be at peace.

"It is hoped that the answer of the German Government may soon be communicated, and that it will be such as shall evince a willingness to reciprocate the very liberal and efficient provisions made in this country to enable Germany, in case of need, to obtain the evidence of witnesses in this country in any suit in which that Government may be interested, and that the facilities which Mr. von Bülow says that Germany will afford in this direction may prove ample and efficacious."

Mr. Fish, Sec. of State, to Mr. Davis, Nov. 14, 1874. MSS. Inst., Germ.; For. Rel., 1874. See further, Mr. Fish to Mr. Davis, Apr. 7, 1875.

"On the 16th of November last I had the honor to receive your note of the 13th of that month, communicating an instruction which the imperial foreign office had directed to you, in reference to the objections which had been interposed by the German Government to the obtaining of the testimony of certain parties resident in Germany, to be used in a suit pending in this country in behalf of the Government of the United States against the German house of S. N. Wolff & Co.

"Although the instruction amounts to a courteous but practical denial to the customary practice under the legal system of the United States of the facilities whereby their courts are accustomed to seek the evidence on which they are to determine the contested rights submitted to them in the administration of justice, still I am bound to recognize the right of a sovereign state to deny such facilities, within its limits, to the courts of another state. At the same time it is hoped that, on a

review of the question, it will be perceived that no invasion of the sovereign rights of a Government, no harm to its dignity, and no inconvenience to its citizens or to its officers or its tribunal, can result from an extension of comity that will allow to the judicial system prevailing in this country and in England the exercise of that mode of seeking the facts involved in a litigation pending in their courts which the experience of a long series of years has shown to be the more convenient, the less expensive, and wholly free from interference with the supreme rights of a state.

"The instruction, substantially but not perfectly, presents the system prevailing in this country, derived mainly from the 'common-law' system of England, for the attainment of the facts and the truth of any case to be judicially decided. The Government with us lends its aid, so far as it can do it practically, to the eliciting of the facts of every case, with respect to which its courts are called upon to determine and administer justice; and believing that a full knowledge of the truth, as contested between litigants, is essential to the administration of justice, it grants as an act of courtesy, as well as of justice, the power to compel the attendance of witnesses and requires them to testify under oath in any suit for the recovery of money or property depending in any court in any foreign country with which the United States are at peace, and in which the Government of such foreign country shall be a party or shall have an interest.

"It allows the testimony to be taken, either under a commission or letters rogatory, as the judicial procedure of such foreign country, or its policy, may dictate and prescribe, in its own forms of the administration or pursuit of justice, and either case it affords to such friendly Government the means whereby to obtain the evidence which is sought from witnesses within its limits. Its own citizens, equally with resident aliens, are made amenable to its process, in aid of such friendly power seeking to recover what it may consider to be due to it, in money or property, by the evidence which those citizens or aliens may be supposed able to furnish.

"I subjoin hereto an extract from the statutes of the United States on this point.

"These facilities have been voluntarily extended by the United States to the Governments with which it is in amity, in full knowledge, and because of the fact so correctly and forcibly presented in the dispatch of Mr. von Bülow, that they cannot be enjoyed except under such limitations and restrictions as may be provided by treaty stipulations or (as in the case with the United States) are prescribed by the legal system in force in each country. They are a voluntary contribution on the part of the United States to the comity of nations and to the administration of justice, and toward the attainment of the rights of every other power with which they are at peace.

"The facilities thus given to friendly powers, in suits in which such powers are parties, or are interested, are, by the judicial practice of the several states, generally or largely accorded also in suits in which individuals, citizens, or subjects of such states are parties, and have been and are constantly availed of by Germans as well as individuals of other nationalities.

"With regard to the proceedings in the case in which the United States were endeavoring to obtain testimony in a suit wherein it was seeking to recover a large amount supposed to have been fraudulently withheld by a German house, the commission was addressed to consuls, not in their official capacity as consuls, but because of their being known and of the assurance of a probability of their presence at or near the points where the witnesses were residing. They had no authority to attempt the compulsory attendance of any witness. The commission was issued with the expressed assent of the counsel representing the defendants in the suit; there was no attempt to extend what are termed 'the exceptional privileges granted to consuls of the United States by the consular treaty between Germany and America,' nor 'to limit the operation of the laws' of the country in which the commission was to be executed; and the assent of the attorneys of the defendants to the issuing of the commission, and the provision for taking testimony on behalf of the defendants, and for the presence of the counsel of the parties if desired, anticipated the objection stated by Mr. von Bülow that German law allows the parties to be represented at the examination.

"I observe that Mr. von Bülow remarks that they 'objected not so much to the taking of sworn testimony by American consuls in their official capacity, as on general principles to the *actual examination of witnesses* by American commissioners within the limits of the German Empire.'

"I have stated that there was no desire or attempt to take testimony 'by American consuls in their official capacity.'

"Mr. von Bülow states that, in the present case, 'now pending in the southern district court at New York, the German courts, in whose districts the persons to be examined as witnesses reside, will immediately comply with any request that may be addressed to them by the aforesaid American court and American commissioners, or any other duly authorized representative of the parties will be at liberty to be present at all times fixed by the competent German courts, and to put to the witnesses, through the presiding judges, any questions to which an answer under oath may be important or desirable for the decision of the court at New York.'

"This is confined to one pending suit, whereas the previously cited objection was 'on general principles to the actual examination of witnesses by American commissioners,' and makes it desirable to know whether the objection 'on general principles' will be enforced in case the administration of justice in the courts of the United States shall

in some other case, find itself in need of the evidence of witnesses residing in Germany.

"The intelligent minister of Germany to the United States is aware of the multitudinous cases arising from the intimate commercial and social relations happily existing between the two countries, and of the consequent frequency of cases in which the testimony of parties residing in either country is essential to the determination of rights in the other, and will therefore appreciate the importance of an understanding of the limitations which either state may impose upon the other in the attainment of legal evidence. He is aware, also, of the promptness and of the facility with which legal evidence is furnished by the United States in response to the frequent requests made therefor by all foreign powers, to determine the fact, the date, or the circumstances of the death of parties in the United States, to determine successions or other questions of interest to the citizens or subjects of such powers, or to the powers themselves. The agents and officers of the Government are freely and cheerfully employed to obtain the evidence desired, which is furnished as an act of international comity, and in no instance has the application been obstructed on the ground that it must be made through the courts of this country, or has any internal legal system been interposed as an objection to the request made.

"If the German Government decide that in no other form than that of 'requisitions,' analogous to the cumbrous forms known to the common law of England as 'letters rogatory' (which are recognized by the laws of the United States because of their being known to the laws and the practice of some other countries), will it allow the evidence of witnesses residing in the German Empire to be taken for use in suits pending in the United States, the latter do not contest the right to impose such limitation.

"It seems, however, to the United States that such limitation is in restraint of the admiuistration of justice, by a constrained subjection of the proceedings in the courts of one country to the judicial system of another perhaps at entire variance, in its forms of procedure, and especially in its mode of examining witnesses; and that the principle so aptly stated by Mr. von Bülow that 'the courts of all the countries are bound to assist each other in the execution of law and the attainment of justice,' is but partially enforced when the legal system of *one country* limits and confines the search for only the truth, in the administration of justice under the judicial system of another, to the technical formalities of its own.

"The experience of the United States, since its existence as an independent power, of the practical working of the system which prevails in this country, and also in England, of affording every facility for the obtaining of the evidence of witnesses when without the actual jurisdiction of the court in which is pending the suit wherein their testimony is important, by means of commissions rather than by letters rogatory,

attests the greater convenience of the former, and the entire absence of any resulting danger to the parties litigant, to the witnesses, or to the state. The evidence thus obtained is taken in the form suited to the judicial system of the court which is to pass upon it, while much expense and delay is generally avoided.

"It is hoped that the German Government may see fit to relax (what is recognized as within the abstract right of every Government) the rigid rule of confining the courts of the United States, in search of testimony needed from witnesses in Germany, to its own tribunals, as the only channel through which it is to be obtained.

"Should it, however, be desired to adhere to the course indicated by Mr. von Bülow, the courts in the United States should be apprised of the rigidness of the rule, which will (as in the case which has given rise to this correspondence) be apt to arrest the course of justice, owing to the unadvised adoption of the system of commissions, which obtain so generally, and which has hitherto been supposed to be free from the objections of any Government."

Mr. Fish, Sec. of State, to Mr. Schlözer, Dec. 9, 1874. MSS. Notes, Germany. For Rel., 1875.

"While under our practice, both in the Federal and State courts, it is certainly true that a commission is the usual, perhaps the universal, means in general use, of obtaining the testimony of a witness in a foreign country, it is probably too broad a statement to say that none of our courts can make use of letters rogatory. Such question may, in many cases, be regulated by statute in the States, but it is true that letters rogatory are both executed by and issued from the Federal courts from time to time, and probably also from the State courts. Letters rogatory have, I think, been actually issued from the district courts in New York in the case of Wolff, which gave rise to this question, and since the question arose. Sections 875, 4071, 4072, 4073, 4074, of the Revised Statutes, contain provisions on the question."

Mr. Fish, Sec. of State, to Mr. Davis, June 8, 1875. MSS. Inst., Germ.

As to letters rogatory from a United States court to a Brazilian court, see Mr. Cadwalader, Asst. Sec. of State, to Mr. Partridge, Aug. 13, 1875. MSS. Inst., Brazil. See further Mr. Frelinghuysen, Sec. of State, to Mr. von Schaeffer, Mar. 29, 1883. MSS. Notes, Austria. Mr. Frelinghuysen to Mr. Morton, Dec. 19, 1884. MSS. Inst., France.

As to letters rogatory from abroad to take the testimony of persons in prison in the United States, see Mr. Frelinghuysen, Sec. of State, to Mr. Sargent, June 27, 1883. MSS. Inst., Germ.

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# APPENDIX

[*In this appendix are introduced documents which issued since the first edition went to press, together with others which were inadvertently omitted in that edition.*]

## § 2.

### DISCOVERY THE BASIS OF TITLE.

"When any European nation takes possession of any extensive sea-coast, that possession is understood as extending into the interior country to the source of the rivers emptying within that coast, to all their branches and the country they cover; and to give it a right in exclusion of all other nations to the same. * * * Whenever one European nation makes a discovery and takes possession of any portion of that continent and another afterwards does the same at some distance from it, where the boundary between them is not determined by the principle above mentioned, the middle distance becomes such of course. * * * Whenever any European nation has thus acquired a right to any portion of territory on that continent, that right can never be diminished or affected by any third power by virtue of purchases made, by grants, or conquests of the natives within the limits thereof."

Messrs. Pinckney and Monroe to Mr. Cevallos, Apr. 20, 1805. MSS. Dispatches, Spain. 2 Am. St. Pap. (For. Rel.), 664.

"The two rules generally, perhaps universally, recognized and consecrated by the usage of nations, have followed from the nature of the subject. By virtue of the first, prior discovery gave a right to occupy, provided that occupancy took place within a reasonable time and was ultimately followed by permanent settlement and by the cultivation of the soil. In conformity with the second, the right derived from prior discovery and settlement was not confined to the spot so discovered or first settled. The extent of territory which would attach to such first discovery or settlement might not in every case be precisely determined. But that the first discovery and subsequent settlement within a reasonable time, of the mouth of a river, particularly if none of its branches had been explored prior to such discovery, gave the right of occupancy and ultimately of sovereignty to the whole country drained by such river and its several branches, has been generally admitted. And in

a question between the United States and Great Britain her acts have with propriety been appealed to as showing that the principles on which they rely accord with their own."

Mr. Gallatin to Mr. Addington, Dec. 19, 1826. MSS. Dispatches, Gr. Brit. 6 Am. St. Pap. (For. Rel.), 667.

"Vattel, § 208 (in translation), says:

"'The law of nations will therefore not acknowledge the property and sovereignty of a nation over any uninhabited countries, except those of which it has really taken possession, in which it has formed settlements, or of which it has actual use. In effect, when navigators have met with desert countries in which those of other nations had in their transient visits erected some monuments to show their having taken some possession of them, they have paid as little regard to that empty ceremony as to the regulations of the Popes who divided a great part of the world between the Crowns of Castile and Portugal.'

"Martens wrote in 1789 to the same effect in his *Précis du droit des gens*, § 37; and so did Kluber in 1819 in his *Droit des gens*, § 126.

"The principle and rule to be deduced respecting title to unoccupied regions, or those in the possession of the aboriginal inhabitants, from the writings of the accepted teachers of public law, are that acquisition and title may be original and derivative; that original title includes discovery, use, and settlement, which are ingredients of occupation, and will constitute a valid title, but that derivative title comes of conquest, treaty, and transfer. My opinion is that the English title to sovereignty and dominion in the province of New Netherlands and the colony of New York was not original in this sense, but was derivative from conquest."

Opinion of Mr. Sidney Webster on the law of marriage in New York in 1772.

## § 4.

### CONTINUITY OF LAWS.

In Campbell *v.* Hall, Cowp., 204, (S. C., under title "The island of Granada," 20 St. Tr., 239,) it was declared by Lord Mansfield that "a country conquered by the British arms becomes a dominion of the King in right of his Crown, and therefore necessarily subject to the legislative powers of the Parliament of Great Britain." "It was also declared that the laws of a conquered country *continue until they are altered by the conqueror*." The latter position was approved by Lord Ellenborough in Pictou's case, 30 St. Tr., 943.

See Dana's Wheaton, note 169.

## § 5.

### BURDENS PASS TO NEW SOVEREIGN.

"Upon the general question of the binding effect upon Peru of contracts made by the Pierola and Iglesias governments in accordance with the constitution and laws of that country, the opinion of this Department is that the performance of such engagements is obligatory upon the present Peruvian Government, and that the attempt on the part of that Government to avoid such contracts, thus denying the capacity

of the Pierola and Iglesias governments to contract, in violation or disregard of the vested rights of citizens of the United States, would afford just ground for complaint. For the greater part of six years, from 1879 until 1885, either the Pierola or the Iglesias government was recognized by foreign powers as the Government of Peru. The United States, in common with other nations maintaining diplomatic and commercial relations with that country, took no part in the civil conflict which raged from time to time during that period, but acted upon the principle of recognizing as the lawful Government of Peru that political organization which was able to maintain the diplomatic and commercial relations of the country with foreign nations; the acts of such a Government being universally admitted as binding upon the country which it represents.

"This principle holds even where a change in the form of a Government occurs, and it applies still more strongly where the change is merely in the *personnel* of the Government. Contracts made by a Government are to be regarded as the obligations of the nation it represents, and not as the personal engagements of the rulers. Hence, although the Government may change, the people remain bound."

Mr. Bayard, Sec. of State, to Mr. Buck, Sept. 23, 1886. MSS. Inst., Peru. See *supra*, §§ 137, 236.

## § 8.

### LAW OF NATIONS PART OF LAW OF LAND.

The law of nations includes as part of itself the law of a port in which a merchant ship may be moored, so far as concerns crimes in such vessel disturbing the peace of the port.

Mr. Bayard, Sec. of State, report in Pelletier's case, Jan. 20, 1887. Sen. Ex. Doc., 49th Cong., 2d sess. See *infra*, § 35*a*.

"A question may be raised, does this customary law of nations, as established in Europe, bind the United States? An affirmative answer to this is warranted by conclusive reasons.

"1. The United States, when a member of the British Empire, were, in this capacity, a party to that law, and not having dissented from it, when they became independent, they are to be considered as having continued a party to it. 2. The common law of England, which was and is in force in each of these States, adopts the law of nations, the positive equally with the natural, as a part of itself. 3. Ever since we have been an independent nation we have appealed to and acted upon the *modern* law of nations as understood in Europe. Various resolutions of Congress during our Revolution, the correspondence of executive officers, the decisions of our courts of admiralty, all recognized this standard. 4. Executive and legislative acts and the proceedings of our courts under the present Government speak a similar language. The President's proclamation of neutrality refers expressly to the *modern* law of nations, which must necessarily be understood as that prevailing in Europe and acceded to by this country; and the general voice of our nation, together with the very arguments used against the treaty, accord in the same point. It is indubitable that the customary

laws of European nations is a part of the common law, and, by adoption, that of the United States."

Hamilton: Letters of Camillus, No. 20. 5 Lodge's Hamilton, 89.

## § 10.

### TAXES.

In instructions by Mr. Fish to Mr. Davis, November 21, 1874 (For. Rel. 1875, part i, 488), it is assumed that income taxes can be imposed upon "resident aliens."

As a general rule, poll taxes, and taxes based on personal allegiance, are determinable by the *lex domicilii*, while the taxes due on property which has a personal site are determinable by the *lex situs*. See Whart. Conf. of Laws, §§ 65, 79, 80, 363, 368. As between the several States in the United States, the question of liability for poll and personal taxation is determinable by the *lex domicilii*, and so are taxes on succession. As to income taxes, more difficult questions arise. During the late civil war the United States Government imposed an income tax on resident aliens. In Germany and in England such taxes are imposed on aliens after a residence of a designated period. Certainly when a citizen of the United States resides in a foreign country for a period so long as to sustain the presumption that he has abandoned his native allegiance, then he is open to be taxed as to income in the place of his residence. Local laws, however, imposing such taxes on a mere transient residence have no extraterritorial force. The proper course for a citizen of the United States taxed under such laws, on a mere transient residence, is to pay under protest, so that the question can be one of diplomatic adjustment.

It has been held in England that an income tax could be levied in England on the profits of a trade carried on in England by foreigners through an agent resident in England. (Pommery *v.* Apthorpe, Q. B. Div., Dec. 17, 1886; 35 Alb. L. J., 437.)

In Att'y-Gen. *v.* Coote, 4 Price, 183, it was held that a statute imposing a duty on the property of persons residing in Great Britain applies to persons residing there for any length of time, however short, although they may at the same time have a more permanent residence elsewhere.

## § 14.

### SEIZURE OF PERSONS IN FOREIGN TERRITORY.

"I transmit herewith for your information copy of a detailed report, with accompanying papers, received from Mr. E. D. Linn, United States consul at Piedras Negras, touching the recent kidnapping of Francisco Arresures by the collusion of officers of the State of Coahuila and of Maverick County, Texas, under circumstances which leave no reasonable doubt that a brutal murder was the object and result of the successful attempt of the Coahuila officials to get unlawful possession of Arresures.

"You have been heretofore instructed to ask for an investigation of Arresures's murder and the punishment of the guilty parties. Your No. 283, of the 3d instant, reports that you have done so, and a telegram received from you yesterday, August 13, is understood to communicate the Mexican reply to your application. It states that the government of Coahuila claims Arresures as, by law, a Mexican and a fugitive from justice. After extradition, and while being conducted to the court, he took flight, and in subsequent pursuit was killed.

"The testimony now before the Department shows that such a reply on the part of the Government is evasive and inaccurate.

"The citizenship of Arresures is not material. He appears to have resided for some years in the United States, and there to have declared

his intention to become its citizen. He was therefore not merely under the protection which the laws of the United States and of the State of Texas, where he had his residence, throw over him as an alien resident, but entitled to the peculiar protection, as against any unlawful exercise of authority emanating from the land of his origin, with which our laws invest those aliens lawfully within their jurisdiction who have acquired rights of inchoate citizenship by duly making declaration of intention to become citizens.

"Under any circumstances, being accused of crime committed in Mexican jurisdiction, he could only be demanded from the United States, within whose jurisdiction he was alleged to have taken refuge, in accordance with the provisions of the treaty of extradition of December 11, 1861, between the United States and Mexico."

Mr. Bayard, Sec. of State, to Mr. Jackson, Aug. 14, 1886. MSS. Inst., Mex.; For. Rel., 1886.

## § 30.

### SOVEREIGNTY OVER RIVERS.

"But neither the lakes nor the public rivers of the United States are in the Federal sense highways of the State. A vessel after leaving a port of a State on a public river is on a national highway, subject to State jurisdiction for some limited police purposes which are subordinate to the paramount right of navigation, and the navigable rivers are as much national highways as the high seas are international.

"The littoral jurisdiction of a State, although extending for some purposes beyond low-water mark, is subject to the paramount right of navigation as a highway of the nation, in the same manner as the sea within the three-mile zone from the shore is subject to the right of navigation by foreigners without becoming subject to the local law. Such waters are considered as the common highway of nations, and the jurisdiction of the local authorities exists only for the protection of the coast and its inhabitants, not to subject passing vessels to the local law of the government of the shore.

"Such rivers within the boundaries of a State are navigable waters of the United States and are national and not State highways, and the control of the General Government extends over all vessels engaged in their navigation where such rivers may be made the means of interstate commerce, and even canals are now considered public waters over which the admiralty jurisdiction extends."

Henry's Adm. Juris., § 12.

But while such is the case, all crimes on board vessels in foreign territorial waters are, when they disturb the peace of the waters or the shore, cognizable by the sovereign of such waters or shore.

See Wnart. Crim. Law, 9th ed., §§ 269 *ff.*

## § 32.

### MARINE BELT.

"It will be found, on an accurate inquiry, that all the prizes brought in under French commissions that have been restored, have been found to be in one or the other of the following descriptions:

"'1. Those captured within a marine league of the shores of the United States.

"'2. When the capturing vessel was owned and principally manned by American citizens.

"'3. When the capturing vessel was armed in our ports.'

"As to the jurisdiction exercised by the United States over the sea contiguous to its shores, all nations claim and exercise such a jurisdiction, and all writers admit this claim to be well founded; and they have differed in opinion only as to the distance to which it may extend. Let us see whether France has claimed a greater or less extent of dominion over the sea than the United States. Valin, the King's advocate at Rochelle, in his new Commentary on the Marine Laws of France, published first in 1761, and again by approbation in 1776,* after mentioning the opinions of many different writers on public law on this subject, says: 'As far as the distance of two leagues the sea is the dominion of the sovereign of the neighboring coast, and that whether there be soundings there or not. It is proper to observe this method in favor of states whose coasts are so high that there are no soundings close to the shore, but this does not prevent the extension of the dominion of the sea, *as well as in respect to jurisdiction as to fisheries*, to a greater distance by particular treaties, or the rule hereinbefore mentioned, which extends dominion as far as there are soundings, or as far as the reach of a cannon shot; *which is the rule at present universally acknowledged.*' 'The effect of this dominion,' the same author says, 'according to the principles of Puffendorf, which are incontestable, is that every sovereign has a right to protect foreign commerce in his dominions as well as to secure it from insult, by preventing others from approaching nearer than a certain distance.' In extending our dominion over the sea to one league, we have not extended it so far as the example of France and the other powers of Europe would have justified. They, therefore, can have no right to complain of our conduct in this respect."

Mr. Hamilton in "The Answer." 5 Lodge's Hamilton, 351.

## § 33.

### LAW OF FLAG.

See on this head Hathaway *v.* The Brantford City, Dist. Ct. S. D. New York, Dec. 2, 1886. 29 Fed. Rep., 373.

## § 35a.

### LAW AS TO OFFENSES IN PORTS.

"It is now to be considered whether the acts in question (consisting of an attempt in a Haytian port to entice Haytians on board to be carried off as slaves, followed by forcible resistance to arrest), committed as they were in Haytian territorial waters, constituted an attempt at slave-trading. In answering this question it is important to remember that both by our own common law and by the French law a punishable attempt is an intended unfinished crime. It requires four constituents: First, intent; secondly, incompleteness; thirdly, apparent adaptation of means to end; and fourthly, such progress as to justify

*Book 5, Title 1.

the inference that it would be consummated unless interrupted by circumstances independent of the will of the attemptor. Nowhere are these distinctions laid down more authoritatively than by Rossi, Ortolan, and Lelièvre, when commenting on Article I of the French Penal Code, which declares that '*toute tentative de crime * * * est considérée comme le crime même.*'

"I cite these high authorities in French jurisprudence because it is important to show that the Haytian courts, when laying down the law in this respect, did so in accordance with the law accepted in Hayti as part of the jurisprudence of France. But I do not cite the numerous cases in which the same law had been laid down in England and in the United States. It is enough now to say that it is an accepted principle in our jurisprudence that an attempt, as thus defined, is as indictable in our courts as is the consummated crime of which it was intended to be a part, and that under the indictment for the consummated crime, there may be now, both in England and in most of our States, a conviction of the attempt. While it is not indictable, for instance, to buy a box of matches, it is indictable to carry a match to a hay-rack for the purpose of igniting it, a purpose which is only prevented by a police officer stepping in. While it is not indictable, also, to have in possession materials for skeleton keys, it is indictable to carry skeleton keys manufactured from such material to a house which it is designed to enter, though the intent be frustrated by the owner's watchfulness. It is not indictable, also, to own poison, but it is indictable knowingly to place it where it is likely to destroy human life unless removed by some extraneous agency. In cases of this class there can be convictions of attempt in any jurisdiction in which the final application of the preparations to the object takes place.

"After a careful examination of the evidence in this case, I have come to the conclusion that Pelletier's action in the territorial waters of Hayti constitutes an attempt at slave trading, viewing attempt in the sense given above. There is no question as to Pelletier's intent; there is no question that the crime was left unaccomplished; there is no question that this failure of completion was owing to the forcible interference of the Haytian authorities. There is only one other condition to be considered, that of the adaptation of means to end. And as to this point I have no doubt. I can conceive of no means more fully adapted to carry out his atrocious purpose than those brought by him into operation in the secluded harbor of Fort Liberté. There, in waters not visited by other shipping by which he might be watched, unguarded by armed cruisers which could search his vessel on the first suspicious sign, and in close proximity to a rural population of negroes whose race simplicity and credulousness were likely to be increased by their isolation, he, as we may infer from the evidence, a veteran slave-kidnapper, took a vessel which in prior cruises had shown her adaptation to slave-trading, and then put a false French name on her stern, and assumed

a false French name for himself, so as to do away with any suspicion connecting him with the former outrage at Port-au-Prince. He had several devices ready by which he could inveigle on board due quota from that population. He had a guano island to talk about, for which he wanted laborers, male and female, though he had not a single implement on board to dig out and prepare the guano on that island, if ever it should be reached. He had some other work to do on some other island for which he required help. He was to give a ball, to which a number of Haytians, male and female, sufficient to make up his cargo, were to be invited; and in order to make the invitation appear more considerate, and the expected entertainment more festive, as well as to throw a cloak over his infamous antecedents, his own name and that of his ship, as has been said, were changed to names more distinctively French, and his men, mostly French, were ordered to talk French. 'Choice liquors' in abundance also were at hand, so that the victims, after the dance, could be sufficiently stupefied so as to make their subjugation more easy. Then, whatever were the means by which the requisite number of Haytians were to be enticed on board, every precaution was taken for stifling their cries, for securing their persons, and, if their resistance could not be otherwise overcome, for taking their lives. Handcuffs enough there were for the ring-leaders, and in numbers so great as to be incapable of explanation in any other way. There was the material for the re-erection of the old slave-deck, under which the captives were to be compressed. There were the 'revolvers' and other fire-arms with which the crew, a body of infamous desperadoes, expecting to share in the spoil, were to be armed, and there was the capacity of that crew for the use of such weapons, as shown by the volleys they fired at the Haytian barges which sought their arrest. Had a vessel with hot shot taken its place in those tranquil waters before the hamlets in which that ignorant and confiding people was gathered, had the guns been loaded for the purpose of destroying the homes and lives of that people, had gunners standing at their guns been arrested at the moment before the expected discharge,—while the crime intended would have been less execrable than that designed by Pelletier, it could not have been more subject to Haytian jurisdiction. For by Pelletier there was then placed in those territorial waters of Hayti to operate on that Haytian shore a mechanism of atrocity adjusted with peculiar skill to the consummation of what I believe to be a crime among the worst known to our laws, because it combines abduction, torture, enslavement, assassination, coupled with the infliction of a curse heavier than all others, both on the people from whom the victims are torn and the people by whom they are received. It is impossible for me to hold that such an attempt was not within the jurisdiction of Hayti, and it seems a mockery to assert that the guilty parties are to elude Haytian jurisdiction on the pretense that anchoring a slave ship in Haytian waters, with every contrivance to entrap and enslave

Haytian citizens, is not disturbing the tranquillity of those waters, even though, on the discovery of the conspiracy, on the eve of its consummation, the slaver, in seeking to escape, fired on its pursuers. Such firing was part of one and the same outrage. I can conceive of no more flagrant disturbance of the tranquillity of territorial waters than these facts disclose.

"The view here maintained, of the jurisdiction of the sovereign of territorial waters of offenses committed in such waters, when of a character calculated to disturb the peace of the port, is sustained in the case of Mali *v.* Keeper of Jail, decided this week by the Supreme Court of the United States. From the opinion in this case of Chief-Justice Waite, which I am permitted to cite in advance of publication, occurs the following:

"'It is part of the law of civilized nations that when a merchant vessel of one country enters the ports of another for the purpose of trade, it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement; for, as was said by Chief-Justice Marshall in The Exchange, 7 Cranch, 144, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the Government to degradation, if such * * * merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. United States *v.* Diekelman, 92 U. S., 520; 1 Phill. Int. Law (3d ed., 483), sec. cccli; Twiss's Law of Nations in Time of Peace, 229, § 159; Creasy's Int. Law, 167, § 176; Halleck's Int. Law (1st ed.), 171. And the English judges have uniformly recognized the rights of the courts of the country of which the port is part to punish crimes committed by one foreigner on another in a foreign merchant ship. (Regina *v.* Cunningham, Bell C. C., 72; S. C., 8 Cox C. C., 104; Regina *v.* Keyn, 11 Cox C. C., 198, 204; S. C., L. R., 1 C. C., 161, 165; Regina *v.* Keyn, 13 Cox C. C., 403, 486, 525; S. C., 2 Ex. Div., 63, 161, 213.) As the owner has voluntarily taken his vessel for his own private purposes to a place within the dominion of a Government other than his own, and from which he seeks protection during his stay, he owes that Government such allegiance for the time being as is due for the protection to which he becomes entitled.

"'From experience, however, it was found long ago that it would be beneficial to commerce if the local Government would abstain from interfering with the internal discipline of the ship and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local Government to be dealt with by the authorities of the nation to which the vessel

belonged as the laws of that nation or the interests of its commerce should require. But if crimes are committed on board of a character to disturb the peace and tranquillity of the country to which the vessel has been brought, the offenders have never by comity or usage been entitled to any exemption from the operation of the local laws for their punishment, if the local tribunals see fit to assert their authority.'"

Mr. Bayard, Sec. of State, Report on Pelletier's case, Jan. 20, 1887. Sen. Ex. Doc. 64, 49th Cong., 2d sess.

## § 38.

### NECESSITY VACATES PORT LAW.

"Were there no treaty relations whatever between the United States and Great Britain, were the United States fishermen without any other right to visit those coasts than are possessed by the fishing craft of any foreign country simply as such, the arrest and boarding of the Grimes, as above detailed, followed by forcing her into the port of Shelburne, there subjecting her to fine for not reporting, and detaining her until her bait and ice were spoiled, are wrongs which I am sure Her Majesty's Government will be prompt to redress. No Governments have been more earnest and resolute in insisting that vessels driven by stress of weather into foreign harbors should not be subject to port exactions than the Governments of Great Britain and the United States. So far has this solicitude been carried that both Governments, from motives of humanity, as well as of interest as leading maritime powers, have adopted many measures by which foreigners as well as citizens or subjects arriving within their territorial waters may be protected from the perils of the sea. For this purpose not merely light-houses and light-ships are placed by us at points of danger, but an elaborate life-saving service, well equipped with men, boats, and appliances for relief, studs our seaboard in order to render aid to vessels in distress, without regard to their nationality. Other benevolent organizations are sanctioned by Government which bestow rewards on those who hazard their lives in the protection of life and property in vessels seeking in our waters refuge from storms. Acting in this spirit the Government of the United States has been zealous, not merely in opening its ports freely, without charges, to vessels seeking them in storm, but in insisting that its own vessels, seeking foreign ports under such circumstances, and exclusively for such shelter, are not under the law of nations subject to custom-house exactions.

"'In cases of vessels carried into British ports by violence or stress of weather [said Mr. Webster in instructions to Mr. Everett, June 28, 1842] we insist that there shall be no interference from the land with the relation or personal condition of those on board, according to the laws of their own country; that vessels under such circumstances shall enjoy the common laws of hospitality, subjected to no force, entitled to

have their immediate wants and necessities relieved, and to pursue their voyage without molestation.'

"In this case, that of the Creole, Mr. Wheaton, in the Revue Française et Étrangère (ix, 345), and Mr. Legaré (4 Op., 98), both eminent publicists, gave opinions that a vessel carried by stress of weather or forced into a foreign port is not subject to the law of such port; and this was sustained by Mr. Bates, the umpire of the commission to whom the claim was referred (Rep. Com. of 1853, 244, 245):

"'The municipal law of England [so he said] cannot authorize a magistrate to violate the law of nations by invading with an armed force the vessel of a friendly nation that has committed no offense, and forcibly dissolving the relations which, by the laws of his country, the captain is bound to preserve and enforce on board. These rights, sanctioned by the law of nations, viz, the right to navigate the ocean and to seek shelter in case of distress or other unavoidable circumstances, and to retain over the ship, her cargo, and passengers, the law of her country, must be respected by all nations, for no independent nation would submit to their violation.'

"It is proper to state that Lord Ashburton, who conducted the controversy in its diplomatic stage on the British side, did not deny as a general rule the propositions of Mr. Webster. He merely questioned the applicability of the rule to the case of the Creole. Nor has the principle ever been doubted by either Her Majesty's Government or the Government of the United States; while, in cases of vessels driven by storm on inhospitable coasts, both Governments have asserted it, sometimes by extreme measures of redress, to secure indemnity for vessels suffering under such circumstances from port exactions, or from injuries inflicted from the shore.

"It would be hard to conceive of anything more in conflict with the humane policy of Great Britain in this respect, as well as with the law of nations, than was the conduct of Captain Quigley towards the vessel in question on the morning of October 8.

"In such coasts, at early dawn, after a stormy night, it is not unusual for boats, on errands of relief, to visit vessels which have been struggling with storm during the night. But in no such errand of mercy was Captain Quigley engaged. The Marion Grimes, having found shelter during the night's storm, was about to depart on her voyage, losing no time while her bait was fresh and her ice lasted, when she was boarded by an armed crew, forced to go seven miles out of her way to the port, and was there under pressure of Captain Quigley, against the opinion originally expressed of the collector, subjected to a fine of $400 with costs, and detained there, as I shall notice hereafter, until her voyage was substantially broken up. I am confident Her Majesty's Government will concur with me in the opinion that, as a question of international law, aside from treaty and other rights, the arrest and detention under the circumstances of Captain Landry and of his vessel were

in violation of the law of nations as well as the law of humanity, and that on this ground alone the fine and the costs should be refunded and the parties suffering be indemnified for their losses thereby incurred.

Mr. Bayard, Sec. of State, to Mr. Phelps, Nov. 6, 1886. MSS. Inst., Gr. Brit.; For. Rel., 1886.

"The Rebecca, an American schooner, cleared at Morgan City, La., on the 30th January, 1884, with a cargo of lumber for Tampico, Mexico, and having also on board six cases of merchandise to be left on the way at Brazos Santiago, Tex., and which were not on the manifest of the cargo for Tampico. While on her voyage, and off the bar at Brazos, a storm arose, which increased in violence until the vessel, which was then awaiting a favorable opportunity to enter the port of Brazos, was driven a considerable distance to the southward, and so seriously damaged by the storm that the captain, deeming it unsafe to attempt to return to Brazos Santiago, made for the port of Tampico, which he entered with his vessel, in a leaking and seriously disabled condition.

"When the Rebecca began to leak at sea the six cases of merchandise intended to be landed at Brazos Santiago, and which had been reached by the water, were broken open, and the packages, thirty in number, contained in the cases, were so stored as to be protected from damage by the sea. On the arrival of the vessel at Tampico, the master immediately noted a protest of distress with the United States consul. On the following day the Mexican customs officials seized the thirty packages in question, which were not on the manifest of cargo for Tampico, on the ground that they had been brought into port in violation of the Mexican law requiring all goods entered in a Mexican port from a foreign country to be manifested, and arrested the master of the vessel on the charge of attempting to smuggle. This charge was not sustained, and the master was released; but he was subsequently arrested and required to give bond to answer the charge of bringing goods into a Mexican port without proper papers. In due time this charge was heard before the district court for the south and center of Tamaulipas, sitting at Tampico, and it was adjudged by the court that the goods should pay triple duty. The master refused to comply with this sentence, and thereupon the goods and vessel were sold by order of the court.

"This Department has taken the ground that as the Rebecca was driven by stress of weather from her intended course and entered the port of Tampico in distress, making no attempt to conceal the unmanifested merchandise, and without any intention on the part of the master or owners to violate the port regulations or tariff laws of Mexico, the vessel was not liable to penal prosecution either for 'smuggling' or for 'bringing goods into port without proper papers;' and that the seizure and sale of the vessel, under the circumstances above stated, was a gross breach of comity and hospitality peculiarly unreasonable and unjust.

"The Mexican Government, while denying that the entrance of the Rebecca into Tampico was enforced by stress of weather, has taken the position that the judgment of its courts, ordering the sale of the vessel, is final and conclusive, especially as the master and owners failed to take an appeal from the judgment so rendered to another court, as it is contended might have been done.

"This Department has contested and denied the doctrine that a Government may set up the judgment of one of its own courts as a bar to an international claim, when such judgment is shown to have been unjust or in violation of the principles of international law; and has further maintained that, under the circumstances of the case and in view of the fact that the prior proceedings had been so palpably arbitrary and unjust, the master and owners were not bound to attempt further judicial remedies in the local tribunals."

Mr. Bayard, Sec. of State, report on Rebecca case, Feb. 26, 1887. Sen. Ex. Doc. 109, 49th Cong., 2d sess. See *infra*, §§ 238, 242.

§ 50*e*.

BORDER RAIDERS.

See order of Secretary of War to General Sherman, June 1, 1877, directing the United States commander in Texas "that in case the lawless incursions continue he will be at liberty, in the use of his own discretion, when in pursuit of a band of the marunders, * * * to follow them across the Rio Grande," &c.

House Ex. Doc. 13, 45 Cong., 1st sess.

§ 61.

RELATIONS WITH HAYTI.

"By the law of nations, it must be remembered, all sovereign states are to be treated as equals. There is no distinction between strong states and weak; the weak are to have assigned to them the same territorial sanctities as the strong enjoy. There is a good reason for this. Were it not so, weak states would be the objects of rapine, which would not only disgrace civilization, but would destroy the security of the seas, by breeding hordes of marauders and buccaneers, who would find their spoil in communities which have no adequate power of self-defense. And there are peculiarly weighty reasons why the Government of the United States should lift a resolute hand to prevent such rapine and spoliation when attempted by persons carrying her flag, outcasts as they may be, and flung aside as that flag may be by them, whenever, as in the present case, this may subserve their nefarious purposes. The United States has proclaimed herself the protector of this Western World, in which she is by far the strongest power, from the intrusion of European sovereignties. She can point with proud satisfaction to the fact that over and over again has she declared, and declared effectively, that serious indeed would be the consequences if European hostile foot should, without just cause, tread those states in the New World

which have emancipated themselves from European control. She has announced that she would cherish, as it becomes her, the territorial rights of the feeblest of these states, regarding them not merely as in the eye of the law equal to even the greatest of nationalities, but, in view of her distinctive policy, as entitled to be regarded by her as the objects of a peculiarly gracious care. I feel bound to say that if we should sanction by reprisals in Hayti the ruthless invasion of her territory and insult to her sovereignty which the facts now before us disclose, if we approve by solemn executive action and Congressional assent that invasion, it will be difficult for us hereafter to assert that in the New World, of whose rights we are the peculiar guardians, these rights have never been invaded by ourselves."

Mr. Bayard, Sec. of State, report on Pelletier's case, Jan. 20, 1887. Sen. Ex. Doc. 64, 49th Cong., 2d sess.

## § 67.

### TERRITORIAL RIGHTS IN CHINA.

"I have received your No. 240 of the 12th of November last, touching the projected revision of the municipal regulations and by-laws of Shanghai, and offering certain pertinent points for the consideration of the Department.

"It appears that by the municipal charter of Shanghai every foreigner owning land of the value of at least 500 taels, or occupying a house of an assessed rental value of not less than 250 taels, is a member of what is called the 'municipal body,' and is entitled to vote at all municipal elections. The 'municipal body' elect at stated times a municipal council, consisting of not more than nine members, who have the power to make regulations for the government of the municipality, subject to the approval of the consuls and foreign ministers, or a majority of them, and of the rate-payers at a special meeting.

"In the proposed revision it is insisted by the municipality, in respect to any by-law that may hereafter be passed, that 'any such additional or substituted by-law, or alteration or repeal of a by-law, shall be binding when approved by the treaty consuls and the intendant of circuit, or by a majority of them; but the representatives of the treaty powers may, at any time within six months of the date of such approval, annul any such additional or substituted by-law, or alteration or repeal of by-law.'

"Your opinion as to this proposed ordinance is in entire accord with that of the Department, that it would reverse the proper order of things and be inexpedient to put in force, without the approval of the foreign ministers, a by-law which they might, in the exercise of an acknowledged power, subsequently disapprove and disallow. This would be in fact the substitution of a power of annulment for the power of veto which the foreign ministers now possess.

"The question which you suggest as to the authority of the consul-general at Shanghai to enforce the ordinances of the municipality

against citizens of the United States is not without difficulty. Under section 4086 of the Revised Statutes of the United States, consuls of the United States in China are empowered to exercise criminal and civil jurisdiction in conformity with the laws of the United States. It is provided, however, that when those laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies the common law and the law of equity and admiralty shall be extended to the persons within the consul's jurisdiction; and if neither the common law nor the law of equity or admiralty, nor the statutes of the United States, furnish appropriate remedies the ministers in the countries, respectively, to which the statute applies shall, by decrees and regulations which shall have the force of law, supply such defects and deficiencies.

"The last clause, in respect to decrees and regulations, has been construed by the Department to confer upon the ministers in question the power to regulate the course of procedure and the forms of judicial remedies rather than any general legislative power for the definition of offenses and the imposition of penalties for their commission. It is true that opinion has been divided on this point. Mr. Attorney-General Cushing held that the power given to the commissioner of the United States in China to make 'decrees and regulations' which should have the force of law gave him the power to legislate in certain respects for citizens of the United States in China, and 'to provide for many cases of criminality which neither Federal statutes nor the common law would cover.' (7 Op., 504, 505.) The disposition, however, of this Department has been to restrict the legislative power of the minister to the regulation of the forms and course of judicial procedure, it not being regarded as desirable or proper to authorize the exercise of so great a power, while it was so much in doubt, as that of criminal legislation.

"But the ordinances of the municipality of Shanghai, although dependent for their operation as to citizens of the United States upon the approval of the minister of this Government in China, are conceived to present in one aspect a different question from that of the power of the minister of the United States as to criminal legislation. The municipality of Shanghai is understood to have been organized by the voluntary action of the foreign residents of certain nationalities, or such of those residents as were owners or renters of land, for the purpose of exercising such local powers for the preservation of the order and morals of the community as are usually enjoyed by municipal bodies. In the United States, where government is reduced to a legal system, these powers of local police rest on charters granted by the supreme legislative authority of the state; but it is not difficult to conceive of a case in which a community outside of any general system of law might organize a government and adopt rules and regulations which would be recognized as valid on the ground of the right of self-preservation, which is inherent in people everywhere.

"In this light may be regarded the municipal ordinances of Shanghai. The foreign settlement not being subject to the laws of China, and the

legal systems of the respective foreign powers represented there being not only dissimilar *inter se*, but insufficient to meet the local needs, it became necessary for the local residents interested in the preservation of peace and order to supply the deficiency.

"American citizens residing in Shanghai enjoy, in common with other persons composing the foreign settlement, all the rights, privileges, and protection which the municipal government affords; and as they go there voluntarily, and presumptively for the advancement of their personal interests, they may reasonably be held to observe such police regulations as are not inconsistent with their rights under the laws of the United States. It is true that this reasoning is not conclusive as to the strict legal authority of the consul-general of the United States to enforce such regulations; but, taken in connection with the fact that at present American citizens in Shanghai are not subject to any judicial control except that of the consul-general of the United States, it affords a basis upon which his enforcement of the municipal regulations may be justified.

"It is important to observe that the jurisdiction of consuls of the United States in China is very extensive, including not only the administration of the laws of the United States, and the law of equity and admiralty, but also of the common law. The consular courts have, therefore, what the courts of the United States generally have not—common-law jurisdiction in criminal cases. It is true that this jurisdiction is difficult, indeed incapable, of exact definition, but it implies the power to enforce rules which are not to be found on the statute-book of the United States, and which can be ascertained only by the application of the general principles of the common law to special cases and condition. In respect to matters of local police, a fair measure and definition of the law may be found in the regulations adopted by the municipality in aid of and supplementary to the general juridical systems of the foreign powers. Such a process, while maintaining the peace and order of the community, tends to consolidate the local administration of law.

"The Department is, however, of opinion that all difficulties would be removed if the treaty powers would adhere to the plan suggested in your dispatch of organizing a municipal court to administer the regulations of the municipal body. This course would be advantageous, both to the municipality and to the treaty powers. It would relieve the consular representatives of the latter from the performance of an embarrassing duty, and would secure a uniform and equal administration of the municipal laws."

Mr. Bayard, Sec. of State, to Mr. Denby, Mar. 7, 1887. MSS. Inst., China.

As to statutes of limitation in China, see *infra*, § 125.

As to limits of appeal from consular courts in China, see *infra*, § 125.

## § 68a.

### EXTRATERRITORIALITY IN TURKEY.

"Permit me to attract your attention to the relations of citizens of the United States as a nationality to the Ottoman Porte, in connection

with which two important questions present themselves for consideration, the first being the position of citizens of the United States residing continuously in Turkey for business or other purposes; the second, the position in respect to the Porte, of educational, eleemosynary, and religious institutions established and carried on by citizens of the United States on Turkish soil.

"So far as concerns missionary *status*, the question now immediately presented is one which does not exclusively concern the schools of the American Board of Commissioners of Foreign Missions. Excellent as is their work, and entitled to the highest respect, I have simply to say that the efforts the Department is now making, and has heretofore steadily made, in support of those schools is wholly divested of sectarian preferences, and would be exerted with equal earnestness in support of the schools in Turkey of any other and all other American religious or charitable associations.

"In view of the general question of the rights of citizens of the United States in Turkey, it is important to maintain that the rights of extraterritoriality, claimed to a greater or less extent for these schools, are part of the same system by which rights of extraterritoriality are claimed by this government in Turkey (1) for our citizens in certain juridical relations and, (2) for our diplomatic and consular establishments, so as to enable them to extend protection to the extent to which such protection is enjoyed by other Christian embassies, legations, and consulates in Turkey. The basis of this jurisdiction may be thus stated:

"Constantinople, and the domain of which it is the capital, have, from a very early period down to the present day been populated by distinct and diverse nationalities, to which rights of government by their own especial laws have always been conceded. We have this thus conceded (during the Greek empire) by Cassiodorus, the secretary of Theodoric the Great: '*Romanis, Romanus judex erit; Gothis, Gothus; et sub diversitate judicum una justitia complectabatur.*'

"When the Ottoman Porte was established by conquest in Turkey the same system of recognition and assignment of self-government to each distinct nationality was not only adopted but extended. Not only were Armenians and other nationalities whom the Turks, after the conquest, found in their domains, recognized as entitled to a large measure of local self-government, but similar privileges were from time to time accorded to foreign Christian nations. For this course on the part of the Porte—a course which has led to the non-application to Turkey of the principles of territorial sovereignty generally recognized elsewhere—the following reasons may be given:

"When the Porte took possession of Turkey its population was largely made up of Christian nationalities to which local self-government had been previously more or less assigned. These nationalities could not be expelled from Turkey without expelling the population by which its fields were tilled and its business exchanges conducted. On

the other hand, the Porte could not undertake the municipal control of such nationalities, nor the settlement of their business differences, nor the supervision of their religious functions. * * * Those who rejected Mohammed were, to the Turk, not merely enemies, but Giaours—unclean persons—persons with whom the Turk could have no business or even social relations. Hence they were to be excluded from Turkish armies. While they might be taxed for imperial purposes, they were, so far as concerns their own particular interests, to determine themselves the taxes which they were to bear. In Turkish schools their children could not be received; and, therefore, they were entitled to have schools of their own, in which the teaching was to be distinctively Christian, and which were regarded as part of the system of diverse nationality recognized by ancient usage and essential to the existence of the Empire. And so it was with regard to the settlement of business disputes. As the Porte, or its courts, whatever they might have been, could not, without abandoning its fundamental doctrine of creed isolation, take cognizance of business disputes between unbelievers, these disputes must be settled by courts of the nationalities to which these unbelievers respectively belonged. And if questions of religion were involved, such disputes must be referred for determination to the head of the church to which the disputants belonged.

"This demarcation of jurisdictions will not appear strange when it is recollected that a similar policy and practice are adopted in this country by the dominant race toward the North American Indians. We can scarcely rate the incapacity of these Indians to adopt and apply our institutions as greater than the Ottoman conquerors regarded the incapacity of the Christian nationalities in Turkey at the conquest to adopt and apply Ottoman institutions, nor regard the political capacity of these Indians as of a less grade than the Ottoman conquerors regarded that of their new Christian subjects. And we continue to do for the Indians what the Ottoman conquerors of Turkey did for the Christian races who at the conquest were found there. Just as the Ottomans professed themselves unable to understand the laws of those Christian races, or to establish over them Moslem law, therefore leaving them to their own courts, so we, declining to absorb Indian law into our own, or even to apply to Indians our own municipal jurisprudence, leave the adjudication of questions arising in Indian tribes to the determination of their tribal law.

"This renunciation by the Porte of legislative and judicial control over Christian nationalities, which was worked into the traditions of the Empire, acquired not only greater municipal force but more fully recognized international validity, when the great European powers sent to Turkey not only diplomatic and consular agents, but merchants, to conduct business with the Christian subjects of the Porte, and missionaries to minister not only to persons of their own nationality but to

whomsoever might apply. These visitors could not be repelled. Turkey could not afford to quarrel with the leading sovereigns of civilization, nor could she preclude that civilization from pouring, through its agents, into her domains. Those agents came and remained in great numbers; not merely merchants and capitalists, but religionists, devoted to the work of maintaining worship, according to their views, with hospitals and schools. To these energetic and influential settlers Turkish law, for the following reasons, was even less applicable than to the native Christians. The new-comers were protected by foreign powers whom Turkey was unwilling to offend; and they belonged to Western races who, from their idiosyncrasies, cannot be fused with the Orientals. They are, to adopt Lord Stowell's language, frequently cited with approval in the United States (The Indian Chief, 3 C. Rob. Adm. Rep., 29), 'immiscible,' so that by no comity of international law can the institutions of the one be applied to the other. No foreigner with ordinary business capacity or ordinary self-respect would live in a country where he could not be heard in the local courts of justice, or, if he were heard, it would be as degraded by the disabilities of an inferior and abject race. Yet, on the other hand, the presence in Turkey of foreigners of business capacity and of self-respect is essential to the maintenance of the Empire. By them its monetary affairs are conducted, its soldiers drilled, its schools taught in all that concerns liberal civilization, and its relations with the outside world regulated. Turkey could not, and cannot now, be expected to surrender the policy which, nominally at least, treats the Ottomans as the dominant race on her soil; and the only alternative open to her has been, therefore, to permit foreigners of the classes so necessary to her political prosperity to enjoy, as far as practicable when living within her borders, their own distinctive institutions. The Porte could not exist if it were to surrender the political exclusivism of Islamism. It could not exist, also, if it were deserted by those foreigners to whom its progress in civilization is due. Hence the local self-government conceded to foreign communities in Turkey, evidenced in the old capitulations and gradually extending to meet the exigencies of the times, is a necessary emanation of the political and social conditions of that Empire as they now exist. It is for the legation of the United States at Constantinople to see that American citizens in Turkey enjoy in their various relations the rights of extraterritoriality which, under the system I have outlined, are among the essential conditions of the continuous political existence of Turkey under its present dynasty.

"The most important of the prerogatives growing out of these conditions is that of the distinctive jurisdiction assigned to our ministers in Turkey under treaty, and as applied by Revised Statutes, § 4125, which gives these officers such jurisdiction as 'is permitted by the laws of Turkey *or*' [in the alternative] 'its usages in its intercourse with the Franks or other Christian nations.' By the same standard of usage,

as evolved by the processes above stated, are to be determined the territorial rights exercised by our legations and consulates in the East, and the prerogatives of American missionaries, under the limitations above mentioned.

"The effect of the treaty of 1830 on this extraterritoriality is thus stated by Mr. Cushing (7 Op., 567, 568): 'Commerce, in the treaty, means *any subject or object of residence or intercourse whatsoever* * * * *as to all civil affairs to which no subject of Turkey is a party. Americans are wholly exempt from the local jurisdiction; and,* * * * *in civil matters as well as in criminal, Americans in Turkey are entitled to the benefit* of 'the usage observed towards other Franks.'

"'I think the "causes" spoken of in the second sentence of the fourth article are of the same nature as to parties as the "litigations and disputes" mentioned in the first sentence, that is, between citizens of the United States and subjects of the Porte; the meaning of which is, that causes between such parties under five hundred piastres in amount are to be decided by the ordinary local magistrates, assisted by the dragoman, and causes above that amount by the Porte itself; that is, the Sultan or his appropriate minister, with intervention of the minister or consul of the United States.

"'My conclusions in this respect are founded, first, on the phrase in the second article which engages that citizens of the United States in Turkey shall not be "treated *in any way* contrary to established usages." What are the "established usages?" Undoubtedly the absolute exemption of all Franks, in controversies among themselves, from the local jurisdiction of the Porte.

"'I will not repeat here what has been said in previous communications as to the ground or principle of the right of extraterritoriality asserted by, and fully conceded to, Franks generally, that is, Western Christians in Turkey.'

"One of the distinctive incidents of this extraterritoriality is thus noticed by Mr. Marcy in his note of September 26, 1853 (Dig. Int. Law, § 198):

"'By the laws of Turkey and other Eastern nations the consulates therein may receive under their protection strangers and sojourners whose religion and social manners do not assimilate with the religion and manners of those countries. The persons thus received become thereby invested with the nationality of the protecting consulate. These consulates and other European establishments in the East are in the constant habit of opening their doors for the reception of such inmates, who are received irrespective of the country of their birth or allegiance. It is not uncommon for them to have a very large number of such *protégés*. International law recognizes and sanctions the rights acquiesced [*sic* acquired?] by this connection.

"'In the law of nations, as to Europe, the rule is that men take their national character from the general character of the country in which

they reside; and this rule applies equally to America. But in Asia and Africa an immiscible character is kept up, and Europeans trading under the protection of a factory take their national character from the establishment under which they live and trade. This rule applies to those parts of the world from obvious reasons of policy, because foreigners are not admitted there as in Europe and the Western parts of the world, into the general body and mass of the society of the nation, but they continue strangers and sojourners, not acquiring any national character under the general sovereignty of the country.' (1 Kent Com., 78, 79.)

"In a report to the Institute of International Law on this subject, by M. F. de Martens (Annuaire, 1882–'83, p. 225), is found the following statement:

"'D'autre part, les gouvernements musulmans eux-mêmes n'ont jamais insisté sur leur pouvoir territorial pour juger les procès mixtes entre sujets des États chrétiens. Les contestations entre giaours étaient trop impures aux yeux des musulmans pour qu'une intervention de leur part fût permise.'

"And in the same volume, page 231, M. J. Hornung says:

"'Cette exterritorialité des colonies européennes et américaines trouve sa justification dans les défauts de la justice et de la police locale et dans le déplorable état des prisons. Souvent, en outre, les pays de l'Orient sont encore, au point de vue religieux, dans leur droit et leur justice, ce qui—soit dit pour leur défense—était encore le cas, dans les pays chrétiens, il y a cent ans ou même moins. Ainsi, devant les tribunaux ottomans de l'empire turc, le témoignage des chrétiens n'est pas, en fait, admis sur le même pied que celui des musulmans, le cheik-ul-islam n'ayant pas encore donné son autorisation aux cadis.' (Voir le rapport de Sir Travers Twiss dans le tome V de l'Annuaire.)

"Concessions by the sovereigns of Constantinople and the region which it dominates of extra territorial privileges were issued by the Christian Emperors to Venice early in the eleventh century; to the Amalfians in 1056; to the Genoese in 1098; to Pisa in 1110. The charters granting these privileges were called 'capitulations,' from the fact that they were divided into chapters; and this title they continued to hold after the Moslem conquest. When the Turks took possession of Constantinople, after the conquest of 1453, they found the Genoese in possession, under a specific capitulation, of the town of Galata, which was surrounded by an intrenched camp. This capitulation was confirmed by Mahomet when master of Constantinople. Capitulations to Venice, dated October 2, 1540, granted to Venetians the right of having all differences between Venetians in Turkey decided by judges to be appointed by Venice, while to the trial before Turkish courts of differences between Venetians and Turks, the presence of a Venetian interpreter was an essential condition. In the same capitulations was given to Venice the right of having permanently at Constantinople a magistrate, as a sort

of Venetian viceroy, by whom general supervision over Venetians was to be exercised. Venetians, by the same instrument, were exempted not merely from military service, but from the tax to which other Christians were subjected.

"The law in this respect is thus summed up by M. F. Laurent, in his Droit Civil International, vol. 1, page 239, as translated in this Department:

"'The conquerors left to the conquered their law and a sort of autonomy; the Greeks, Armenians, Slavs retained their religions and civil establishment as it existed at the epoch of the conquest; the Turks confine themselves to ruling, and this rule consists merely in levying the tribute imposed on conquered populations; they do not interfere with the administration of justice. As is the case with the Turks, the civil law is closely interwoven with the religious law, the conquerors left to the vanquished, together with their religion, a quite extensive civil autonomy, clothing the heads of the various religious communities with an authority analogous to the Sultan's. This system was extended to the Europeans who settled in the ports of the Levant for commercial purposes. In them the settlers are governed by their own laws; this autonomy is guaranteed them by the capitulations, a kind of convention made between the Sultan and the foreigners represented by their Government. The capitulations cannot be altered without the consent of the contracting parties. Hence this peculiar consequence, that the laws respecting foreigners and the rights assured to them only bind them when their respective sovereign states have accepted them. It can scarcely be said that the state is sovereign, for it does not proceed by the course of ordering and commanding; the relations between the Government and the foreigners are governed by international and not by municipal law. It will certainly not be asserted that this peculiar establishment is due to a liberal disposition of mind or even to the tolerance of the conqueror, for the latter may easily leave to the conquered and to foreigners entire religious liberty without granting them an autonomy which destroys the very conception of the state. It is simply incapacity, oriental barbarism.' It has been said of the Turks that they have camped in Europe; they rule over peoples who dwell side by side, among whom there is no bond of connection, and between the conquerors and the conquered there is no connecting link save that of force.' To the same effect writes Mr. W. B. Lawrence, Commentaire sur Wheaton, vol. 4, pp. 106 *ff.*

"To French subjects specific extraterritorial rights were given in the capitulations issued in February, 1535, or, according to Von Hammer, in February, 1536. (See De Testa's Traités de la Porte Ottomane, vol. 1, pp. 15 *ff.*) These capitulations were from time to time renewed and amplified, until they took the shape of the capitulations, or 'Lettres Patentes' of May 30, 1740. De Testa, vol. 1, pp. 186, 187.) * * *

"I have referred in detail to these capitulations, because they have sometimes been put forward as the basis on which rests the right of our missionaries in Turkey to the protection they claim. But, accepting the view of Mr. Pendleton King, by whom the mission at Constantinople has been recently ably conducted, I doubt the expediency of relying solely on the capitulations for this purpose, since I think it may be questioned whether under the text the 'religieux,' to whom privileges are given, are not to be limited to persons of French nationality. It is not necessary, however, to thus limit ourselves. In the eighteenth article of the 'capitulations and articles of peace between Great Britain and the Ottoman Empire, as agreed upon, augmented, and altered at different periods [beginning in 1675], and finally confirmed by the treaty of peace concluded at the Dardanelles in 1809,' as published by the Levant Company, 1816 (1 Br. and For. St. Pap., 750), we have the following:

"'XVIII. That all the capitulations, privileges, and articles granted to the French, Venetian, and other princes, who are in amity with the Sublime Porte, having been in the like manner, through favor, granted to the English, by virtue of our special command, the same shall be always observed according to the form and tenor thereof, so that no one in the future do presume to violate the same or act in contravention thereof.'

"As illustrating the nature of the rights subsequently recognized as residing not merely in Protestant missionaries in Turkey, but in their converts, I inclose several important documents, marked Exhibit B.

"I also inclose a protocol of the conference which preceded the treaty of Paris of March 30, 1856, bearing on the same questions. This protocol is marked Exhibit C.

"In the treaty of Paris referred to is the following article:

"'ART. IX. His Imperial Majesty the Sultan having, in his constant olicitude for the welfare of his subjects, issued a firman, which while ameliorating their condition without distinction of religion or race, records his generous intentions towards the Christian populations of his Empire, and wishing to give a further proof of his sentiments in that respect has resolved to communicate to the contracting parties the said firman emanating spontaneously from his sovereign will.

"'The contracting powers recognize the high value of this communication. It is clearly understood that it cannot, in any case, give to the said powers the right to interfere, either collectively or separately, in the relations of His Majesty the Sultan with his subjects, nor in the internal administration of his Empire.' (Holland's Eastern Question, 246.)

"The firman to which the ninth article, as given above, refers, is the Hatti-Humayoun of February 18, 1856 (*Ibid.*, 329, *ff.*), which virtually makes general the concessions of extra territoriality given in the capitulations above cited.

* * * * * * *

"Among the articles of the Treaty of Berlin, July 13, 1878, are the following:

"'ART. LXI. The Sublime Porte undertakes to carry out, without further delay, the improvements and reforms demanded by local requirements in the provinces inhabited by the Armenians, and to guarantee their security against the Circassians and Kurds.

"'It will periodically make known the steps taken to this effect to the powers, who will superintend their application.

"'ART. LXII. The Sublime Porte, having expressed the intention to maintain the principle of religious liberty, and give it the widest scope, the contracting parties take notice of this spontaneous declaration.

"'In no part of the Ottoman Empire shall difference of religion be alleged against any person as a ground for exclusion or incapacity as regards the discharge of civil and political rights, admission to the public employments, functions, and honors, or the exercise of the various professions and industries.

"'All persons shall be admitted, without distinction of religion, to give evidence before the tribunals.

"'The freedom and outward exercise of all forms of worship are assured to all, and no hindrance shall be offered either to the hierarchical organizations of the various communions or to their relations with their spiritual chiefs.

"'Ecclesiastics, pilgrims, and monks of all nationalities traveling in Turkey in Europe, or in Turkey in Asia, shall enjoy the same rights, advantages, and privileges.

"'The right of official protection by the diplomatic and consular agents of the powers in Turkey is recognized both as regards the above-mentioned persons and their religious, charitable, and other establishments in the holy places and elsewhere.' (Holland's Eastern Question, 306.)

"As an exposition of the effect of the articles above cited, I inclose, marked Exhibit E, a translation made in this Department of a passage from an article by Mr. Ed. Engelhardt in the Revue de droit international et legislation comparée, vol. xii, p. 373.

"This passage shows the construction assigned by the British Government, and accepted by Turkey, to the Treaty of Berlin, so far as concerns the religious liberty of Protestants.

"I have inclosed the above documents in this instruction because (1) they indicate the basis on which rests the extraterritoriality in Turkey of our citizens both as to religious liberty and as to distinctive judicial organizations, and (2) these documents may not be readily accessible in Constantinople. From them you will see that there is no necessity of basing the claim of American missionaries in Turkey on the French capitulations. They are maintained far more effectively under the treaties of Paris and of Berlin, under the Turkish decrees

which preceded these treaties, and under the settled customs of the Porte.

"The construction given by Turkey to these treaties, and especially to the capitulations to Great Britain quoted above, is evidenced by her continued protection of the American missions in Turkey, with their hospitals and schools, in which Turkish patients are received and Turkish children instructed. These missions have been in existence for many years. They have now connected with them six colleges, forty-three seminaries and high schools, attended by two thousand pupils, and five hundred primary and secondary schools with over ten thousand pupils. Of these schools Mr. Hyde Clarke, in the Journal of the British Statistical Society for December, 1867, page 526, thus speaks:

"'By the assistance of American funds and the devoted exertions of the American missionaries, men and women, a great influence has been exerted in the Armenian body generally; their services have not been so much devoted to theological propagandism as to rendering service as physicians, teachers, and social reformers.' In these institutions a million of dollars, sent from the United States, has been invested, and from the United States their pecuniary support as well as most of their teachers are obtained. For more than half a century Turkey has seen these funds flow in, these schools built, these hospitals in beneficent operation, these children in process of instruction. 'During the sixty years that American schools have existed in Turkey,' so it is stated in an official communication from the American Board of Commissioners of Foreign Missions, which has these missions in charge, 'it (Turkey) has not only not interfered with or objected to them, but it has repeatedly protected them against unlawful aggression on the part of ill-disposed persons.'

"The protection by Turkey of the schools established by other religious communions on Turkish soil, a protection which has existed from a time coincident with the establishment of such schools, shows that Turkey regarded them as among the incidents of the territorial rights assigned by the capitulations to those religious communions. We have, therefore, in this protection not merely a contemporaneous construction of the Turkish capitulations, treaties, and edicts, but a construction so continuous that it has the force of settled law. And this construction is strengthened by the fact that the Porte has ordered that no duties should be charged on goods coming to the American missions or schools. There could be no stronger proof that these missions and schools are regarded by Turkey as having not merely a protected but a favored existence on her soil.

"It has been argued by high authority that the right on the part of American missionaries in Turkey to the continued maintenance of their churches, hospitals, and schools may be rested on the 'favored-nation' clause of our treaty of 1862 with Turkey, applying to us privileges granted to other sovereignties. Turkey has claimed that this treaty

has terminated by notice; and though there is little strength in this contention, it is not necessary that the question should now be raised. The rights of the missionaries above noticed find abundant support in ancient usage and in the Turkish legislation prior and consequent to the treaties of Paris and Berlin, applied, as this legislation has been, in such a way as to grant what are virtually charters to the missions in question for their hospitals and schools.

"From what has been said it will be seen, therefore, that the right of Protestant citizens of the United States to conduct their missions, chapels, hospitals, and schools in Turkey in the way they have been heretofore conducted, rests on the privileges of extraterritoriality granted to Christian foreigners in Turkey, as expanded in the present case by usage established by Turkey, so as to enable persons of Turkish nationality to be received in such hospitals and schools.

"So far as concerns the right of Americans, whatever may be their religious faith, to protection in the exercise of that faith, the right rests on the concessions of extraterritorialty above stated. So far as it concerns their right to receive in their hospitals and schools (otherwise than as servants) persons of Turkish nationality, it rests on usage, amounting, from duration and the incidents assigned to it by law, to a charter. It is not, however, claimed that as to such persons of Turkish nationality extraterritorial rights in American missions can be acquired. They must remain subject to the sovereignty of the Porte, which is entitled to prescribe the terms on which they can be permitted to attend such missions. It is, therefore, with peculiar satisfaction that the Department learns that, in part through the instrumentality of Mr. Pendleton King, as chargé d'affaires, an arrangement has been effected with the Turkish authorities by which the missions are enabled to pursue, as heretofore, their meritorious, unselfish, and beneficent work among Turks in Turkey.

"I inclose herewith, as a matter of information, an opinion by Mr. Edwin Pears, lately forwarded to this Department by American citizens residing in Constantinople, as to their legal rights. Mr. Pears is well known as president of the European bar at Constantinople, and as an accomplished lawyer and historian."

Mr. Bayard, Sec. of State, to Mr. Straus, Apr. 20, 1887. MSS. Inst., Turkey.

*EXHIBIT E.*

(The other exhibits attached to the above instructions are sufficiently noted in the text.)

The following is a translation made in this Department of a passage from an article by Mr. Ed. Engelhardt in the Revue de droit international et legislation comparée, vol. xii, p. 373:

"It remained for the Congress of Berlin to strike the most effective blow at the Porte's autonomy respecting religious government. By article 62 of the treaty of July

13, 1878, the Turkish Government not only recognized the existence in the foreign diplomatic and consular officers of a right of official protection over the ecclesiastics, pilgrims, and monks of their nationality, and over their establishments; it bound itself *generally* to maintain the principle of religious liberty, thus rendering itself liable to a control from which its own Mahometan establishment could not escape.

"The sequence of the steps is clear; foreign intervention was first limited to the holy places, to the priests officiating in them, and to foreign visitors. It afterwards extends to the other foreign persons in holy orders, both of the Frankish or Catholic religion, and of the Greek faith; next comes the Ottoman Christians, the patronage of whom, unjustly contended for by Russia,* has devolved upon the great powers; lastly, the Mussulman religion itself is threatened in its ancient and jealous independence.

"The autonomy of Islam, regarded solely from the religious point of view, had already been impaired at the time of the discussion of the fourth paragraph of the preliminaries of peace in 1856. The four deliberating powers, England particularly, had indicated the interest they felt in the suppression of the Mahometan law which punished apostasy and public blasphemy by death, representing that inasmuch as Turkey was about to form part of the European concert, it was impossible to acquiesce in the maintenance of a rule which was of the character of an *insult* to every civilized nation.'†

"Moreover, during the years 1856 and 1857 the British embassy had more than once officially interceded in behalf of Mussulmen who had been converted or were about to be converted, and whom the local authorities were prosecuting as criminals, and long diplomatic correspondence had been exchanged on this delicate point of foreign intervention.‡

"After the Treaty of Berlin, so delicate a treatment was not deemed necessary, and Europe was the spectator of an incident which in certain respects recalled the adventure of which Prince Mentchikoff was the hero in 1853. Towards the close of the year 1879 the Turkish police arrested a mollah who had assisted an Anglican missionary in translating Christian works hostile to the Mahometan faith. In the eyes of the followers of Islam a more culpable act would not be conceived or one more odious than that of a priest of the national religion lending his personal assistance to a work of propagandism directed against that religion.

"Ahmet Tewfik Effendi was therefore condemned as proven guilty of a crime defined by the law of the land.

"The English embassador, whose intervention in this case had been asked by the agent of the London Church Missionary Society, did not content himself with intervening in behalf of his fellow-subject, who had himself been put under examination and arrest; he demanded of the Porte the immediate release of the *ulema* as well as his immunity from all punishment, alleging the liberty of conscience which the Sultans had promised their subjects, and the religious liberty embodied in article 62 of the Treaty of Berlin." (Note of Sir H. Layard to the Porte, dated December 24, 1879.)

"The ultimatum of Sir H. Layard was successfully supported by the representatives of Germany, Austria-Hungary, and Italy.

"It would scarcely be possible to show more clearly that to the abdication of judicial functions a result of the first capitulations had succeeded in Turkey a second and not less grave abdication, that of absolute autonomy in religious matters."

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*According to an interpretation based upon contemporary facts the clause of the treaty of Kutchuk-Kainaidji, by which the Porte promised to protect the Christian religion, only applied to the Christian provinces of the Danube and of the Archipelago which Russia had occupied and which she restored to the Sultan.

†Dispatches from the British Embassy, 4th, 18th, and 26th Feb., 5th Mar., 25th Apr., 30th May, 1856.

‡Dispatches from British embassy, 23 Sept., 1856, 26 Nov., 1857, 14 Aug., 1860.

## § 91.

### RECEPTION OF REFUGEES.

"PHILADELPHIA, *November* 23, 1795.

"MY DEAR SIR: Inclosed are letters for Mr. de la Fayette and his tutor. I leave them open for your perusal; and notwithstanding the request in my letter of the 18th, I shall cheerfully acquiesce in any measures respecting them which you (and others with whom you may be disposed to consult) may deem more eligible.

"As there can be no doubt that the feelings of both are alive to everything which may have the semblance of neglect or slight, and, indeed, expectant as they must have been (without adverting perhaps to the impediments) of an invitation to fly to me without delay, and distressing and forlorn as the situation of one of them is, it is necessary that every assurance and consolation should be administered to them. For these reasons I pray you to send my letters to them by express, the expense of which I will defray with thankfulness.

"The doubt which you have expressed of the propriety of an open and avowed conduct in me towards the son of Mr. de la Fayette, and the subject it might afford to malignancy to misinterpret the cause, has so much weight that I am distrustful of my own judgment in deciding on this business lest my feelings should carry me further [than] prudence (while I am a public character) will warrant. It has, however, like many other things in which I have been involved, two edges, neither of which can be avoided without falling on the other. On one side, I may be charged with countenancing those who have been denounced the enemies of France; on the other, with *not* countenancing the son of a man who is dear to America.

"When I wrote to you last I had resolved to take both the pupil and tutor into my own family, supposing it would be most agreeable to the young gentleman, and congenial with friendship—at the same time that it would have given me more command over him—been more convenient and less expensive to myself than to board them out. But now, as I have intimated before, I confide the matter entirely to your decision, after seeing and conversing with them.

"Mr. Adet has been indirectly sounded on the coming over of the family of Fayette *generally*, but not on the *exact* point. His answer was, that as France did not make war upon women and children he did not suppose that their emigration could excite any notice. The case, however, might be different, if one of them (with his tutor, whose character, conduct, and principles may, for aught I know to the contrary, be very obnoxious) was brought into my family, and, of course, into the company that visited it. But as all these things will be taken into consideration by you I shall not dwell upon them, and only add that

"With esteem, regard, and sincere affection, I am ever yours,

"G. WASHINGTON.

"P. S.—I have no doubt but that young Fayette and his tutor might be boarded at Germantown, or in the vicinity of this city, and would be at hand to receive assistance and advice as occasion might require although he might not be a resident under my roof.

"Colonel HAMILTON."

4 Hamilton MSS., Dept. of State. See also Washington to Hamilton, May 6, 1794, 10 Washington's Writings, 411.

§ 98.

DIPLOMATIC PRIVILEGE FROM TESTIFYING.

"Athough fully aware of the immunity from judicial citation which pertains to your position as the envoy of a foreign Government, yet, inasmuch as our constitutional procedure requires that a person accused of crime shall be confronted with the witnesses against him, and as yourself and the members of your household are best qualified to give the evidence necessary to prevent a possible miscarriage of justice, I may be permitted to express the hope that you will courteously offer your aid toward the vindication of the laws in this case."

Mr. Porter. Acting Sec. of State, to Mr. Gana; Jan. 3, 1887. MSS. Notes, Chili.

§ 102.

JOINT ACTION OF DIPLOMATISTS.

"The policy of this Government is distinctly opposed to *joint* action with other powers in the presentation of claims, even when they may arise from an act equally invading the common rights of American citizens and the subjects of another state residing in the country to whose Government complaint is made. While this Government is ready to secure any advantage which may be derived from a coincident, and even identical representation with other powers whose cause of complaint may be common with our own, it is averse to joint presentation, as the term is strictly understood. A sufficient reason for this is found in the consideration that a truly joint demand for redress in a given case might involve a joint enforcement of whatever remedy might become imperative in the event of denial; and this Government is indisposed to contemplate such entanglement of its duties and interests with those of another power."

Mr. Bayard, Sec. of State, to Mr. Scott, Oct. 14, 1886. MSS. Inst., Venez.

§ 106.

RECALL OF DIPLOMATIC AGENTS.

Much difficulty was experienced, at the time of the preparation of the first edition of this work, in the collection of the facts necessary to explain the relations of the Government to the Marquis of Casa Yrujo in 1804–1807. (See vol. 1, § 106, p. 698.) In view of the fact that portions of the diplomatic correspondence of that period had been destroyed at the sacking of Washington in 1814, I applied to Mr. Curry, minister of the United States at Madrid, for any supplementary information he could obtain in respect to the Marquis de Yrujo from the archives of our legation at Madrid. In reply he very kindly furnished me with the following document, which appears to be a copy of statements made in this relation to the Spanish Government by Mr. G. W. Erving, when

minister at Madrid. I ought further to say that an examination of Mr. Erving's communications to this Government during his mission in Spain has impressed me with a conviction that to his sagacity and good sense our settlement in 1822 with Spain was largely due.

"Case of the Marquis de Casa Yrujo, envoy extraordinary and minister plenipotentiary of His Catholic Majesty to the United States.

"The deviation of this minister from the line of conduct prescribed by his diplomatic station near the Government of the United States may be traced as far back as the month of February, 1804. In a letter of that date to the Department of State he undertook to require from the Government a prohibition of all trade by the citizens of the United States with the island of St. Domingo, a colony under the dominion of a third power, and endeavored to enforce the demand by suggesting that it would be backed by the principal nations of Europe. It is true that he disclaimed this import of his suggestion; but his explanation, if it had done less violence to his expressions, could not rescue him from the just charge of referring to the presumed views of those nations with the manifest and offensive desire of awing the councils of the United States.

"The correspondence on that occasion must have become known to the Spanish Government, which ought to have seen in it, moreover, a style and a tone very different from what it would expect from the ministers of other nations residing at Madrid.

"It was not long before another occasion was seized by the Marquis de Yrujo for developing the intemperance of his character.

"The situation of the southern frontier of the United States, fixed by the treaty of 1795 with Spain, had for some time required an extension to that quarter of certain revenue provisions existing in every other. During the session of 1804 this extension was made by an act of Congress, and it was so framed as to be applicable to the event of an expected adjustment of the controversy relating to the territory between the Mississippi and the river Perdido which would put the United States in actual possession of the entire river Mobile. This was the construction put on that part of the act by the executive authority, the constitutional expositor of it, and the construction in which the law has been actually carried into operation.

"The Marquis de Yrujo, without waiting for any evidence whatever of the meaning which would be officially and practically applied to the terms and phrases used in the act, without even previously asking for explanations on this subject, gave way to the vehemence of his temper, first in his verbal remonstrances against the act, and afterwards in his letter of March 7, 1804, in which he substitutes a positive meaning for the provisional meaning; and on this unwarrantable construction proceeds to arraign the act of Congress in terms which ought never to stain a diplomatic paper. After acknowledging that he had ascertained the printed act to be authentic, he calls it 'an atrocious libel,' an insulting usurpation of the unquestionable rights of his sovereign, 'a direct contradiction of the assurances given by the President.'

"It was reasonably supposed that the Spanish Government, with such a specimen of the character of its minister in its hands, would lose not a moment in making him feel the marks of its displeasure, which were so clearly prescribed as well by its respect for itself as by that which was due to the United States. In this confidence, no recall of him was expressly desired, and from an unwillingness to interrupt the ordinary

communication between the two Governments that channel of it was permitted to remain unclosed.

"This moderation on the part of the American Government was not, however, followed by any steps on that of His Catholic Majesty expressive of corresponding sentiments, and it was not very long before the Marquis de Yrujo, encouraged doubtless by the impunity he had experienced from his own Government, and calculating on the patience of that of the United States, took a course which put their patience to a new trial.

"Instead of confining himself to a communication with the Government in all cases where he had information to give or representations or remonstrances to make, according to the established and essential rules of exercising the diplomatic trust, he addressed himself, in the month of September, 1804, to the editor of a gazette in Philadelphia, with the avowed purpose of engaging him, by a pecuniary recompense, to make his press instrumental in combating the supposed measures and views of this Government and in gaining over the people here to those of his own. This charge does not rest merely, as has been alleged, on the declaration of the editor, which included many aggravating particulars, and was made under the solemnity of an oath, but is ratified by the express and official avowals of the marquis himself. It may be added that the attempt to seduce the editor was, contrary to the assertion of this minister, in direct violation of an act of Congress, prohibiting under adequate penalties any correspondence or intercourse of citizens of the United States with any foreign Government or its agents in relation to any dispute or controversies with the United States, with intent to influence the measures or conduct of such foreign Government or its officers, or defeat the measures of the Government of the United States.

"Instead, again, of offering apologies, or even a modest silence, for so flagrant an aberration, he made it the subject of a letter to the Department of State, in which he avows the fact charged, denies the impropriety of it, even in the latitude of the affidavit made by the editor, and asserts a right, as the public minister of His Catholic Majesty, in common with the citizens and under the Constitution of the country, to employ the press in vindicating and advancing the objects of his Government and in turning the opinion of the people against their own.

"This is the first instance, without doubt, in which such a doctrine ever made its appearance, and it is not less notable for its extravagance than for its novelty. To claim, in the same breath, all the rights of a citizen, and all the immunities of a public minister, to speak of rights under the Constitution of the country, as belonging to a foreign minister who disclaims every species of allegiance except to his own sovereign, to put himself on a level with private citizens in the free use of the press, and to put himself above even the Government, by holding himself as responsible for his abuses of that freedom to a foreign Government only—these are inconsistencies which overwhelm the pretension from which they flow, a pretension which, as it has its origin, will probably have its end, with the case in which it is advanced.

"What, in fact, would be the state of things if in a Government where the press is free so extravagant a pretension were admitted and exercised; if to all the privileges and means already indulged to public ministers by usage and the law of nations, were to be added the free use of the press under the municipal laws for the purpose of employing, in that most operative of all modes in a Government like that of

the United States, the treasures of a foreign prince and the intrigues of a foreign minister, in poisoning the public opinion, in biassing the elections, and in turning both against the interests and Government of the country?

"To show that this pretension is not unjustly ascribed to the Marquis de Yrujo, it is stated in his own words, as follows: 'Under such circumstances I believed then, *and I believe now*, it was not only *my right* but also *my duty* to check the torrent of impressions as contrary to truth as to the interest of my country, being very well acquainted with the great influence of public opinion in a popular Government as that of the United States; with a just intention of bringing the subjects of discussion under a forcible point of view which had been carefully concealed, and presenting them to the public eye under new aspects; and, apprehending that the editors who had previously espoused a party on the question would refuse to insert in their papers my intended publication, I thought that Mr. Jackson, among others, would not perhaps have the reluctance which I anticipated in the former.' (This letter was written in English.)

"Not satisfied with addressing to the Government this curious attempt to justify his transaction with the editor, he had the temerity to carry his doctrine into practice by causing the letter to be printed in a newspaper, and such was the eagerness in taking this step that the letter appeared in print before it was delivered at the office of the Secretary of State.

"Who could doubt that the Spanish Government would be duly struck with such an outrage on decorum, and such an open contempt for all the restraints imposed by the law of nations on foreign ministers, who have far more than a balance for these restraints in the privileges with which the same law endows them? The Government of the United States could certainly no longer forbear a formal representation to the Spanish Government of the insuperable objection to such a diplomatic organ, and to let it be clearly understood that the recall of its minister was expected. Instructions to this effect were accordingly forwarded to the American ministers extraordinary then at Madrid, and in pursuance of those instructions, the requested recall, with the grounds of the request was, on the 13th of April, 1805, formally addressed to the Spanish Government.

"In answer to this letter the minister informed them, on the 16th of the same month, by command of the King, that as the marquis had obtained his royal permission to return to Spain 'at the season which would be convenient for making a passage with the most probable safety,' the desired removal of the marquis would, in that mode, be accomplished, and a hope was expressed that the Government of the United States would consider that as a proper mode for reconciling its object, with the respect due to the minister plenipotentiary of His Majesty.

"To this communication the American ministers, reciting the permission given for the return of the marquis, '*in the course of the present favorable season*, and the wish of His Catholic Majesty that this mode might be satisfactory,' expressed in reply their confidence that the respect entertained by the United States for His Catholic Majesty would induce their Government to be satisfied with the mode of fulfilling their object most agreeable to him.

"The President acquiesced in the proposed removal of the marquis by a permitted return, instead of a recall, and on the receipt of the com-

munication from the minister of the United States at Madrid justly expected that the effect of the instructions from the Spanish Government to their minister, which ought not to be much longer on the way than the communication of those ministers, would speedily appear in the presentation by the Spanish minister of his letters of recall. Whilst presumable casualties could in any measure explain the delay, it was allowed to have as little effect as possible either on the estimate of the dispositions of the Spanish Government or on the intercourse with its representative. This explanation, however, vanishing gradually with the lapse of time, was at length prescribed altogether by satisfactory evidence that the marquis had received, at different times, communications from his Government of dates subsequent to the engagement that his return should take place by permission, for which return the most favorable season of the year might have been found between the arrival of instructions, if duly given, and the winter months. It was under these circumstances, and after a lapse of many months, that it was learned, with no little surprise, that the marquis, instead of leaving the United States, had formed the purpose of taking his station at Washington, as usual, on the meeting of the legislature, the time for which was approaching. Such a purpose would certainly have justified a course which a Government less temperate in its character than that of the United States would have rigorously pursued. In adherence nevertheless to its principles of moderation, and to the policy of rather preventing than redressing obnoxious occurrences, measures of rigor were not only forborne, but a friendly and informal intimation was allowed to be given to the marquis that under existing circumstances prudence and delicacy equally recommended a change of his intention.

"The intimation was disregarded, and at the end of the eighth month from the period at which his leaving the United States was promised he arrived at the city of Washington. Those who take into view the more rigorous modes of proceeding which the law of nations, as carried into practice by some of the most respectable of them, would have authorized, will find in that adopted by the Government of the United States a fresh example of its disinclination to depart from the most lenient course reconciliable, in any manner, with the attention indispensably due to the rights and to the honor of the nation. In this spirit the following letter was written to the marquis, bearing date the 15th of January, 1806:

"'In consequence of the just objections which your conduct had furnished against your continuance here as the organ of communication on the part of His Catholic Majesty, it was signified at Madrid, in the month of April last, through the mission of the United States there, that the substitution of another was desired by the President. In reply it was intimated by Mr. Ceballos that as you had yourself expressed a wish and obtained permission to return to Spain, the purpose might be accomplished without the necessity of a recall, and that such a change in the mode would be agreeable to your Government. In a spirit of conciliation the arrangement proposed by Mr. Ceballos was admitted; and it was not doubted that it would without delay have been carinto effect. It is seen, therefore, not without surprise, that at this late day you should have repaired to the seat of Government, as if nothing had occurred rendering such a step improper. Under these circumstances the President has charged me to signify to you that your remaining at this place is dissatisfactory to him, and that although he cannot permit himself to insist on your departure from the United States

during an inclement season he expects it will not be unnecessarily postponed after this obstacle shall have ceased.

"'I am charged by the President at the same time to be fully understood that the considerations which have led to this explanation being altogether personal, they are perfectly consistent with the ready admission of a successor, and with all the attention which can be due to whatever communications His Catholic Majesty may please to make with a view to maintain and cultivate harmony and friendship between the two nations.

"'I have the honor to be, &c.,

"'(Signed) JAMES MADISON.'

"This letter was answered on the succeeding day by one in which he prefixes to some very unsound remarks, in terms not always the most delicate, on his transactions with the Philadelphia editor, and on the letter of the American minister, requiring his recall, a declaration in these words: 'As I have not come to form plots, to excite conspiracies, or to promote any attempts against the Government of the United States, and as, to this hour, I have not directly or indirectly committed acts of that tendency, *which alone* could justify the tenor and object of your letter, to which I now reply, it results that my coming was an act innocent, legal, and which leaves me in possession of all my rights and privileges both as a public man and a private individual. Making use of these I intend to remain in the city of four miles square, in which the Government resides, as long as may suit the interests of the King, my master, and my own personal convenience; adding, as I ought to do, that I shall not lose sight of these two considerations, in relation to the time and the season of fulfilling our mutual wishes for my departure from the United States.'

"The letter from which this passage was extracted was followed by another of January 19, which is given entire:

[Translation.]

"'SIR: Disembarrassed from the personal explanations into which for just reasons I found myself obliged to enter in my first answer to your letter of the 15th current, I must now inform you of what would otherwise have then constituted my sole reply, viz: *That the envoy extraordinary and minister plenipotentiary of His Catholic Majesty to the United States receives no orders but from his sovereign.* In like manner I ought to declare to you that I consider the style and tenor of your letter as contrary to decorum, and its object as an infraction of the privileges given to me by my character. This infraction of the diplomatic rights, as inexplicable as unsupported, requires from me the most solemn protest against your said letter, its style, and the intent with which it was addressed to me. I protest, therefore, in the most solemn manner in which it is possible for me to do it, against this step, as contrary, under existing circumstances, to the diplomatic laws and customs, as it is to the spirit of the Constitution and Government of the country; and in order that your conduct in this case may not affect in any manner the privileges of the corps to which I have the honor to belong, I shall immediately transmit to the other members of it accredited to the United States a copy of your said letter, of my first answer, and of this my protest, in order that it may forever appear that if there has existed on the part of this administration an arbitrary determination to violate the rights of embassy, respected by

all civilized nations, there has likewise existed in me the just resolution of repelling such an attempt.

"'God preserve you many years.

"'Washington, 19 January, &c.

"'(Signed) THE MARQUIS OF CASA YRUJO.

"'Mr. JAMES MADISON.'

"These letters speak for themselves. With the sole exception of cases where a foreign minister may be engaged in plots, conspiracies, or attempts on the Government itself, they assert a right in him, under the law of nations, and what is more, under the municipal constitution, to go where he pleases, to stay as long as he pleases, and to commit every other species of offense he pleases, without being removable or controllable by the Government of the country, or in the least responsible to any other authority than that of his own sovereign.

"May then a foreign minister, when once received, offer with impunity to the Government receiving him every offense short of the specified crimes against the state? May he trample on all the rules of decorum observed in public as well as in private intercourse? May he tamper with the virtue and fidelity of the citizens; may he corrupt the press for the purpose of public or private defamation; may he give ostentatious defiances to the Government; may he insult the Chief Magistrate by insolent letters charging him with dishonorable conduct, and by the publication of them arraign him before the community; may he even insult him to his face, by his looks, his language, and his deportment; may he commit, and go on committing, these and a thousand other enormities not falling within the specified cases, and find in his diplomatic badge a consecrated shield against every restraint, until his case shall have been transmitted to his own Government, and it shall please that to reseue the insulted Government from the presence and provocation of such a functionary?

"Common sense revolts at such pretensions; every Government which respects itself will feel its right, whenever a foreign functionary shall presume to carry them into practice, to banish him instantly from its presence, to strip him of his immunities, or to order him out of the country, according to the degree of provocation given. This right, inherent in all Governments, derives additional energy in the case of the United States, not only from peculiarities in their political principles and institutions, which would widen the range for indignities not on the short list of crime against the state, but especially from the distance of the Governments whose representatives might so offend, and the lengthened periods of liability to such indignities, if no right existed on the spot to put an end to them.

"After the moderate exercise of this incontestable right in the letter signifying to the Marquis de Yrujo that his presence at the seat of Government was dissatisfactory, the provocation superadded by the style and matter of his answer would have justified a procedure against him much more expressive of the sentiment they were calculated to inspire. This sentiment, however, was not otherwise manifested than by a silent consignment of him to the mortification of his own reflections.

"These reflections had not the effect which they ought to have had. On the contrary, pressing forward in his intemperate career, he not only executed his purpose of communicating to the other public ministers at Washington the correspondence which had just taken place with the Department of State, but caused that correspondence, with his letter

to those ministers, to be published in the Gazette as another appeal to the people against their Chief Magistrate. So familiar, indeed, had this resort become to his mind that nearly about the same time he addressed to the public, through the press and with the same view, an official letter which he had written to the Department of State commenting, in a style which might have been more respectful without being less adapted to its object, on certain passages in a message of the President to the legislative body.

"But although no immediate notice, beyond that of the letter of January 15 was taken of the Marquis de Yrujo, notwithstanding the continuance for two weeks thereafter within the city of Washington, it was a matter of course to communicate to his Government these aggravated provocations, with the proof they afforded of the protracted forbearance of the Government of the United States. The printed copies of all the documents, with the facts attached to them, of his having caused them to be thus published, were accordingly transmitted to the diplomatic agent of the United States at Madrid, with an instruction to lay the whole before the Spanish Government without a single comment.

"On the 6th of May last the communication was so made, with an effect, however, very different from what was expected. Instead of repairing the wrongs of the Spanish representative against the United States by expressions of regret, and by withdrawing the author of them, Mr. Cevallos, in his answer to the communication, vindicated the Marquis de Yrujo throughout, adopts his pretensions and his fallacious arguments; copies often his very words, and descends so far as to repeat observations which, as they would have been passed over in silence in an answer to the marquis, if his title to one had not been forfeited, must excite the greater surprise at their escaping the pen of His Catholic Majesty's first secretary of state.

"The letter of Mr. Cevallos does not scruple to mingle with these extraordinary contents a complaint not less extraordinary, that the communication made on the 6th of May, without an explanation of the reasons which supported it, was a disrespectful mode of addressing the Spanish Government on the subject.

"But what explanation could be deemed necessary in a case which explained itself in every particular; which carried on the face of it pretensions without example in diplomatic history, addressed to the Government in terms at which every Government ought to take offense; and the proof that these pretensions had been actually exercised in a printed appeal to the people of the United States against their own constituted authorities. This silence was in fact so far from being dictated by want of respect for His Catholic Majesty that it was preferred as at once the most delicate and emphatic manifestation of the charges against his minister, and of the confidence placed in his readiness to do justice to a friendly power who might reasonably have declined awaiting so distant an interposition.

"Proceeding himself in the very footsteps of the Marquis de Yrujo, which this minister ought to have been made to tread back, Mr. Cevallos contends that the letter of January 15, signifying the dissatisfaction of the President at the repairing of the marquis to Washington, was a marked violation of the sacred rights of embassy; that such a step would be justified *solely* by a conspiracy of that minister against the Chief Magistrate of the United States, or against the security of the nation or its Government, and that in case the Spanish plenipotentiary had justly drawn on himself the treatment experienced, a specification of the crime and exhibition of the proofs ought to have been the first

communication made, instead of that silent transmission of copies of correspondence in question, which was itself a confirmation of the violent and causeless procedure of the American Government. He even allows himself to assert the singular pretension of the marquis, as the minister of a foreign nation, to the peculiar rights and privileges of American citizens under the Constitution of the country.

"It would be an useless repetition of remarks already made to point out the tendency of these spurious doctrines and pretensions; but it may not be amiss, once for all, to substantiate those remarks by the latest as well as the highest authorities on public law, premising only that a material error of fact runs through the answer of Mr. Cevallos. He takes for granted that the letter of January 15 to the Marquis de Yrujo, which cut off official communication with him, stripped him at the same time of the immunities attached to his character, and subjected him to the municipal jurisdiction. However justifiable this course might have been, it is neither the import nor has it been the effect of that letter.

"The rights and the responsibilities of public ministers are perhaps nowhere more clearly laid down than by Mr. Rayneval in his work entitled 'Institutions du droit de la nature et des gens.'

"'Mais* l'immunité dont il s'agit n'assure point l'impunité. Si le ministre oublie lui même sa dignité; s'il perd de vue la maxime qu'il ne peut ni offenser, ni être offensé; s'il se permet des injustices, des actes arbitraires; s'il ose troubler l'ordre public, *manquer aux habitans, au souverain lui-même*; s'il conspire, *s'il se rend odieux, suspect ou coupable*, il doit être puni, mais par son souverain. Cest un devoir pour celui-ci. Cest une condition tacite mais essentielle de l'admission de son agent. Le souverain près duquel celui-ci réside peut aussi, selon les occurrences, prendre des mesures de sûreté contre lui; il peut *interrompre toute communication, tout rapport avec lui;* il peut même le *renvoyer* de ses États; et en cas de résistance, employer la force pour le contraindre; car en pareil cas, le ministre se met dans un état hostile, et devient lui-même l'auteur de la violence qu'il éprouve; il manque aux obligations que le caractère dont il est revêtu lui impose; il détruit par là lui-même ce caractère, et par conséquent les prérogatives qui y sont attachées.'

"The authority of Mr. Rayneval has been cited, not only because he is so late a writer (his work being published in 1803) and of known talents, but because he has, through the greater part of his life, been practically occupied in diplomatic affairs, sometimes in the foreign department under the French Government and sometimes as its minister abroad. To the best means, therefore, for understanding both the law and the practice, he adds the advantage of deriving an impartiality between the pretensions of foreign ministers and those of the sovereign receiving them from his having been in situations to maintain both.

"Should authorities longer known to the public be called for in this case, Grotius, Bynkershoek, and Wyquefort will be found to speak a similar language; and above all, Vattel, as will be seen by the passages here extracted LIV, Chap. VII, §§ 94 and 95:

"'Si l'ambassadeur oublie les devoirs de son état, s'il se rend désagréable et dangereux, s'il forme des complots, des entreprises préjudiciales au repos des citoyens, à l'État ou au Prince à qui il est envoyé, il est divers moyens de le reprimer, proportionnés *à la nature* et au degré de sa faute. S'il maltraite les sujets de l'État, s'il leur fait des injustices, s'il use contre eux de violence les sujets offensés ne doivent point recourir aux magistrats ordinaires, de la juridiction desquels l'ambas-

* Liv. II, Chap. XIV, §. 3.

sadeur est indépendant, par la même raison ces magistrats ne peuvent agir directement contre lui. Il faut en pareilles occasions s'adresser au souverain, qui demande justice au maître de l'ambassadeur, en cas de refus peut ordonner *au ministre insolent de sortir* de ses États.

"'Si le ministre étranger offense le Prince lui-même, *s'il lui manque de respect*, s'il brouille l'État et la cour par ses intrigues, le Prince offensé, voulant garder des ménagemens particuliers pour le maître, se borne *quelquefois* à demander le rappel du ministre, ou si la faute est plus considérable, il lui *défend la cour* en *attendant la réponse du maître;* dans les cas graves, il va même jusqu'à le chasser de ses États?'

"To these passages from Vattel, an extract from a succeeding one may properly be added as a concise and conclusive reply to a consideration which Mr. Cevallos seems to regard as particularly supporting the pretensions of the Marquis de Yrujo. In requiring, on the occasion of a demanded recall of a public minister, that regular proofs should accompany a specified offense, Mr. C. gives as a reason that 'the contrary doctrine would leave ministers at foreign courts at the mercy of the Governments there, and deprive them of the sacred and necessary independence requisite for the discharge of their duties, a monstrous doctrine, yet a necessary consequence of admitting the principle of removal without those preliminaries.'

"Vattel, referring to a like argument used in a case which he cites, makes the following remark:

"'Elle seroit bien plus malheureuse, la condition des princes, s'ils étoient obligés de *souffrir dans leurs États et à leur cour un ministre désagréable*, ou justement suspect, un brouillon, un ennemi masqué sous le caractère d'ambassadeur, qui se prévaudroit de son inviolabilité pour tramer hardiment des entreprises pernicieuses.'*

"The validity of this reflection of Vattel is illustrated by the best attested experience, which has constantly shown a greater tendency in foreign ministers to abuse their privileges and pervert to evil purposes the benevolent policy of permanent legations than in Governments to exert an undue authority over the ministers residing near them.

"No institution could promise better to the peace and harmony of nations than that which mutually places near friendly Governments well-chosen representatives, always on the spot to explain difficulties, to repress unjust or extravagant jealousies, to remit faithful intelligence, to promote justice, and by these laudable offices to cherish that confidence and good will which alone can maintain peace among nations. And where this important trust is committed to enlightened and upright functionaries, of whom there are many honorable examples, who consult the true object of the diplomatic establishment, its happy fruits confer on it the highest praise. But how often has there been occasion to lament the course actually pursued by those intended organs and guardians of the friendship of nations? How often has it been found that, instead of the good which they might do, both to the countries appointing and to those receiving them, all their address is employed in the evil task of corrupting the citizens, of poisoning the councils, and of disturbing the tranquillity of the latter? How often are they found to sacrifice every patriotic consideration to their selfish views, by representations to their Government calculated, not to correct injurious errors, or impart salutary truths, or promote a wise and honorable policy, but to flatter prejudices, to stimulate jealousies, to disguise or pervert facts, or to varnish and recommend projects contrary

* Livre IV, Chap. VII, § 96.

to both the interests and the honor of their own country; in a word, by telling their Government not what is true, but what may be agreeable; not what will promote its just and useful objects, but what will recommend themselves to the favor of their superiors and pave the way to higher honors or advantages for themselves.

"That this is not a picture drawn by fancy for a particular occasion will be admitted by all who have the least acquaintance with the history of diplomacy. Instead of citing cases, which it would be so easy to multiply, a single but very unexceptionable authority shall suffice.

"M. Callierés, who held an important station in the French cabinet, after having been employed at different times in diplomatic missions, delivers, in his 'Manière de Négocier avec les Souverains':*

"'Il faut rendre justice à la plus part des légitimes souverains, en disant, qu'il y en a très peu qui se portent d'eux-même à des semblables desseins; presque toutes les entreprises injustes, et les cabales qu'on fait en leur nom dans les autres états, leur sont suggérés par leurs ministres, ou par quelque négociateur qui les y engagent, en s'offrant de les exécuter, bien loin de les en détourner, et les négociateurs ne sont pas à plaindre quand ils tombent dans les filets qu'ils ont eux-mêmes tendus pour autres; on pourroit alléguer divers exemples de la vérité de cette observation, et on se trouvera toujours dix contre un où les négociateurs ont été les auteurs et les soliciteurs des pareilles entreprises pour se faire de fête auprès de leurs Princes.'

"Mr. Cevallos is unfortunate in all his attempts to vindicate the conduct of his Government on this occasion towards the United States.

"Referring to the delay in the promised return of the marquis, assigned in the letter to him of January 15, 1806, as a ground on which his visit to Washington was reprehended, and a communication with him refused, Mr. Cevallos not only denies the sufficiency of the delay, if real, to justify the measure, but denies that the promise required the departure of the marquis until his return should be freed from the risk incident to the state of war.

"The best answer to this construction of the promise will be found in a brief review of the correspondence, between the ministers extraordinary of the United States and Mr. Cevallos.

"In the letter from those ministers, already cited, they expressly state the demand of the President to be 'the *immediate* recall of the Marquis de Yrujo,' for reasons which rendered his '*longer stay*' in the quality of minister plenipotentiary '*highly improper*.'

"In the answer, Mr. Cevallos suggests that as the marquis had asked and obtained the royal permission to come to Spain *at the season* which shall be convenient to him to make his passage with the most probable safety, it was hoped that the Government of the United States would consider this as a proper mode of reconciling their wish with a due respect for the character of the minister plenipotentiary of His Majesty.

"In the reply of the American plenipotentiaries, citing not the words but the sense of Mr. Cevallos, they observe that as His Majesty had some time since given leave to his minister plenipotentiary near the United States *to return to Spain in the course of the present favorable season*, &c., they were very confident that the *mode proposed* of complying *with the request* of their Government would be satisfactory.

"If there were any ambiguity in the terms by which Mr. Cevallos expressed the season for the return of the marquis, an ambiguity which ought not to be presumed, the sense in which they were understood by the ministers of the United States is perfectly free from it. They ex-

* Chap. ix, p. 76, first paragraph.

pressly refer to the season, not to the *war*, but of the *year* and even the *present season* of the year. If Mr. Cevallos had, therefore, meant not the season of the year, but of the war, his candor would never have permitted him to be a party to an arrangement in which he clearly understood the intention of the other party, whilst the other party misunderstood his intention, and whilst he knew that they did so. He would have corrected their misconception, by an explanation required by good faith, instead of confirming it by the silence which observed.

"Another reflection annihilates the plea now urged. The object of the President, communicated by the American ministers to the Spanish Government was the *immediate* recall of its minister, because his longer stay in the United States had become highly improper. The object of the Spanish Government was to spare the feelings of its minister by substituting a return by permission in place of a recall; and in this change of mode, which equally produced the departure of the offensive minister, the essential object of the United States, their plenipotentiaries acquiesced and anticipated the acquiescence of their Government. How could Mr. Cevallos suppose that, with this essential object in charge, they meant to be satisfied with an arrangement which completely defeated it, which, instead of producing the immediate departure of the minister whose recall was demanded, permitted him to remain as long as an obstinate war, just entered into by Spain, might be protracted? How could he suppose that if the ministers could have so far forgotten the purport of their orders just presented to him, that the Government of the United States would so far forget what it owed to itself as to accept, for an immediate recall of the minister who had so highly offended it, his voluntary return at any time within a period so likely to be of protracted duration? How could the American minister, in fact how could the Government of the United States, suppose that so preposterous an expectation could ever enter into the discerning mind of His Catholic Majesty's first minister of state?

"Mr. Cevallos dwells on a passage over the Atlantic in time of war as a risk unjust towards the marquis as it would be unreasonable towards his successor.

"Does he suppose, then, that this tenderness is due to a public minister who has abandoned himself to the career in which the Marquis de Yrujo has been traced? Can he suppose that a Government is to tolerate the indefinite stay of an offensive minister, and subject itself to a reiteration of his insults because the remedy may expose him to personal inconveniences? Such an expectation would, it is true, be unjust and unreasonable; not, however, as it relates to the culpable minister, but to the offended nation. If, besides, the mere recall or removal of the minister, the risks of the sea in time of war be an additional consequence of his misconduct, they ought to be an additional restraint from acts which might justly lead to that consequence. These risks never can be a consideration to which a Government can be expected to sacrifice the essential respect which it owes to itself, and the satisfaction due in such a case from a friendly Government. More than this, Mr. Cevallos ought to have recollected that the minister in question actually passed the sea on his original mission to the United States whilst Spain was at war with the same power as at present; and that this is not the only instance in which the sea has been passed in time of war by Spanish ministers appointed to the United States.

"He may be informed also that it has been usual for both French and English ministers to cross the Atlantic during war both in missions to and returns from the United States.

"The anxiety of Mr. Cevallos to transfer to the Government of the United States the blame which adheres to that of Spain has led him into errors of various kinds. Among others, he has permitted the assertions to escape from him that the letter to Mr. de Yrujo, closing the communication with him, was scarcely half a year after the demand of his recall at Madrid, and that the promise of fulfilling the wish of the American Government, even by the return of the marquis on leave, was an excess of condescension on the part of His Catholic Majesty.

"Had the interval between the demand of recall and the refusal of further communication been correctly stated the inference of Mr. Cevallos would not have been warranted. Six months was evidently a longer time than could have been requisite for the transmission of instructions from the Spanish Government to its minister in the United States. With the aid of several copies, always employed in time of war, two or three months are amply sufficient; and as has been already noticed, communications of dates posterior to the promise of his return to Spain had unquestionably been received by the marquis from his Government a considerable time before his visit to Washington took place. But the statement of Mr. Cevallos is not correct, and the error is the more surprising, as it ought to have been prevented by the face of the very documents on which he was commenting, or rather by the very dates which he cites from them. The letter demanding the recall bore date the 13th April, 1805; the date of the letter to the marquis on his arrival at Washington was January 15, 1806, making an interval of more than eight instead of scarcely six months.

"In calling the promise that the marquis should return on leave even in exchange for a recall, an excess of condescension on the part of His Catholic Majesty, Mr. Cevallos has created a difficulty of replying, without observations of a nature which the Government of the United States would always reluctantly employ towards a Government which it wishes to respect. Mr. Cevallos, before he indulged his pen in this very extraordinary sentiment, ought to have weighed more deliberately the consistency with the regard due from one Government to the reasonable expectation of another to be gratified by the removal of a public minister on the mere consideration that his character or conduct was disagreeable; and that this reasonable expectation becomes a positive and incontestable right in such a case as that in question has been shown to be. He ought to have reflected that the language held by him implies that a Government has a right to keep an obnoxious representative near a foreign Government, in defiance of the will of the latter, within the limits of its own sovereignty; a doctrine to which neither His Catholic Majesty nor any other sovereign would listen for a moment. These reflections would have been suggested by any one of those accredited authors on the law of nations to whom Mr. Cevallos has appealed. He would even have been led by them to reflect that a Government in attempting to obtrude or continue a minister near a foreign Government to which he was unacceptable, violates the first principle of diplomatic policy, not less than it forgets the dignity which ought to be seen in all the proceedings. Mr. Rayneval's remarks on this subject could not be more pertinent:

"'Le premier devoir d'un ministre public est de se rendre agréable, d'inspirer de la confiance, de se faire considérer: si donc un souverain manifeste de la répugnance à le recevoir, il y a de l'imprudence à exiger son admission; et si par des circonstances particulières on lui fait la loi à cet égard, on doit prévoir qu' un ministre désagréable remplira mal sa mission. Il faut bien se pénétrer de cette vérité qu' un min-

istre public doit avoir de la considération personnelle, s'il veut qu'on en ait pour son caractère. La nécessité peut forcer de, dissimuler mais cette dissimulation nuit au succès des affaires comme *à la dignité* du souverain qui s'obstine à soutenir un agent qui déplaît.'

"The letter of June 2, 1806, from Mr. Cevallos, having been answered by the American chargé d'affaires at Madrid, he replied in another on the 24th day of June, in the same spirit and to the same effect; and this again receiving an answer from the same quarter, it was intimated in brief reply from Mr. Cevallos on the 18th of July, that as the motives for demanding the recall of the Marquis de Yrujo, had not been explained, His Majesty had given orders that the reclamation on this subject should be addressed at Washington to the Government of the United States.

"In the mean time the Marquis de Yrujo, though he has not again obtruded himself at the seat of Government, has not retired from the United States, and has lately invited, through an indirect channel, the acquiescence of the Government in a modified renewal of his official communications with it. Not succeeding in this, he proceeded to signify peremptorily through the same channel that it was the purpose of His Catholic Majesty that he should continue to exercise in the United States the functions of his minister. Finding disappointment alone to be the fruit of these experiments he resorted to another, still through the same channel, regardless of the light in which he placed both his Government and himself, by such versatile and inconsistent disclosures. A day or two only after it had been signified to be the intention of His Catholic Majesty that this particular minister should continue to be his diplomatic functionary in the United States, it was signified, without any intimation or probability of intervening instructions, that provisional arrangements existed for the use of a different functionary of an inferior grade. As the Government of the United States had, in the letter of the 15th of January, sufficiently explained its readiness at all times to admit a successor to the Marquis de Yrujo, the proper answer was found in that letter to this abrupt change in the aspect given to the intentions of His Catholic Majesty. No accredited successor, however, of any grade has yet presented himself, nor consequently has any reclamation, such as was intimated to the American chargé d'affaires at Madrid, been received. From the foregoing review it is manifest that if the Government of the United States be under any difficulty of justifying itself in the case of the Marquis de Yrujo the difficulty arises not from the illegality or rigor of its proceedings towards him, but from that excess of condescension and forbearance for which his continuance to the present day within the United States and in the enjoyment of the immunities of a public minister is a conspicuous monument.

"It only remains to observe that the conduct of the American Government throughout has been equally a proof of the disposition of the United States, in spite of every adverse occurrence, to maintain harmony with Spain and to defer to the last moment the most just and proper steps, which misinformations or misconstructions might possibly render unpropitious to the relations between the two countries.

"DECEMBER, 1806.

"NOTE.—The passage in the last sheet marked thus | is not inserted in my note to Mr. Ceballos.—G. W. E."

In respect to Mr. Erving's services, I have the following notes from Hon. Robert C. Winthrop:

"It gives me pleasure to put on paper what I told you this morning about my old friend and kinsman, George William Erving, formerly our minister at Copenhagen and at Madrid. I had left him in Washington when I went down to Virginia, and spent a day or two with Mr. Madison at Montpelier, in 1832. I bore a message from him to Mr. Madison, who said to me, in the most emphatic manner, 'I never had a more capable and faithful minister than Mr. Erving, nor one for whom I had a greater regard.'

"There was a marble bust of Erving in Mr. Madison's library, which is now in my own possession, together with a large collection of Erving's letters to Madison, which had been carefully preserved." (May 9, 1887.)

"I might have added to my note about Mr. Erving that he was a man of great accomplishment. He was a graduate of Oxford University. He wrote an elaborate little volume on the Basque language, which is now among the rarities of public and private libraries, and he contributed to one of the New York reviews a remarkable paper on the little Republic of San Marino, which was then (sixty years ago) hardly known on this side of the ocean. He was a noted political writer in the newspapers in the days of Jefferson, more recently was nominated as minister to Constantinople by General Jackson. The Senate reduced the grade of the mission to a chargé d'affaires, and he withdrew his name. He died in 1850 at nearly eighty." (May 10, 1887.)

## § 107.

### CHINESE COURT CEREMONIES.

"This question of presentation to His Imperial Majesty, while apparently one of form, is in reality a question of substantial and high importance, because it involves the consideration of the equality of sovereign states in their intercourse one with another, and the recognition of that equality by the Government of China by granting to the diplomatic agents accredited to the Emperor the audience to which by public law they are entitled." And this question is more important now than it was in 1873, inasmuch as in the interval China has accredited diplomatic representatives to this Government, "who have been cordially received and treated on an equal footing of honor and respect with the representatives of other foreign powers," being invited to the President's inauguration, &c.

Mr. Bayard, Sec. of State, to Mr. Denby, Dec. 11, 1886. MSS. Inst., China. See as to China, *supra*, § 67.

## § 118.

### CONSULAR AGENTS.

In the text, vol. I, § 118, p. 771, is given an instruction by Mr. Hunter, Assistant Secretary of State, to Mr. Everett, May 28, 1855, intimating that as the law then was, consular agents were not, strictly speaking, officers of the United States, being merely the agents of the consuls who at that time appointed them. It should now be observed that in 1856 the appointment of these agents was, by statute (R. S., § 1695), transferred to the President, and they were thenceforth included in the

denomination of "consular officers." (R. S., 1674; Cons. Reg., 1887, par. 21.) Consular agents are still held, however, by the courts to be agents of their supervising consuls (Gould *v.* Staples, 9 Fed. Rep., 159), and are said to be not technically officers of the United States by First Comptroller Lawrence. (4 Lawrence, First Compt. Dec., 88.) But recognition of them is now uniformly requested. (Cons. Reg., 42.)

## § 123.

### BUSINESS RELATIONS OF CONSULS.

"I transmit herewith a copy of a letter from ———, esq., dated the 12th instant, in which he complains that you refused to administer and certify, on the application of certain parties by the name of ———, the oath of verification to a petition inteuded to be filed by the said parties in the surrogate court of the county of New York.

"Consular officers of the United States are authorized by Congress and by some of the States and Territories to administer oaths; take affidavits and depositions, and to perform other notarial services. Such services, when rendered under State or Territorial authority, are unofficial, and consular officers are not compelled to perform them.

"The Department presumes that in the case in question you had good reasons for your action, but, as a general rule, when the notarial act requested can be performed without interference with official business, and without giving offense to the local government, consular officers are expected, upon the tender of a suitable remuneration, to perform it.

"Applying these general instructions to the case of Mr. ———, it follows that, in the absence of any of the above-mentioned reasons for refusing the application of his clients, you should, upon being satisfied of the identity of the said applicants, have administered the oaths and signed the certificates as requested, and should still do so if the parties appear before you again for that purpose.

"You will understand that these instructions relate exclusively to your exercise of notarial functions. They are not to be considered as in any way bearing on the question of your right to issue certificates on matters of law or of fact."

Mr. Adee, Second Asst. Sec. of State, to Mr. Johnson, Apr. 20, 1887. MSS. Inst., Consuls.

## § 125.

### JUDICIAL CONSULAR FUNCTIONS IN CHINA.

"I have to acknowledge the receipt of your dispatch No. 324, of the 3d ultimo, in which you present some interesting and important questions as to the obligatory character of Rule XV of the (Chinese) Consular Court Regulations of 1864. That rule is as follows:

"'Civil actions, based on written promise, contract, or instrument, must be commenced within six years after the cause of action accrues; others, within two.'

"As you correctly state, there are no general statutes of limitations adopted by Congress as affecting all civil proceedings in Federal courts. But it must be remembered that, by section 721 of the Revised Statutes, Federal courts sitting in a particular State must adopt the limitations in force in such State, and in this way any gap in Federal legislation in this respect is filled up. But as the Revised Statutes contain no provision as to limitations in civil suits which applies to our consular courts, we have, in such courts, either to fall back in each case on the general principles of private international law or to adopt in advance as was done by Mr. Burlingame, a general rule of limitation.

"If we revert to the general principles of private international law, the following distinctions are to be observed:

"As to mode of solemnization of contracts, the rule is, *locus regit actum;*

"As to personal capacity, *lex domicilii* controls;

"As to interpretation, *lex loci contractus;*

"As to process, *lex fori;*

"As to mode of performance, *lex loci solutionis*, or the law of the place of performance.

"In Scudder *v.* Bank (91 U. S., 406), while these distinctions were in the main adopted, it was held that statutes of limitation, being matters of process, are governed by the *lex fori.* If we assume, in the present case, that there are no limitations by the *lex fori*, then assuming, also, that limitations of suit are part of the essence of a claim, we would revert, if the question be as to the time of payment, to the *lex loci solutionis*, or the law of the place of performance.

"But however important these distinctions may be in those of our foreign consular courts in which the question comes up *de novo*, they are of but subordinate interest in China, under the view I take of Rule XV of the Consular Court Regulations of 1864. I do not, it is true, regard this rule as a statute. Not only had Mr. Burlingame no power to enact a statute, as such, but the language of the rule shows that it cannot be regarded as a statutory enactment. It limits suits on even sealed instruments to six years, and on unwritten engagements, no matter how solemn or how strongly evidenced, to two years. It contains no exception in favor of minors or persons under disability. It must be regarded, therefore, not as a statute covering civil limitations in all their bearings, but as an assertion that suits in consular courts in China are to be limited as to time, the limitation to be adapted to the social and business conditions of the period of suit. In this way we can explain not only the limitation of two years for unwritten engagements, which in the then immature and unsettled condition of our business in China may have been eminently proper, but the omission of the exceptions I have noticed above.

"I hold, therefore, that Rule XV of the Regulations of 1864, while not to be regarded as having the authority or the fixedness of a stat-

ute, is to be viewed as a rule of court expressing a principle open to modification by the court that issued it. It stands in the same position as do the equity rules adopted by the Supreme Court of the United States and courts of the several States, not as a statutory mandate, to remain in force until expressly repealed or modified, but as a principle and regulation of practice which it is open to the court to expand or vary as the purposes of justice may require.

"As to the importance of your adopting such a rule there can be no question. Were there no such limitation required in China, American merchants in China might be harassed by old debts and stale demands outlawed in the United States, and their business much impeded. Aside from this the principle that the right of suit should be limited as to time, is as essential to public justice as is the principle that the right of suit should exist at all."

Mr. Bayard, Sec. of State, to Mr. Denby, Apr. 27, 1887. MSS. Inst., China. See as to limitation, *supra*, § 239.

"I have received your No. 332, of March 11, 1887, in which you discuss the appellate jurisdiction of the United States minister to China.

"I concur with you in the opinion that there is no appeal from a consular court in China to the United States minister in cases where the matter in dispute exceeds $2,500; but that the appeal in such cases is to be to the circuit court for the district of California. This is in my judgment the proper construction of the statutes. As a matter of judicial practice, the vesting of appeals in such cases in the circuit court for the district of California has been accepted by that court. In the case of The Ping-On, before Sawyer and Hoffman, JJ., in March, 1882, (7 Sawyer's Rep., 483), the question was vigorously contested, and it was claimed that sections 4092, 4093, 4094, and 4109, giving jurisdiction, were in this respect annulled by section 4107. But this position was rejected by Hoffman, J., who thus states the law:

"'The provisions of sections 4094, 4109 and 4092 clearly indicate the system Congress intended to adopt.

"'In suits for $500 or less, the decision of the consular court is final, unless the consul sees fit to call in associates and they differ in opinion. In suits for more than $500 and not more than $2,500 an appeal lies to the minister, whose judgment is final. In suits for more than $2,500 the appeal lies to the circuit court for the district of California, and a similar appeal lies from the final judgment of the minister in the *exercise of original jurisdiction* when the amount involved exceeds $2,500. But this original jurisdiction is confined to cases where the consul is interested either as party or witness. It thus appears that Congress has seen fit to withhold, both from the consular court and from the minister, final jurisdiction in all cases where the matter in dispute exceeds $2,500, exclusive of costs, and to provide, in such cases for an appeal to the circuit court for the district of California.'

"I hold, therefore, that the right of appeal from the final judgment

of consular courts in all cases where the matter in dispute exceeds $2,500 is in the circuit court for the district of California, and is, consequently, not in the United States minister."

Mr. Bayard, Sec. of State, to Mr. Denby, May 4, 1887. MSS. Inst., China.

## § 131.

### PROTOCOLS.

"I have received your No. 305 of the 5th instant, inclosing a communication from M. de Freycinet, in relation to the protocol or declaration adopted at the submarine cables conference in Paris, in May last, for the purpose of determining the construction of certain provisions of the convention of March 14, 1884. Immediately upon the reception of your dispatch I sent you the following telegraphic instruction:

"'McLane, Minister, Paris:

"'You are authorized to sign protocol explaining cables convention, subject to Senate's approval. Legislation pending before Congress, which meets December 6.

"'Bayard.'

"In this connection I think it proper to say that I received from the French minister at this capital, under date of the 8th of July last, a note transmitting proceedings of the cables conference held at Paris in May last, and requesting me to authorize you, by telegraph, to sign the protocol in question unconditionally. The reason given for this request was that 'in order to enable the different Governments, and especially the London Cabinet, to adopt such decisions as may be required by an acceptance of the proposed declaration,' it was important 'to change this draft of a declaration without delay to a definitive instrument.'

"With this request to give you authority to sign the declaration definitively I did not deem it proper to comply, for reasons which I will now proceed to state, and which you may make known in a general way to M. de Freycinet.

"The object of the declaration in question is to settle the interpretation and effect to be given to the second and fourth articles of the convention of the 14th of March, 1884. The first of these articles has reference to the punishment of persons for the 'breaking or injury of a submarine cable, done willfully (volontairement) or through culpable negligence,' &c. The second article named provides that the 'owner of a cable, who, by the laying or repairing of that cable, shall cause the breaking or injury of another cable, shall be required to pay the cost of the repairs which such breaking or injury shall have rendered necessary, but such payment shall not bar the enforcement, if there be ground therefor, of Article II of this convention.

"The declaration reads as follows:

"'Certain doubts having arisen as to the meaning of the word *volontairement* inserted in Article II of the convention of the 14th of March,

1884, it is understood that the imposition of penal responsibility mentioned in the said article does not apply to cases of breaking or of damage occasioned accidentally or necessarily in repairing a cable, when all precautions have been taken to avoid such breakings or damages.

"'It is equally understood that Article IV of the convention has no other end and ought to have no other effect than to charge the competent tribunals of each country with the determination, conformably to their laws and according to circumstances, of the question of the civil responsibility of the proprietor of a cable, who, by the laying or repairing of such cable, causes the breaking or damage of another cable, and in the same manner the consequences of that responsibility if it is found to exist.'

"By the Constitution of the United States treaties made under the authority of the United States are a part of the supreme law of the land; and the convention of the 14th of March, 1884, having been made in accordance with the Constitution, is a part of that supreme law.

"But, whilst it is true that treaties are a part of the supreme law of the land, they are nevertheless to be viewed in two lights—that is to say, in the light of politics and in the light of juridical law. Where the construction of a treaty is a matter of national policy, the authoritative construction is that of the political branch of the Government. It is the function of the Executive or of Congress, as the case may be. When a political question is so determined the courts follow that determination. Such was the decision of the Supreme Court in cases arising under the treaty of 1803 with France, of 1819 with Spain, and of 1848 with Mexico.

"But where a treaty is to be construed merely as a municipal law, affecting private rights, the courts act with entire independence of the Executive in construing both the treaty and the legislation that Congress may have adopted to carry it into effect. And while great weight might be given by the courts to an opinion of the Executive in that relation, such an opinion would not be regarded as having controlling force.

"The declaration in question is intended, as has been seen, to settle two questions. The first is that of penal responsibility under Article II of the convention for the accidental or necessary breaking or injury of a cable in an attempt to repair another cable; the second is that of civil responsibility under Article IV of the convention for injuries done to a cable in an effort to lay or repair another cable.

"These are judicial questions to be determined by the courts before whom appropriate suits may be brought. The only power that can authoritatively construe a treaty for the judicial tribunals on questions of the character described is the legislature, or the treaty making power itself. In either case the result would be a law which would be binding upon the courts.

"It is to be observed in this connection that the treaty in question is not self-executing, and that it requires appropriate legislation to give it

effect. If under these circumstances the Executive should now assume to interpret the force and effect of the convention, we might hereafter have the spectacle, when Congress acted, of an Executive interpretation of one purport and a different Congressional interpretation, and this in a matter not of Executive cognizance.

"For the reasons stated it was not deemed expedient to authorize you to sign the declaration unconditionally. And as the session of Congress was drawing to a close when the note of the French minister was received, and it seemed impracticable to secure the Senate's ratification of the declaration before adjournment, it was not thought best to send you such telegraphic instructions as were solicited.

"I desire, however, to refer to an incident in our diplomatic history which bears upon the matter under consideration and which might have been regarded as a precedent for the Executive in this case, if circumstances had seemed to require a different course from that which has been taken. I refer to the protocol which accompanies the treaty of Guadalupe Hidalgo in the volume of treaties between the United States and other powers.

"The treaty, as signed at the city of Gaudalupe Hidalgo on the 2d of February, 1848, was so amended by the Senate as to create doubts of its acceptance by the Mexican Government. In order to secure its ratification by that Government, as amended, President Polk sent two commissioners, Mr. A. H. Sevier and Mr. Nathan Clifford, to Mexico, with instructions to explain to the Mexican minister for foreign affairs, or to the authorized agents of the Mexican Government, the reasons which had influenced the Senate in adopting the several amendments.

"Before the arrival of the commissioners at the seat of the Mexican Government the Mexican Congress approved the treaty as amended without modification or alteration, leaving nothing to be performed except the exchange of ratifications, which took place on the 30th of May, 1848. But between the dates of the approval of the treaty by the Mexican Congress and that of the exchange of ratifications, the commissioners had several conferences with the agents of Mexico, the results of which were reduced to the form of a protocol, which was signed by Messrs. Sevier and Clifford, on the part of the United States, and Señor Luis de la Rosa, on the part of Mexico.

"The expressed object of this protocol was to explain the amendments of the Senate. It was defended by the Administration on this ground, and in a message to the House of Representatives the President stated that 'had the protocol varied the treaty, as amended by the Senate of the United States, it would have no binding effect.' But notwithstanding this explanation, the course of the President in not submitting the protocol to the Senate before the exchange of ratifications of the treaty was severely criticized in Congress."

Mr. Bayard, Sec. of State, to Mr. McLane, Nov. 24, 1886. MSS. Inst., France.

## § 134.

### FAVORED NATION.

In Bartram *v.* Robertson, in the Supreme Court of the United States, October term, 1886, the following opinion of the court was delivered on May 23, 1887, by Mr. Justice Field:

"The plaintiffs are merchants doing business in the city of New York, and in March and April, 1882, they made four importations of brown and unrefined sugars and molasses, the produce and manufacture of the island of St. Croix, which is a part of the dominions of the King of Denmark. The goods were regularly entered at the custom-house at the port of New York, the plaintiffs claiming at the time that they should be admitted free of duty under the treaty with Denmark, because like articles, the produce and manufacture of the Hawaiian Islands, were, under the treaty with their King, and the act of Congress of August 15, 1876, to carry that treaty into operation, admitted free of duty. The defendant, however, who was the collector of the port of New York, treated the goods as dutiable articles, and, against the claim of the plaintiffs, exacted duties upon them under the acts of Congress, without regard to those treaties, amounting to $33,222, which they paid to the collector under protest in order to obtain possession of their goods. They then brought the present action against the collector to recover the amount thus paid. The action was commenced in a court of the State of New York, and, on motion of the defendant, was transferred to the circuit court of the United States.

"The complaint sets forth the different importations; that the articles were the produce and manufacture of St. Croix, part of the dominions of the King of Denmark; their entry at the custom house, and the claim of the plaintiffs that they were free from duty by force of the treaty with the King of Denmark and of that with the King of the Hawaiian Islands; the refusal of the collector to treat them as free under those treaties, his exaction of duties thereon to the amount stated, and its payment under protest; and asked judgment for the amount. The defendant demurred to the complaint on the ground, among others, that it did not state facts sufficient to constitute a cause of action against him. The circuit court sustained the demurrer, and ordered judgment for the defendant with costs (21 Blatch., 211); and the plaintiffs have brought the case to this court for review.

"We are thus called upon to give an interpretation to the clause in the treaty with Denmark which bears upon the subject of duties on the importation of articles produced or manufactured in its dominions, and the effect upon it of the treaty with the Hawaiian Islands for the admission without duty of similar articles, the produce and manufacture of that Kingdom.

"The existing commercial treaty between the United States and the King of Denmark, styled 'General convention of friendship, commerce, and navigation,' was concluded on the 26th of April, 1826. It was afterwards abrogated, but subsequently renewed, with the exception of one article, on the 12th of January, 1858.

"The first article declares that 'the contracting parties, desiring to live in peace and harmony with all the other nations of the earth, by means of a policy frank and equally friendly with all, engage mutually not to grant any particular favor to other nations in respect to commerce and navigation which shall not immediately become common to the other party, who shall enjoy the same freely if the concession were freely

made, or upon allowing the same compensation if the concession were conditional.'

"The fourth article declares that 'no higher or other duties shall be imposed on the importation into the United States of any article, the produce or manufacture of the dominions of His Majesty the King of Denmark; and no higher or other duties shall be imposed upon the importation into the said dominions of any article the produce or manufacture of the United States, than are or shall be payable on the like articles being the produce or manufacture of any other foreign country.'

"The treaty, or convention as it is termed, between the King of the Hawaiian Islands and the United States, was concluded January 30, 1875, and was ratified May 31 following. Its first article declares, that 'for and in consideration of the rights and privileges granted by His Majesty the King of the Hawaiian Islands,' and 'as an equivalent therefor,' the United States agree to admit all the articles named in a specified schedule, the same being the growth, produce, and manufacture of the Hawaiian Islands, into all the ports of the United States free of daty. Then follows the schedule, which, among other articles, includes brown and all other unrefined sugars and molasses.

"The second article declares, that 'for and in consideration of the rights and privileges granted by the United States of America in the preceding article,' and 'as an equivalent therefor,' the King of the Hawaiian Islands agrees to admit all the articles named in a specified schedule which were the growth, manufacture, or produce of the United States of America, into all the ports of the Hawaiian Islands free of duty. Then follows the schedule mentioned.

"By the fourth article it is also agreed on the part of the Hawaiian King that so long as the treaty remains in force he will not lease or otherwise dispose of, or create any lien upon, any port, harbor, or other territory in his dominions, or grant any special privileges, or rights of use therein, to any power, state, or Government, nor make any treaty by which any other nation shall obtain the same privileges, relative to the admission of any articles free of duty thereby secured to the United States.

"The fifth article declared that the convention should not take effect until a law had been passed by Congress to carry it into operation. Such a law was passed on the 15th of August, 1876. (19 Stat. L., 200, chap. 290.) It provided that whenever the President of the United States should receive satisfactory evidence that the Legislature of the Hawaiian Islands had passed laws on their part to give full effect to the convention between the United States and the King of those islands, signed on the 30th of January, 1875, he was authorized to issue his proclamation declaring that he had such evidence, and thereupon, from from the date of such proclamation, certain articles, which were named, being the growth, manufacture, or produce of the Hawaiian Islands, should be introduced into the United States free of duty, so long as the convention remained in force. Such evidence was received by the President, and the proclamation was made on the 9th of September, 1876.

"The duties for which this action was brought were exacted under the act of the 14th of July, 1870, as amended on the 22d of December of that year. (16 Stat. L., 262, 397.) The act is of general application, making no exceptions in favor of Denmark or of any other nation. It provides that the articles specified, without reference to the country from which they come, shall pay the duties prescribed. It was enacted several years after the treaty with Denmark was made.

"That the act of Congress, as amended, authorized and required the duties imposed upon the goods in question, if not controlled by the treaty with Denmark, after the ratification of the treaty with the Hawaiian Islands, there can be no question. And it did not lie with the officers of customs to refuse to follow its directions because of the stipulations of the treaty with Denmark. Those stipulations, even if conceded to be self-executing by the way of a proviso or exception to the general law imposing the duties, do not cover concessions like those made to the Hawaiian Islands for a valuable consideration. They were pledges of the two contracting parties, the United States and the King of Denmark, to each other, that, in the imposition of duties on goods imported into one of the countries which were the produce or manufacture of the other there should be no discrimination against them in favor of goods of like character imported from any other country. They imposed an obligation upon both countries to avoid hostile legislation in that respect. But they were not intended to interfere with special arrangements with other countries founded upon a concession of special privileges. The stipulations were mutual, for reciprocal advantages. 'No higher or other duties' were to be imposed by either upon the goods specified; but if any particular favor should be granted by either to other countries in respect to commerce or navigation, the concession was to become common to the other party upon like consideration, that is, it was to be enjoyed freely if the concession were freely made, or on allowing the same compensation if the concession were conditional.

"The treaty with the Hawaiian Islands makes no provision for the imposition of any duties on goods, the produce or manufacture of that country, imported into the United States. It stipulates for the exemption from duty of certain goods thus imported, in consideration of and as an equivalent for certain reciprocal concessions on the part of the Hawaiian Islands to the United States. There is in such exemption no violation of the stipulations in the treaty with Denmark, and if the exemption is deemed a 'particular favor,' in respect of commerce and navigation, within the first article of that treaty, it can only be claimed by Denmark upon like compensation to the United States. It does not appear that Denmark has ever objected to the imposition of duties upon goods from her dominions imported into the United States, because of the exemption from duty of similar goods imported from the Hawaiian Islands, such exemption being in consideration of reciprocal concessions, which she has never proposed to make.

"Our conclusion is, that the treaty with Denmark does not bind the United States to extend to that country, without compensation, privileges which they have conceded to the Hawaiian Islands in exchange for valuable concessions. On the contrary, the treaty provides that like compensation shall be given for such special favors. When such compensation is made it will be time to consider whether sugar from her dominions shall be admitted free from duty."

## § 145.

### GUARANTEE OF ISTHMUS TRANSIT.

"The Secretary of State, to whom has been referred the resolution of the House of Representatives of the 16th instant, requesting information as to what action has been taken 'by the Department of State to

protect the interests of American citizens whose property was destroyed by fire caused by insurgents at Aspinwall, United States of Colombia in 1885,' has the honor to say that negotiations were commenced in October last and are now pending between the United States and Colombia for the purpose of establishing an international commission to whom may be referred for adjustment, according to the rules of international law and the treaties existing between the two countries, the claims of citizens of the United States against the Government of Colombia growing out of the incident referred to in the resolution of the House of Representatives.

"It is understood to be the duty of the Government of Colombia, under the thirty-fifth article of the treaty between the United States and New Granada of the 12th of December, 1846, to keep the transit across the Isthmus of Panama upon any modes of communication that now exist, or that may hereafter be constructed, 'open and free to the Government and citizens of the United States, and for the transportation of any articles of produce, manufactures, or merchandise, of lawful commerce, belonging to the citizens of the United States.' This duty was expressly acknowledged by the Government of New Granada in the claims convention with the United States of the 10th of September, 1857, in which it was agreed that there should be referred to a commission 'all claims on the part of corporations, companies, or individuals, citizens of the United States, upon the Government of New Granada, which shall have been presented prior to the 1st day of September, 1859, either to the Department of State at Washington or to the minister of the United States at Bogota, and especially those for damages which were caused by the riot at Panama on the 15th of April, 1856, for which the said Government of New Granada acknowledges its liability, arising out of its privilege and obligation to preserve peace and good order along the transit route.'

"This convention was afterwards extended by a convention between the United States and the United States of Colombia, concluded on February 10, 1864, in order that certain claims might be disposed of which the commission under the former convention had failed to decide during the time therein allowed them.

"On several occasions the Government of the United States, at the instance and always with the assent of Colombia, has, in times of civil tumult, sent its armed forces to the Isthmus of Panama to preserve American citizens and property along the transit from injuries which the Government of Colombia might at the time be unable to prevent. But, in taking such steps, this Government has always recognized the sovereignty and obligation of Colombia in the premises, and has never acknowledged, but, on the contrary, has expressly disclaimed, the duty of protecting the transit against domestic disturbance.

"The correspondence which this Department has had with the Government of Colombia respecting the pending convention, it is not deemed

compatible with the public interest to communicate to Congress in the present state of negotiations."

Mr. Bayard, Sec. of State, Report, Feb. 19, 1887. House Ex. Doc. 183, 49th Cong. 2d sess.

## § 150.

### PEACE OF 1782–'83 WITH GREAT BRITAIN.

It was not until after the first edition of this work was printed that I had the opportunity and leisure to examine the Stevens collection of Franklin papers, purchased by Congress, and now on deposit in the Department of State. As to the extraordinary historical value of those papers, as well as the singular skill with which they have been arranged by Mr. Stevens, I entirely concur with Dr. E. E. Hale in the opinion expressed by him in the preface to the interesting volume published this year by himself and his son (Franklin in France, from original documents, by Edward E. Hale and Edward E. Hale, jr., Boston, 1887). Dr. Hale, in this valuable volume, closes his compilation of the Franklin papers with 1782. My object in the present note is (beginning shortly after Dr. Hale closes) to use the materials afforded by the Stevens collection as a means of construing the treaty of peace as definitely settled on September 3, 1783.

The questions which the Franklin papers help largely to solve are, it should be recollected, of great interest in reference not merely to history but to international law. If, as the papers now before us show, the treaty of 1782–3 was a treaty of partition of an empire, then each of the two sovereignties thus separated carried with it all the incidents that it had enjoyed prior to partition so far as this does not conflict with the treaty limitations. The importance of this distinction is manifest. If the United States took by "grant" under the treaty, then the rights of reciprocity, both as to fisheries and as to navigation, which existed previously between the colonies and the parent state, could only, so it might be argued, be claimed under the treaty so far as it created them *de novo*. If, on the other hand, the treaty was one of partition, then these rights remained, except so far as they were limited in the treaty. That the latter view is correct is, I submit, abundantly shown in prior volumes of this work, *supra*, §§ 150, 301 *ff*. And it is so fully sustained by the papers contained in the Stevens collection that I have thought it important to introduce into this appendix extracts from such of those papers as bear on this question.

Before, however, proceeding to this specific task it is important to notice the vividness with which these papers bring before us, with an accuracy heretofore unobtainable, the leading personages who were concerned in the negotiation of the treaty. The more prominent of these personages, whose letters, many of them in the original manuscript, are now in the Department of State, and some of whose private memoranda and journals are also there deposited, are as follows: The Earl of Shelburne, Mr. Charles James Fox, Mr. Richard Oswald, Mr. Thomas Grenville, Count de Vergennes, Dr. Franklin, Mr. Jay, and Mr. John Adams.

The condition of things, so far as concerned Great Britain, at the time when the peace negotiations began, was as follows:

On February 27, 1782, Lord North being still minister, the opposition carried a resolution declaring the advisers of further offensive war with

America to be enemies of their country. On March 8 a resolution of censure on the ministry came within a few votes of adoption. On March 15 a motion of want of confidence in the ministry was lost by a majority of 9, but notice was given of its renewal on the 20th. On that day Lord North resigned, and George III called on Lord Shelburne for advice. Lord Shelburne declared it essential that Lord Rockingham should be made minister, one of the conditions being the recognition of the independence of the United States. In the ministry thus constituted, Lord Rockingham, as prime minister, took the treasury; Lord John Cavendish was chancellor of the exchequer; Mr. Fox, secretary for foreign affairs; Lord Shelburne, secretary for home and colonial affairs, while Dunning, a lawyer of great eminence, and a personal friend of Shelburne, entered into the cabinet as Lord Ashburton and chancellor of the Duchy of Lancaster. As non-cabinet officers were Burke, pay-master-general; Thomas Townshend, secretary at war, and Sheridan, under secretary of state. The Duke of Portland, afterwards prime minister, went to Ireland as lord-lieutenant. Mr. Pitt declined to take any office that did not bring a seat in the cabinet, and no seat in the cabinet was offered to him.

### LORD SHELBURNE.

The Earl of Shelburne, whose character is one of those as to which historians have had the greatest difficulty in giving an explicit judgment, had, in his early political life, been associated with Henry Fox, the first Lord Holland, and with Lord Bute. Certainly two more unsafe guides could not have been found: the first able, subtle, determined, corrupt, making the amassing of wealth his chief parliamentary object; the other a stupid and pompous egotist, without statesmanlike ability, owing his position to the favor with which he was personally regarded by the Princess of Wales during the minority of George III; and, by his high tory views of prerogative, coupled with his pretentious manner, acquiring great influence over that monarch during the early years of his reign. Lord Shelburne's letters to both Fox and Bute show characteristics which enable us to understand why, against Shelburne, the charge of duplicity was so frequently made. But it must be remembered that Shelburne was then a young man conscious of great ability, possessing great wealth, and with a natural ambition to take a leading position in English political life. English politics were at that time in a chaotic state. There was no strong liberal party as such; leading Whigs had become, as in the case of George Grenville, advocates of high prerogative. William Pitt, the father, withdrawn from political activity by ill health, was about for a time to be snuk in the obscurity of the House of Lords. Lord Shelburne's flattery of Lord Holland and Lord Bute was no more fulsome, and was probably no less entirely a matter of form, than was Lord Chatham's flattery of most of the leading public men to whom his letters are preserved; and it must be kept in mind that as soon as Lord Chatham reappeared on the political stage, taking, whenever his health enabled him to take, a leading independent part, he was sustained by Lord Shelburne with a resoluteness and energy which cannot now be questioned. But however this may be, of two points as to Lord Shelburne we may rest assured. Whatever may have been his early political associations, his personal sympathies, as his life matured, were with the school of liberal political economists, of which Adam Smith was the head, and among whose members were Franklin, Price, and Priestley. He did not, indeed, avow republican sentiments,

however much he may have regarded them as in theory sound; in this respect following Halifax, whom he resembled in not a few characteristics. Yet his intimacy with philosophical republicans of the advanced whig school, his impatient disdain of the old-line aristocratic whigs, his opposition to the British navigation laws, his advocacy of free trade, his views on the French revolution, taking, as did Jefferson, a wise intermediate position between the terroristic antagonism of Burke and the extravagant Utopian advocacy of Fox, all indicate that his convictions were those of liberals such as Franklin and Jefferson.* All this, in the negotiations with America, which were to be conducted by him, would lead him to strive for a peace which would establish free commercial relations between the two countries. But there were other reasons why such a peace should not only be negotiated, but negotiated promptly. Lord Shelburne, like Lord Chatham, had resisted the pressure of the Rockingham Whigs, led by Fox and Burke, for a recognition of American independence as a substantive prerequisite to be followed by whatever treaties Great Britain's superior strength might then enable her to impose. This, of course, would amount practically to Great Britain saying to the colonies, as soon as by acknowledging their independence she had detached them from their European allies, "Go off by yourselves; I clear my skirts of you; whatever you get from me afterwards must be a matter of favor." On the other hand, Shelburne, like Chatham, clung to the idea of an imperial confederation, and when this was out of the question, to a treaty of partition, based on reciprocal enjoyment of ancient rights. On this basis, as we will see, were framed the provisional articles which afterwards took the shape of the treaty of peace. And that they were peculiarly liberal to the United States is due not merely to Shelburne's views, as above expressed, but to the necessity of his then political position.

The struggle between Fox and Shelburne for the control of the negotiations with Franklin, then the sole minister of the United States in Paris, will be noticed presently more fully. It is enough at this point to say that the formal right in this respect was with Shelburne, since the colonies belonged to him, and, until their independence was acknowledged, the United States, to the British eye, were still colonies. Fox, unable to submit to this conclusion, was about to resign, when the death of Lord Rockingham, on July 1, 1782, precipitated the resignation not merely of Fox but of his immediate friends. A new cabinet was framed, with Shelburne at the head of the treasury, Thomas Townshend secretary for the colonies, Lord Grantham secretary for foreign affairs, and William Pitt chancellor of the exchequer. Of the cabinet, Mr. Bancroft (Formation of the Federal Constitution, Book I, Chapter III) thus speaks:

"The restoration of intercourse with America pressed for instant consideration. Burke was of opinion that the navigation act should be completely revised; Shelburne and his colleagues, aware that no paltry regulation would now succeed, were indefatigable in digesting a great and extensive system of trade, and sought, by the emancipation of commerce, to bring about with the Americans a family friendship more

*Of Shelburne, Lecky (4 Hist. Eng., 226, Am. ed.), while taking in other points a lower view than that given in the text, writes: "He was one of the earliest, ablest, and most earnest of English free traders, and no statesman of his time showed himself so fully imbued with the commercial views of Adam Smith. * * * His private life was eminently respectable. He bore a long exclusion from office with great dignity and calm, and no part of his public career appears to have been influenced by any sordid desire of emolument, title, or place."

beneficial to England than their former dependence. To promote this end, on the evening of the 11th of February [1783], William Pitt, with the permission of the King, repaired to Charles James Fox and invited him to join the ministry of Shelburne. The only good course for Fox was to take the hand the young statesman offered; but he put aside the overture with coldness, if not with disdain, choosing a desperate alliance with those whose conduct he had pretended to detest, and whose principles it was in later years his redeeming glory to have opposed."

On April 3, Pitt, still retaining, in the delay incident to the formation of the coalition ministry, the leadership of the House, "presented," to follow Mr. Bancroft's narrative, "a bill framed after the liberal principles of Shelburne. Its preamble, which rightly described the Americans as aliens, declared 'it highly expedient that the intercourse between Great Britain and the United States should be established on the most enlarged principles of reciprocal benefit;' and, as a consequence, not only were the ports of Great Britain to be opened to them on the same terms as to other sovereign states, but, alone of the foreign world, their ships and vessels, laden with the produce and manufactures of their own country, might as of old enter all British ports in America, paying no other duties than those imposed on British vessels." The bill was opposed by Eden (afterwards Lord Auckland), as introducing a "bold revolution in our commercial system." Its principle was sustained by Burke, who urged that "all prohibitory acts be repealed," and that the Americans should be left "in every respect as they were before in point of trade." But before further action had been taken on the bill, Lord Shelburne's ministry went out of office, the coalition having at last succeeded in forming a ministry which commanded a majority in the House of Commons. Pitt going out of office with Shelburne, the bill was dropped. By the coalition cabinet, which succeeded, it was utterly repudiated; Fox, while apparently recognizing the justice of free navigation as a principle, declaring that "great injury often comes from reducing commercial theories to practice." Fox's further proceedings in this connection will be noticed when we proceed to consider his general attitude towards the United States after the overthrow of Lord North.

Lord Shelburne's high merits as the originator, together with Franklin, of a system of pacification by which the interests of Great Britain and the United States could each have been best subserved, will be illustrated in future paragraphs. At present it may be enough to quote Mr. Bancroft's estimate of him (10 Hist. U. S., 532):

"It was he who reconciled George III to the lessons of Adam Smith, and recommended them to the younger Pitt, through whom they passed to Sir Robert Peel; but his habits of study and his want of skill in parliamentary tactics had kept him from political connections as well as from political intrigues. His respect for the monarchical element in the British constitution invited the slander that he was only a counterfeit liberal, at heart devoted to the King; but in truth he was very sincere. His reputation has comparatively suffered with posterity, for no party has taken charge of his fame. Moreover, being more liberal than his age, his speeches sometimes had an air of ambiguity from his attempt to present his views in a form that might clash as little as possible with the prejudices of his hearers." In one point alone must I dissent from the above. Lord Shelburne when in office undoubtedly did his best to give the King as little pain as possible when his assent to American independence was required, and when a treaty of reciprocity with America was proposed. But I cannot see among Shelburne's papers, as given in

part in his biography already cited, and in part in the papers in this Department, any evidence of peculiar reverence for "the monarchical element." He did not hesitate to defy George III, first as to the American war, and then as to the French revolution. "According to Lord Holland," says Sir G. C. Lewis (Administrations of Great Britain, 50), "Bentham always said that 'Lord Shelburne was the only minister he ever heard of that did not *fear* the people;'" and it is clear from his course that he looked to the people as the ultimate arbiter of his policy. And it is a singularly strong tribute to Shelburne's capacity as a statesman that the provisional treaty with America, agreed to by him in 1782, the censure of which by the House of Commons, under the lead of Fox and North, was the cause of his overthrow, was in 1783 adopted as a final treaty by Fox and North as a measure required by the popular will.

FOX.

In no part of Fox's stormy career did faction and passion more entirely overcome his natural love of liberty and justice than in his proceedings in reference to the negotiations with the United States for peace. His vehement and powerful denunciations of the war had been among the principal blows under which the North administration had tottered and fallen. He had made it one of the primary conditions of the acceptance of power by the Rockingham party, of which he was the leader, that the independence of the colonies should be promptly and unreservedly acknowledged. When, however, he entered into the new ministry, of which Lord Rockingham was the titular head, he found himself, as secretary for foreign affairs, at once brought into antagonism with Lord Shelburne, who was secretary for home and colonial affairs. Lord Shelburne, as has been noticed, shared Lord Chatham's repugnance to a unilateral recognition of independence, and was unwilling to concede independence except as a basis of a system, if not of federation, at least of business reciprocity. Had Fox had exclusive control of the question of peace, he could have settled matters at once by committing the ministry to an immediate recognition of independence. But the difficulty was that Fox had no such exclusive control. Negotiations with the colonies, as long as they were colonies, fell under Shelburne's control; and Shelburne, while conceding the necessity of acknowledging independence, determined to make this acknowledgment part of a treaty for the adjustment of all questions in dispute between the parties, as well as for the establishment of liberal business relations between them. Shelburne, unable to see how negotiations with the colonies could fall under the department of foreign affairs, sent to Paris Richard Oswald (of whom more hereafter) to negotiate with Franklin not merely as to peace but as to the future relations of the two countries whom peace was to separate. Fox, assuming independence, and regarding the United States as a foreign power, sent to Paris, also on a mission to Franklin, Thomas Grenville, son of George Grenville, the author of the stamp act, and the brother of Lord Temple and of William Grenville, afterwards Lord Grenville. Thomas Grenville, who lived to be the survivor of that remarkable family of brothers, was in his earlier years a devoted friend of Fox; and the letter of Fox, introducing him to Franklin, is, taken in connection with Lord Shelburne's flattering letters introducing Oswald, an illustration of the vast importance then attached in England to Franklin's influence. Fox, in this introduction, referred to George Grenville's action as not in any way to be regarded as indicating a continuance of the

same views in the son; and to this Franklin replied, with his usual tact, saying how much pleasure it gave him to meet any diplomatic agent of Fox. Franklin thus found himself for awhile with two distinct British negotiators seeking from him a settlement; and from the correspondence now on deposit in the State Department it is plain that he was fully aware of the two distinct policies represented by these negotiators, and was determined to wait until it should appear which one of these policies would be adopted by the cabinet. He did not, however, have to wait long. On July 1, 1782, as has been already noticed, on Lord Rockingham's death, Fox resigned, followed by the Rockingham Whigs, and went at once into an opposition as thorough and as bitter as that he had previously maintained against Lord North.

Sir G. C. Lewis, a Whig chancellor of the exchequer, disposed by party traditions to sustain Fox, finds himself unable to accept the position that Shelburne, in sending Oswald to Paris, had encroached on the province of Fox. "It is quite clear," he says (Administrations of Great Britain, 38), "from our narrative of facts, and from the testimonies which we have cited, that Oswald's first visit to Paris arose out of a letter accidentally addressed by Franklin to Lord Shelburne before the change of ministry was made known to him; that Oswald returned to Paris with the full knowledge of the cabinet, and as bearer of a message that he would be speedily followed by Mr. Grenville, as minister plenipotentiary, to treat with the French agent; that he communicated with Mr. Fox when he was in London, and that Mr. Grenville knew he was at Paris, and communicated with him almost daily when he was there. Mr. Oswald's mission had nothing *clandestine* in the ordinary sense of the term. It was open and avowed on both sides of the water. It was known to Fox and the cabinet, and it was recognized in the communications of Mr. Grenville with Franklin and M. de Vergennes. Neither can it be said, with Horace Walpole, that Oswald was sent to thwart Mr. Grenville, for Oswald's mission preceded Mr. Grenville's." But Sir G. C. Lewis then proceeds to argue Grenville had no real cause for complaint, even when Shelburne determined to appoint Oswald as commissioner to treat with Franklin, since if "Grenville found by experience that a separate negotiator for America was likely to interfere with the rest of the negotiation, he could have represented this conclusion to his own Government, and the cabinet would have then decided the question with the advantage of his opinion." Oswald had not been formally commissioned, and the appointment might still be arrested, notwithstanding Lord Shelburne's announcement, if the cabinet thought fit to commit the entire negotiation to one person; but that there was no practical inconvenience in the separation of the two functions, is shown, so Sir G. C. Lewis proceeds to state, by the retention of the same separation in the subsequent ministry of Shelburne, Oswald continuing to treat with the American commissioners, Fitzherbert (afterwards Lord St. Helens) appointed to treat with France, Spain, and Holland. And even when the coalition ministry came into power, while the Duke of Manchester took Fitzherbert's place, Hartley was sent to negotiate with the American commissioners, and in this capacity signed the definitive treaty of 1783. "There is no evidence," Sir G. C. Lewis concludes, "of any *intrigue* on Lord Shelburne's part," and so far from it appearing that Lord Shelburne in sending Oswald was influenced by a desire to propitiate the King, "Franklin's anxiety to secure Oswald's appointment is a decisive proof that 'Shelburne's man' was not desirous of promoting the views which the King so fondly cherished; but, on the

contrary, that he was desirous of promoting the views which the King had quite recently held in the utmost abhorrence." It is clear, also, from Franklin's own papers, "that Lord Shelburne did not use Oswald as the instrument of any royal intrigue, or for the purpose of inculcating any peculiar views of his own;" and Sir G. C. Lewis further asserts that there was nothing in "the Canadian paper," given by Franklin to Oswald, at which Fox had any right to take umbrage. Sir G. C. Lewis insists that Fox's reason for resignation was simply an unjustifiable personal dislike of Lord Shelburne, and he sums up the question as follows: "When Lord Rockingham died, and the King made Lord Shelburne, and not the Duke of Portland, prime minister, there were three courses open to Fox: (1) To remain in Lord Shelburne's government; (2) to resign with his friends and to form a separate independent party; (3), to coalesce with Lord North and the tories. Of these three courses the last was, in our judgment, incomparably the worst, and this was the one Fox selected." Still more strongly writes Mr. Bancroft (10 Hist. U. S., 551):

"To gratify the violence of his headstrong pride and self-will he (Fox) threw away the glorious opportunity of endearing himself to mankind by granting independence to the United States and restoring peace to the world, and struck a blow at liberal government in his own country from which she did not recover in his life-time."

Earl Russell, while seeking as far as possible to palliate Fox's course, says, speaking of the treaties of peace with France and Spain, as well as with the United States (1 Life of Fox, 344):

"It must be owned that these (the treaty settlements) were immense concessions. But they all sank into insignificance in comparison with that article which was the basis of the whole, that upon which Mr. Fox, Mr. Burke, Lord Shelburne, General Conway, and Mr. Pitt were agreed, namely, the independence of the thirteen colonies of North America. To have acknowledged that independence, and to have continued the war with France and Spain, seems to have been the favorite idea of Mr. Fox. * * * Upon the whole, however, it seems to me, that with the independence of America as a starting point, with the want of allies still unsupplied, with our debt still increasing, Great Britain was more likely to rise buoyant from an inglorious peace than from the continuance of a war hitherto disastrous, and sure to be costly. The opinion of Mr. Fox was different, and his dislike of the terms of peace led him to a junction with a statesman whose errors he had often chastised and whose want of foresight and firmness he had ever been ready to censure." * * * Hence followed "that coalition which in the first place overthrew Lord Shelburne's administration; next destroyed that large and extensive popularity which Mr. Fox at that time enjoyed, and finally ruined the Whig party."

But Lord Russell is in error in holding that Fox's objection to the treaty with America was simply its connection with the treaties with France and Spain. His opposition was far more radical and far more antagonistic to liberal principles. This will appear from the following sketch of his parliamentary proceedings in relation to the American treaty:

The announcement in the King's speech on the opening of Parliament on December 5, 1782, of the provisional treaty of peace, was followed by an attack, though on different grounds, from both wings of the opposition. By Stormont, the recognition of independence was attacked because it was irrevocable; by Fox, because it was made part of a treaty virtually

of partition. But to Fox and his friends the treaty was none the less odious because it embraced the independence they had so long striven for. The King's speech Fox declared he "detested," while Burke pronounced it to be "a farrago of hypocrisies and nonsense." It was plain that if the two lines of opposition, Lord North's friends and the old Whigs, led by Fox, should unite, they could, by condemning the peace, overthrow the administration. But could they form an administration to take its place? In the way of such a juncture was Fox's own declaration that "when I shall make terms with one of them, I will be satisfied to be called the most infamous of mankind. I would not for an instant think of a coalition with men who, in every public and private transaction as ministers, have shown themselves void of every principle of honor and honesty. In the hands of such men I would not trust my honor even for a minute." On February 17 an amendment to the address, so drawn as to pledge a confirmation of the peace, but at the same time asking time to consider it, was carried in the Commons against the ministry by a vote of 224 to 208. A motion of censure was subsequently made, and Shelburne authorized Pitt, in case the ministry were defeated on this motion, at once to declare their common resignation. On this motion, as has been already stated, the vote, on February 22, for the ministry was 190; for the opposition 207. On the same day Shelburne announced to the cabinet his resignation, and recommended the King to send for Pitt. This the King at once agreed to do, but Pitt finding himself unable to form a ministry of strength enough to stand, an interval followed which lasted until April 1, when the coalition ministry entered into office.

In Fox's speech of July 9, 1782, explaining his resignation, he said that he resigned because "he found the majority of them (his associates in the cabinet) averse to the idea of unconditional independence in America, which he conceived it to be necessary to the salvation of the country to have granted. If, since he quitted his employment, his late colleagues had changed their opinion he rejoiced at the event." (23 Parl. Hist., 171.)

Parliament shortly afterwards was prorogued for the long vacation. In the mean time the preliminaries of peace with America had been signed, and this fact was announced by the King on the opening of Parliament when it reconvened.

On the debate on the address, December 5, 1782, Fox went so far as to say that, "as to himself, he believed he really was of more service out of office, and debating in the House, than he could possibly have been if he remained in the cabinet, for he found that those measures which, while in office, he recommended in vain to the council, were readily adopted when he laid down his employments." (23 Parl. Hist., 242–3.)

"You call for peace," so Mr. Fox in his speech on February 17, 1783, supposed Lord Shelburne to have said, "and I will give you peace that shall make you repent the longest day you live that you ever breathed a wish for peace. I will give you a peace which will make you and all men wish that the war had been continued; a peace more calamitous, more dreadful, more ruinous than war could possibly be; and the effects of which neither the strength, the credit, nor the commerce of the nation shall be able to support. If this was the intention of this noble person, he has succeeded to a miracle." (23 Parl. Hist., 486.)

On April 9, 1783, the coalition ministry being finally seated, "Mr. Secretary Fox" vigorously opposed on principle any statutory relaxation of the British commercial system in favor of the United States. (23 Parl. Hist., 726.) On May 8 a bill passed the House, on motion of Mr.

Fox, giving the King in council the power on or before December 20 to make any regulation deemed necessary in respect to commercial intercourse with the United States. This was adopted as a substitute for Mr. Pitt's bill, and subsequently passed the House of Lords. (*Id.*, 895.)

By the "King in council," under Fox's auspices, an order was issued which "confined the trade between the American States and the British West India islands to British-built ships, owned and navigated by British subjects." (See Bancroft's Hist. Fed. Const., 44 *ff.*)

Inexcusable as was Fox's coalition with North, as a matter of personal honor, far more inexcusable was his course on the peace question, as a matter of political principle. He had taken the position, with characteristic enthusiasm, of the vindicator of colonial liberties. He had declared that if the colonies allowed themselves to be subjugated they would be fit for nothing else than to be the subjugators of the liberties of Great Britain. He insisted that the only true course was to acknowledge, by an act of full and absolute grace, their independence and sovereignty; and because Lord Shelburne made this acknowledgment part of a treaty by which the boundaries of the United States were settled on a liberal scale, their fishery rights recognized, their claim to the Mississippi secured, and prosecutions and confiscations of loyalists stopped, he succeeded, in coalition with Lord North, in overthrowing Lord Shelburne's ministry. Yet, while by the vote of censure he forced through the House he brought about this overthrow, he did not attempt to modify the provisional articles of peace, but readopted them as the definitive treaty of 1783, formally executed under his administration. The fact is that he must on reflection have been convinced that the censure which he had carried in the House, while efficient enough in getting rid of a hated rival, would have been fatal, had it been made the basis of a new system, to the interest of peace.

For, what would have been the result of acknowledging the independence of the thirteen colonies and then casting them adrift, to have their boundaries, their relation to the fisheries, to the Indians, and to the loyalists, settled by a new treaty, to be negotiated after a general European pacification, when the States, whose sovereignty was then recognized, would have stood alone, Great Britain holding the ocean, the ports of New York and Charleston, and the Indian tribes as serfs, wherever they might roam? Judging from Fox's subsequent course on the navigation question, judging from his readiness to crush the maritime rights of the Union as far as he could even under the wise and liberal articles of 1782, it is more than probable that, had he been at liberty to impose a new treaty on the United States, after having acknowledged their independence, he would have insisted on conditions which would have necessitated a renewal of the war. In fact, in denouncing as monstrous the concessions of the articles of 1782, in his speech censuring these articles, he pledged himself, should he himself undertake a new treaty, that at least such treaty should contain no such concessions; but that if the United States were to be permitted to enjoy the independence so ostentatiously flung at them, they were to enjoy it shorn of the valley of the Mississippi, shorn of the fisheries, burdened with the support of the loyalists, with a lien on their territory for the benefit of Indian hordes owing allegiance to the British crown. Such a treaty as this, if it had been extorted, would have been the precursor of a war which, however injurious it would have been to the United States, would have exhausted British resources and have ultimately

ended in British defeats far more humiliating to Great Britain than those which preceded the negotiation of 1782.

But, although Fox did not attempt, after he had overthrown the Shelburne ministry, to change the terms of the settlement of 1782, he did his best, as far as within him lay, to make that settlement not merely burdensome to the United States, but, by the very fact that it was thus made burdensome, proportionally mischievous to Great Britain.

At the time when Pitt's bill, suspending as to America the navigation laws, was introduced, the United States had adopted no navigation laws of their own, though these afterwards were passed by way of retaliation. But while there was at this time a free interchange of shipping between Great Britain and the United States, it was in the United States that the swiftest and staunchest ships then afloat were built. On this state of facts Pitt argued that it would be impolitic and unbusiness-like for Great Britain to say, "No, we will not let your vessels enter our service, though by keeping you out we lose our best ships." Yet, in the teeth of this position and in defiance of his own prior utterances as to unrestricted intercourse with America, Fox, as we have seen, blocked the passage of the bill until the coalition ministry came in, and then procured the passage of an act leaving the navigation question to be disposed of by an order of council, which, in a few weeks, shut United States built vessels out of British ports.

It is true that this was a blow to the United States ship-building interest, but it was a still greater blow to Great Britain, as it was soon found that British merchant vessels, built in Great Britain, were outsailed by United States vessels built in the United States; so that when a choice was open to other nations between the two, the latter were taken. And to these very navigation laws by which Great Britain confined herself almost exclusively to her own ship-yards and to her own materials for ship-building, may be attributed the fact that in the war of 1812 her merchant vessels were almost driven from the seas by American privateers, while her cruisers were outsailed by American cruisers. The British navigation act did not take away from United States ship-builders their superior skill; but by giving British ship builders a monopoly of the business it removed from them all fear of competition and kept them in their old position of inferiority to the ship-builders of the United States. And the British West Indies, by cutting off their supplies from the United States, received an almost fatal shock. (Lecky, Hist. Eng. VI, 285.)

But a still heavier stigma rests on the order of council thus issued under Fox's auspices. It was the precursor of a series of orders which forced America into the war of 1812; which, by their insolence and wanton oppressiveness, twice drove the Northern European powers into Napoleon's arms, and in this way tended to protract his military ascendency, and to vastly swell the amount of blood and treasure required to overthrow that ascendency, and which, by the consent of all publicists, among whom the English are not the least conspicuous, are now held to be in gross violation of important sanctions of international law.

### OSWALD.

Richard Oswald, who was selected by Lord Shelburne to open negotiations with Franklin in April, 1782, and whose name appears as one of the signers of the articles of 1782, was a Scotch merchant of London, who had acted as commissary-general of the Duke of Brunswick in the Seven Years' War. By marriage, as well as by purchase, he possessed considerable estates in America, and from his familiarity with Ameri-

can affairs he was frequently appealed to for information by Lord North. He was introduced and recommended to Lord Shelburne by Adam Smith, of whom he was a disciple; and his selection as negotiator at Paris was due, not merely to his knowledge of and interest in American affairs, but to his prior acquaintance with Franklin, with whose liberal commercial views he fully sympathized. Shelburne's letter of credence to Franklin was one singularly flattering to both Franklin and Oswald. "I find myself," so wrote Shelburne, April 6, 1782, "returned to nearly the same situation which you remember me to have occupied nineteen years ago, and should be very glad to talk to you as I did then, and afterwards in 1767, upon the means of promoting the happiness of mankind; a subject more agreeable to my nature than the best concerted plans for spreading misery and devastation. I have had a high opinion of the compass of your mind and of your foresight. I have often been beholden to both, and shall be glad to be again, so far as is compatible with your situation. Your letter discovering the same disposition made me send to you Mr. Oswald. I have had a longer acquaintance with him than even I have had the pleasure to have with you. I believe him to be an honest man, and after consulting with our common friends I have thought him the fittest for the purpose. * * * He is fully apprised of my mind, and you may give full credit to everything he assures you of. At the same time, if any other channel occurs to you, I am ready to embrace it. I wish to retain the same simplicity and good faith which subsisted between us in transactions of less importance." On Oswald's arrival at Paris he was informed by Franklin that in the absence of Jay, Adams, and Laurens, co-commissioners, no definite action could be taken in negotiation. But on April 18 Franklin urged on Oswald the importance of the cession of Canada to the United States, and he placed a memorandum of his views in Oswald's hands, suggesting, also, that so much of the waste lands of Canada should be sold as would "pay for the houses burnt by the British troops and their Indians, and also to indemnify the royalists for the confiscation of their estates." "This," it was added, "is mere conversation matter between Mr. O. and Mr. F., as the former is not empowered to make propositions, and the latter cannot make any without the concurrence of his colleagues." On April 23 this memorandum—the important character of which will be hereafter discussed more fully—having been seen only by Lord Shelburne and Lord Ashburton (Dunning), the cabinet adopted a minute that Mr. Oswald "shall return to Paris with authority to name Paris as the place of their future conferences," and "to settle with Dr. Franklin the most convenient time for setting on foot a negotiation for a general peace, and to represent to him that the principal points in contemplation are the allowance of independence to America upon Great Britain being restored to the situation which she was placed in by the treaty of 1763, and that Mr. Fox shall submit to the consideration of the King a proper person to make a similar communication to M. de Vergennes." (3 Shelburne's Life, 183.)

Oswald was then directed by Shelburne to return to Paris, and to inform Franklin that Shelburne had reluctantly come into the concession of absolute independence; that he would have preferred federal union, but that such a measure being now impracticable he would accept independence, coupled with free trade, the payment of debts, and the relief of the loyalists. Oswald remained but a short time in Paris, referring both Franklin and Vergennes to Thomas Grenville, who had then arrived in Paris as Fox's representative in all matters which involved a

general peace. On May 14 he returned to London, and on May 18 Grenville was instructed by the cabinet "to make propositions of peace to the belligerent powers upon the basis of independence to the thirteen colonies in North America, and of the treaty of Paris." On May 23 Grenville was further instructed to propose to Vergennes the acknowledgment of the independence of America "in the first instance." Shelburne, still holding that negotiation with the colonies remained, until the formal recognition of their independence, in his department, authorized the departure, on May 28, of Oswald for Paris to continue his negotiations with Franklin. But on Oswald's visiting Franklin, on May 31, he found that Grenville was on the spot claiming to lead the negotiations.

The temper of the Fox section of the Rockingham ministry towards Oswald is illustrated by the following letter from Sheridan to Thomas Grenville, May 21, 1782:

"Mr. Oswald talks very sanguinely about Franklin, and says he is more open to you than he has been to any one; but he is a Scotsman and belongs to Lord Shelburne. If the business of the American treaty seemed likely to prosper in your hands I should not think it improbable that Lord Shelburne would try to thwart it." (It will be remembered that the negotiations with the colonies fell, not in Fox's department, but in that of Shelburne.) "Oswald has not yet seen Lord Shelburne, and by his cajoling manner to *our secretary* (Fox) and eagerness to come to him, I do not feel prejudiced in his favor; but probably I judge wrongly whenever the other secretary is concerned, for I grow suspicious of him in every respect the more I see of every transaction of his." (Buckingham Correspondence, I, 28.)

On June 4, 1782, Grenville writes to Fox as follows:

"Mr. Oswald told me that Lord Shelburne had proposed to him when last in England to take a commission to treat with American ministers; that upon his mentioning it to Franklin now it seemed perfectly agreeable to him, and even to be what he had very much wished; Mr. Oswald adding that he wished only to assist the business, and had no other view; he mixed with this a few regrets that there should be any difference between the two offices; and when I asked upon what subject, he said, owing to the Rockingham party being too ready to give up everything. You will observe though, for it is on this account that I give you this narrative, that this intended appointment has effectually stopped Franklin's mouth to me; and that when he is told that Mr. Oswald is to be the commissioner to treat with him, it is but natural that he should reserve his confidence for the quarter so pointed out to him; nor does this secret seem only known to Franklin, as Lafayette said, laughing, yesterday, that he had just left *Lord Shelburne's* ambassador at Passy." Grenville then proceeds to speak of the "Canada" conference, hereafter commented on; to express his astonishment at such a cession being thought advisable; and then to throw what proved to be a bomb into the cabinet by saying that while such conferences were going on behind his back he could be of no further use. "Once more I tell you I cannot fight a daily battle with Mr. Oswald and *his secretary* (Shelburne); it would be neither for the advantage of the business, for your interest or your credit or mine; and even if it was, I could not do it * * * Sheridan's letter of suspicion was written, as you see, in a spirit of prophecy." To this came Fox's reply of June 10, noticed elsewhere, which called for "further proofs of this duplicity of conduct." (Buckingham Correspondence, *ut supra.*) See 4 Lecky, Hist. Eng., 247 *ff*, reviewing the relations of Grenville and Oswald.

Fox, however, not disposed to acquiesce in Grenville's withdrawal from the contest, issued fresh powers to Grenville, received by him on June 15, giving him authority to treat with the King of France "and any other prince or state." But Franklin declined to consider this term as including the United States, with whom negotiations would then be in contravention of British legislation. But an act enabling such negotiation to take place having subsequently passed, Fox at once demanded that the negotiation should pass into his hands. In this, however, he was overruled by a majority of the cabinet, on the ground that, until there was an express acknowledgment of independence, the colonies remained in Shelburne's department. On Fox's resignation, which, as has been already noticed, was made public on the death of Lord Rockingham, on July 1, 1782, followed by the accession of Shelburne as prime minister, Oswald was sent again to Paris as representing the colonial department, the headship of which passed to Thomas Townshend. Alleyn Fitzherbert, English minister at Brussels, was appointed to succeed Grenville, Oswald thus remaining the sole representative of the ministry so far as concerned America. On July 6 Franklin proposed to him the following "necessary" conditions on which peace with America could be secured:

1. Acknowledgment of entire independence.
2. Settlement of boundaries.
3. Freedom of fishing.

Among the "advisable" articles were the following:

—Free commercial intercourse.

—Cession of Canada to the United States partly in payment of war spoliation, partly to raise a fund to settle refugee claims.

Heretofore the negotiations had been purely informal. On July 25, 1782, an enabling act having in the mean time passed Parliament, Oswald received a commission giving him full authority to "treat, consult, and conclude with any commissioner or commissioners named or to be named by the said colonies or plantations, * * * a peace with said colonies or plantations, or any part or parts thereof." With this came instructions from Shelburne, saying that "in case you find the American commissioners are not at liberty to treat on any terms short of independence, you are to declare to them that you have an authority to make that concession, an earnest wish for peace disposing us to purchase it at the price of acceding to the complete independence of the thirteen States;" and he was further instructed to claim, as a matter of justice, the settlement of debts due to British subjects prior to 1775, and the restitution of the estates of the loyalists. But, as will be hereafter more fully noticed, the acceptance of Oswald's commission was objected to by Jay, then, in Franklin's sickness and Adams's absence, acting as sole commissioner, on the ground that the thirteen United States were spoken of as "colonies or plantations," their sovereignty as independent States not being in these terms implied. It was in vain that Franklin, when appealed to, said, that as the object of the commission was to invest the "colonies or plantations" with sovereignty, it was not unsuitable that they should be referred to by their prior title to designate the objects of the settlement. It was in vain that Vergennes urged the delay and irritation consequent upon an application for a merely formal change of this character, saying that, after all, mere titles amounted to nothing, as the King of England was permitted without protest from the French court to speak of himself as King of France. Jay, however, insisted, though the effect of

his application, if it was logically pursued, would have been, by the antecedent implied acknowledgment of the independence of the colonies, to overthrow the whole policy of Shelburne, which was to make the recognition of independence not a gratuity, to leave the United States the victim, when in future they might be left without allies, of whatever conditions Great Britain might impose, but a part of a system of partition involving free interchange of reciprocal rights.

But Shelburne was not disposed to break on a mere question of form, and a new commission was issued to Oswald, in which the colonies were spoken of as "The United States of North America," while at the same time Shelburne remained firm in the position that independence was to be recognized, not unilaterally, as a matter of grace, but bilaterally by treaty. Oswald, however, was instructed by Townshend, under Shelburne's direction, on September 1, 1782, to accept the "necessary articles" of Franklin, as a basis, waiving an express treaty stipulation as to debts and refugee claims, which Franklin declared he had no power to give. On September 11, 1782, Oswald, in order, perhaps, to stimulate Shelburne to take more decisive action, wrote to Townshend saying (on what now appears to be erroneous information) that the French court was endeavoring to keep the American commissioners from coming to a settlement, and that Lafayette was acting as agent of the court to effect this object. That Lafayette was desirous of making the best terms possible for the United States and of inflicting the greatest possible humiliation on Great Britain, cannot be questioned. But not only was Vergennes, as we will presently see, desirous of lowering the American ultimatum as far as was necessary to secure peace, but neither he nor the "court" would have been likely at that time to have selected Lafayette, whom they regarded as a rash enthusiast absorbed in American interests, for any political mission of this critical type.

Influenced, however, in part by Oswald's statement as to the position of France, in part by intimations from Rayneval, who visited Shelburne as a confidential agent of Vergennes, that if peace was not at once concluded between Great Britain and America, America would continue the war under the wing of France, the British cabinet determined to advance a step further, and on September 20, 1782, to give Oswald unlimited powers. "Having said and done everything which has been desired," so Shelburne, on September 23, wrote to Oswald, "there is nothing for me to trouble you with, except to add that we have put the greatest confidence, I believe, ever placed in man in the American commissioners. It is now to be seen how far they or America are to be depended upon. I will not detain you with enumerating the difficulties which have been incurred. *There never was a greater risk run. I hope the public will be the gainer, else our heads must answer for it, and deservedly.*"

On October 5 Jay handed to Oswald a draft treaty which embraced the main points previously submitted by Franklin, omitting, however, the clause for the cession of Canada, which, as will be hereafter more fully seen, Franklin regarded as essential to any permanent pacification between Great Britain and the United States. On only one point in the programme as thus modified by Jay was there any difficulty, viz, the northeastern boundary; but as to this Oswald ultimately accepted Franklin's proposition that the question should be settled by a future commission. The draft treaty, as thus made up, was then forwarded by Oswald to Townshend, Oswald defending it on the ground that its object

was to reduce as far possible the points of difference between the two countries, and to establish between them a reciprocity of rights.

But the repulse of the allied attack on Gibraltar led the ministry to think that terms more favorable would be obtained from the American commissioners than those conceded by Oswald. In order, however, not to put on Oswald the ungracious office of withdrawing his own concession, an additional envoy was sent to Paris, Henry Strachey, who had been secretary of the treasury under Rockingham, and assistant secretary of state under Shelburne. Strachey was authorized, as a last resort, to accept all the American propositions except that which gave the right to dry fish in Newfoundland and the provisions as to the navigation act, as to which it was added the executive had no power to act. In a confidential letter of October 20, 1782, Shelburne wrote to Oswald in the following words, which are none the less remarkable from the fact that they refer to concessions which Shelburne afterwards adopted: "As you desire to be assisted by my advice, I should act with great insincerity if I did not convey to you that I find it difficult, if not impossible, to enter into the policy of all that you recommend upon the subject, both of the fishery and the boundaries, and of the principle which you seem to have adopted of going before the commissioners in every point of favor and confidence. The maxim is not only new in all negotiations, but I consider it as no way adapted to our present circumstances, but as diametrically opposite to our interest in the present moment." He then recurred to his view that the peace to be solemnized was a "separation," to be followed, if not by "reunion," at least by "commerce and friendship."

Immediately after Strachey's arrival at Paris, on October 30, 31, and on November 1, 1782, meetings were held of the commissioners on both sides, Franklin and Jay being re-enforced by John Adams. It was settled by Adams and Jay, Franklin being overruled, but acquiescing, as the least mischievous alternative, that there should be no communication of their proceedings to Vergennes, a conclusion the bearings of which will be presently more fully discussed.

In the conference of November 1 both sides agreed to a modification of the northeastern boundary, while the American commissioners receded from their demand of the right to dry fish on the coast of Newfoundland, accepting as an equivalent the use for the same purpose of the unsettled parts of Nova Scotia, and the right of fishing in the Gulf of Saint Lawrence. The American commissioners, however, refused to make any provision whatever for the refugees. (See, as to this position, comments hereafter given in sketch of Franklin.)

Notwithstanding the fact that Strachey united with Oswald in recommending the adoption of the draft treaty as thus amended (see Oswald to Townshend, November 8, 1782, Strachey to Townshend of the same date), it was received in London with much disfavor. George III, when brought face to face with "separation," bolted, and could hardly be brought to look on it as an established fact. "With a full appreciation of the difficulties that arose from the attitude of the King, Shelburne met the cabinet. Richmond and Keppel were very bitter against Oswald, who they declared was only an additional American negotiator, and they proposed to recall him. This Shelburne and Townshend refused to do, as they especially desired that Oswald should be in Paris to negotiate a commercial treaty as soon as the necessary acts of Parliament had been passed." (3 Shelburne's Life, 298.) Shelburne, however, insisted on further efforts being made on behalf of the refugees,

and Strachey being at the time in London was instructed to proceed again to Paris to make such efforts.

On November 28 Henry Laurens, the fourth American commissioner, having arrived, there was a full meeting of the commissioners at Mr. Oswald's apartment in Paris. It was then agreed that it should be provided that there should be no further confiscation of loyalist property or persecutions of loyalists, and that Congress should recommend to the State legislatures to issue amnesties and to restore confiscated property. The fourth article was extended to cover debts due during as well as before the war.

The draft articles as thus settled were signed at once by all the commissioners; but to enable faith to be kept with France it was provided that the treaty "was not to be concluded until terms of peace shall be agreed upon between Great Britain and France." Strachey agreed with Oswald in vindicating the settlement. "If," he wrote to Nepean, "this is not as good a peace as was expected, I am confident it is the best that could have been made. Now, are we to be hanged or applauded for thus rescuing England from the American war?"

This terminates Oswald's connection with the negotiations of 1782–'83, and, in fact, his political life, as he died in retirement a few months after the fall of the Shelburne ministry. The treaty, as is noticed above, was vehemently assailed by Fox, by Burke, and by North; and though it was regarded as final, was nevertheless censured by a majority of the House of Commons, thereby wrecking the Shelburne ministry. It has been frequently said that of all treaties executed by Great Britain it is the one in which she gave most and took least; and in view of the fact that Great Britain at the time held New York, Charleston, and Penobscot, and had almost unchecked control of American waters, her surrender, not merely of the entire territory claimed by the colonies, but of the Indians in that territory whom she had held under her allegiance, of the rights of the refugees she had pledged herself to protect, and of the fisheries in which she thus conceded to the United States a joint ownership, presents an instance of an apparent sacrifice of territory, of authority, of sovereignty, of political prestige, which is unparalleled in the history of diplomacy. So, in fact, was it considered throughout Europe, as is exhibited by a series of vivid statements taken by Mr. Bancroft (Formation of Federal Constitution, Book I, Chap. III) from manuscripts to which he had access. "'The English buy the peace rather than make it,' wrote Vergennes to his subaltern in London, their 'concessions as to boundaries, the fisheries, and the loyalists, exceed everything I had thought possible.' 'The treaty with America,' answered Rayneval, appears to me like a dream.' Kaunitz and his Emperor mocked at its articles." (Citing Joseph II and Leopold, Briefwechsel von 1781 bis 1790, I, 146.) See also 4 Lecky, Hist. Eng., 284.

Yet the sacrifice was only apparent. Lord Russell, in a passage elsewhere quoted, declares, notwithstanding his devotion to Fox, that Shelburne's peace was preferable to the continuance of war; and as a matter of fact, as we have already said, the treaty was beneficial as well as honorable to Great Britain. It gave to Great Britain, what she never would have had if the Mississippi Valley had remained under the lethargic control of Spain, a vast and energetic Anglo-American population to supply her people with food, her mills with raw materials, and her producers with customers. It opened wide, hospitable, and sympathetic domains as abodes to myriads of British subjects, who, if they had remained at home, would, in the misery and discontent they

would have so greatly augmented, have thrown the body politic into despair. And at that supreme moment, when the Holy Alliance, embracing all continental Europe, declared its determination not merely to restore her revolted provinces to Spain, but to crush England if she resisted this conspiracy, it was the prompt answer of the United States to England's call that made the conspiracy impossible, and enabled England to remain, not merely dominant on the seas, but the vindicator of a liberal foreign policy on which her very existence was staked. We must also remember that had Fox's scheme succeeded, of an absolute recognition of independence, as a sequence of the surrender of Yorktown, while he would have won a signal triumph over his political adversaries, the recognition, coerced as it would seem to have been by the necessities of war, would have been far more humiliating to Great Britain than was the attitude afterwards assumed and carried out by Shelburne, of making what under the circumstances was a voluntary partition of the empire, basing such partition, at least so far as concerned Shelburne and Pitt, on principles of high statesmanship. It must be noticed, also, that by Fox's scheme the persons and property of loyalists would have been handed over to the absolute control of the separate States of the Union, at a time when the popular animosity against these loyalists was at its highest pitch, while there would have been full sweep given to the confiscation or extinguishment of all debts due the mother country. By the Shelburne settlement, on the other hand, confiscations and prosecutions of loyalists were stopped, loyalist prisoners were released, and a pledge given that there should be no lawful impediments on either side to the recovery of *bona fide* debts.

But we are bound, also, in construing the treaty, to ascribe it to a higher motive than that of interest. Shelburne not only believed that the United States, if there should be an amicable partition of interests with Great Britain followed by liberal reciprocities, would promote the prosperity of Great Britain far more effectively than could have been done by a colonial dependence, but he held, as a fundamental article of his political creed, that by such a partition followed by such reciprocity the interests of humane civilization would be far better subserved than they would be by independence granted as a gift to be followed by commercial subjugation. On this principle Shelburne staked his political future, and lost. The same principle was avowed at the time by Pitt, like Shelburne and Oswald, a disciple of Adam Smith, but was afterwards dropped by him when he became prime minister on the defeat of the coalition. But though the completion of Shelburne's policy, by a repeal of the navigation acts, was frustrated, and in its place were instituted insolent restrictions of American commerce, which led to the war of 1812, we must keep in mind, in construing the treaty of 1783, that that treaty at least was a treaty of partition, inspired by liberal principles, and to be applied in subordination to such principles. It is on this principle of partition that rests the right of American fishermen to the free enjoyment of the northeastern fisheries. (*Supra*, § 301 *ff.*)

A "supplementary note" giving a sketch of Oswald's history, substantially concurring with the incidents stated above, is appended to Sir G. C. Lewis' article on the Buckingham papers, published in his "Administrations of Great Britain," 81. Mr. Lecky, in his notice of Oswald, 4 Hist. Eng., 272 *ff.*, unduly, I think, depreciates Oswald's merits.

VERGENNES.

The French alliance with the United States was promoted, on the part of France, by two distinct impulses. The first was enthusi-

asm for liberty, in part philosophical, under the auspices of the Encyclopedists, in part sentimental, inaugurated by Rousseau. By this enthusiasm not merely young nobles, such as Lafayette, were fired, but even Louis XVI and his Queen felt its effect, perhaps not uninfluenced by the feeling that it was just as well that the fire which was thus lit should burn itself out across the Atlantic; and to express this royal sympathy pictures of the King and Queen in full robes were sent to the Continental Congress. The other impulse was a desire to humiliate and cripple Great Britain, which object could be effectually promoted by the establishment of the independence of the colonies. The Count de Vergennes, French secretary for foreign affairs, represented more distinctively the second of these impulses, though he was fully aware of the policy, when he had determined on an alliance with the colonies, of availing himself of the assistance of the first. When, however, Yorktown was captured, and the attitude of the British House of Commons made peace inevitable, he felt that as to the conditions of peace France had something to say. If America imposed conditions so hard as to unite Great Britain in a desperate determination to continue the war, France would be more or less involved in such hostilities; yet to France, peace, in the exhausted state of her finances, was then important. Other considerations came in to prompt Vergennes to use his influence to induce the United States to accede to such terms as to lead to a speedy peace. France had claims to exclusive rights in the Newfoundland fisheries, and these claims she did not wish to see imperiled by a treaty partition between Great Britain and the United States. France, also, was closely bound up with Spain, and France had no desire to see a treaty between Great Britain and the United States which might be regarded as guaranteeing to the United States the Floridas and the Mississippi Valley, then claimed by Spain. To this pressure on the part of France, Congress, as the strain of war became more severe, and the need of French aid the more apparent, was disposed to yield, and it dropped its prior instructions to the commissioners at Paris to insist on the claim to the navigation of the Mississippi. Vergennes' advice to the commissioners unquestionably was not to let claims to the fisheries and to the Mississippi stand in the way of peace. But there is not a trace of evidence that he intrigued with the British commissioners at Paris to induce them to limit the concessions they were prepared to make to the United States.

Vergennes' position, during the negotiations of 1782–'83, was at least as difficult as that of William III in the negotiations which preceded the peace of Ryswick. Vergennes was the head of an alliance against England which contained members at least as dissonant and with interests at least as conflicting as those which William III combined in the alliance against France, of which he was the head. If it was impossible for William III to conclude any treaty which would satisfy each of the allies whom he led—if, in the peace which he actually concluded, it was a matter of course that he should be accused by some at least of the allies of undue reticence in the communication of peace projects, or of want of fairness in the settlement of such projects, so it was also necessarily the case with Vergennes. In both cases there were the usual pledges of co-operation between the allies; yet it must be remembered that it is for the benefit of all the contracting parties that such pledges are to be liberally construed, since no negotiations on behalf of allies could be conducted if it were understood that such negotiations were to be always by the allies in concert, and that not a

word was to be spoken by any one of them in private conference with the common enemy. Such conferences there must be. They were held, and with good results, by Portland and Boufflers prior to the peace of Ryswick; they were held by Vergennes through Rayneval with Shelburne, and by Shelburne through Oswald with Franklin. It was so from the nature of things, and neither ally had the right to complain that each merely tentative and informal conversation was not at once reported to the other.

The only whispers that ever were uttered reflecting on Vergennes' loyalty in the support of American independence are given by Mr. Jay (1 Jay's Life, 156), but these whispers, the original authors of which concealed their names (if names they had), are too trivial to be considered. But, while Vergennes' entire fidelity to the United States, so far as concerns the establishment of independence was concerned, must be conceded, it must also be conceded that he was not disposed to sustain the pretensions of the United States to Canada or the fisheries or the Mississippi Valley. The treaty of amity of 1778 did not bind France to guarantee to the United States Canada or any specific boundary or any fishery rights. On the other hand, France was bound to Spain by a renewed "family compact" to maintain the territories of Spain as against England.

Under these circumstances it was no breach of the treaty of amity for France to say to the United States, "While I will sacrifice everything to make good your independence, I trust you will not press your claims against Britain to such an extent as to make peace impossible; that you will not embarrass my title to the fisheries and Canada; that you will not hazard the alliance by a conflict on your part with Spain." No doubt this position was taken by Vergennes early in 1782, and no doubt these cautions were suggested to Congress by Marbois, French chargé d'affaires at Philadelphia, as a cipher letter of his to Vergennes which the British Government intercepted and put in Jay's hands shows. No doubt also Lord Shelburne knew through Rayneval that Vergennes was not inclined to support the United States in pressing the positions above noticed. And as stated by a late able critic, "It has now been proved by the publication of the French dispatches which are to be found in M. de Circourt's translation of Bancroft's history that no one was more bitterly opposed than the French ministers to the annexation of Canada to the United States." (Edin. Rev., April, 1880, 335.)

This disposition on the part of France, coupled with the dropping of the project by Jay and Franklin, may explain why Canada was lost to us. But, on the other hand, it is clear that Lord Shelburne preferred the United States at the fisheries to France, and the United States in the Mississippi Valley to Spain. Lord Shelburne's view, as we have seen, was to build up the United States into a powerful state in strict alliance with Great Britain, with whom on liberal principles she could control the seas, and he had no particular desire to strengthen either French or Spanish interests in North America. An early peace also was essential to his policy, and hence he promptly sanctioned the preliminaries of 1782, which made the United States tenants in common of the fisheries, which virtually gave the United States the Mississippi Valley, and which surrendered all refugee claims for indemnity.

From the nature of things Vergennes must have been aware, as soon as Jay and Adams arrived in Paris and Rayneval arrived in London, what were the terms that the American commissioners would offer as an ultimatum, and which as a necessity Shelburne would yield. It is not necessary for this purpose to accept the following extraordinary

statement made in the Life of Mr. Jay (Vol. I, 155): "Mr Jay was one evening in conference with Mr. Oswald, when the latter, wishing to consult his instructions, unlocked an escritoire, when, to his astonishment and alarm, he discovered that the paper was missing. Mr. Jay smiled and told him to give himself no concern about the document, as he would certainly find it in its place as soon as the minister had done with it. In a few days the prediction was verified. So fully apprised was Mr. Jay of the artifices of the Government that while secrecy was important he made it a rule to carry his confidential papers about his person." This statement, it is observed, is not alleged to have been made by Mr. Jay himself, and on its face it is open to serious criticism. Not only would Mr. Jay's "confidential papers," if we are to judge from the papers of the same import in the Franklin collection, have been far too bulky for him "to carry about his person;" not only, supposing the French court to have been as unscrupulous as he supposed, would it have been as easy for the emissaries of the court to snatch them from his person as it would have been for them to have broken into his lodgings and extracted them from his escritoire, but Jay's communications to Oswald, as given at large in the Shelburne papers, of which copies are in the Department of State, are inconsistent with any such assumption as that he and Oswald were at the time living under this extraordinary police surveillance. Jay began his mission, as we will see when his agency in the peace is considered, filled with defiant antagonism to Great Britain and a desire to unite in any step by which she could be humiliated. This, however, soon gave way to distrust of France, and a determination, while still defying Great Britain, to do so keeping France at arm's length. But there is not one word in his copious conversations with Oswald—conversations of which, as reported by Oswald, his biographer was not aware—not one word hinting such a charge against Vergennes as that given above; while, on the contrary, in Jay's official letters there are constant references to the courtesy and magnanimity with which he had been received in France.

It was not, in fact, necessary for Vergennes to set his secret service to work to discover the conclusions of Jay and Adams. Adams appears to have freely talked of them in Paris as soon as they were adopted; Jay "unreservedly explained to Mr. Oswald the views and policy of the French court," being "no longer restrained by delicacy towards France from taking the course required by the occasion." (1 Jay's Life, 144.) Oswald, who was at least equally communicative to Rayneval, no doubt enlightened Rayneval as to Jay's views; and even Jay himself, on October 24, informed Rayneval that "we met with difficulties," and that "we (Oswald, Jay, and Adams) could not agree about all our boundaries," and that "we expected" as to the fisheries, "the same rights we had formerly enjoyed" (*id.*, 144). All this, of course, went to Vergennes, whose avowed agent Rayneval was; and from this, as well as from Adams' want of reticence, Vergennes must have been fully aware, at a time when if he chose he could have effectively intervened, of the claims on which the American commissioners rested. But even if he was not so aware, he was officially advised of the preliminary articles as soon as they were signed; and this was time enough for France, if she chose, to break up the settlement by saying that the concessions to the United States were greater than she regarded as consistent either with her own interests or her obligations to Spain. She did not do so. On the contrary, after a not unnatural complaint, as will be hereafter seen, of the want of consideration with which she had been treated, she continued to make to the United States gifts and loans of

money which were not only generous in themselves but of immense importance to the new government, then sorely in want of funds. (See *infra*, in notices of Franklin's part in the peace.)

Mr. Sparks makes the following statement:

"I have read in the office of foreign affairs, in London, the confidential correspondence of the British ministers with their commissioners for negotiating peace in Paris. I have also read in the French office of foreign affairs the entire correspondence of the Count de Vergennes, during the whole war, with the French ministers in this country, developing the policy and designs of the French court in regard to the war and the objects to be obtained by the peace. I have, moreover, read the instructions of the Count de Vergennes, when Rayneval went to London, and the correspondence which passed between them while he remained there, containing notes of conversations with Lord Shelburne, on the one part, and Count de Vergennes' opinions on the other. After examining the subject with all the care and accuracy which this means of information has enabled me to give to it, I am prepared to express my opinion that Mr. Jay was mistaken both in regard to the aims of the French court and the plans pursued by them to gain their supposed ends." (8 Dip. Corr. Am. Rev., 209.)

It is true, as Mr. Bigelow (3 Life of Franklin, 210) says, that by a secret compact of April 12, 1779 (not 1799, as printed), between France and Spain, France engaged not to conclude peace until Gibraltar was surrendered to Spain. It is true, also, that Vergennes, during the negotiations of 1782–'83 between the United States and Great Britain, instructed both Luzerne, at Philadelphia, and Rayneval, at London, that France was not prepared to sustain the claim of the United States to the Mississippi Valley, to the fisheries as exclusive of France, or to Canada. But, as has been maintained above, this was when the question was whether France would permit peace to be sacrificed for these objects. When the first two of them were conceded by Great Britain there was not a word of objection by France. And, as has been seen, France continued, after the provisional articles were signed, as unflinching in support of the United States, as recognized by those articles, as she had been during the war of independence. And so far from there being any "intrigue" on the part of Vergennes to secretly thwart the American policy of territorial extension north and south, he avowedly directed his representatives in Philadelphia to represent to Congress (1) that France herself would look forward, if the war continued, to regain her old control of Canada and the fisheries, and that she was unwilling to see Spain disturbed on the Mississippi, and (2) that the United States, by asking so much, might drive Great Britain to desperation, and, by awakening again the war fever in England, wantonly protract the war. (See Hale's Franklin in France, 278.) France had a perfect right to give this advice, and she gave it openly and unreservedly; and it is greatly to her credit that when her advice was rejected, and when the provisional treaty with Great Britain recognized the right of the United States to the fisheries and the Mississippi Valley, Vergennes gave an assent without which the treaty would have failed.*

### FRANKLIN.

Of Franklin's relations to the peace it is practicable at present to notice only a few of the more prominent incidents.

* In this view of Vergennes' course Mr. Lecky (4 His. Eng., 278) concurs.

It was natural that Franklin should have opened himself more freely to Oswald than to Grenville. Oswald came first, sent by Shelburne, within whose department the negotiation lay, and with Shelburne Franklin had been in old times intimate, sharing his distinctive views of political economy. Grenville came from Fox, to whom the negotiation did not belong, whose course had been erratic, whose views on political economy were at least not those of Franklin, and with whom Franklin had no personal acquaintance. Oswald was an elderly man, a business man, a man, like Franklin, "of the people." Grenville was but twenty-seven years of age, a son of George Grenville, the author of the stamp act, and himself an inheritor of the aristocratic pride by which his family was distinguished. But Franklin preferred Oswald, not because he was (according to Mr. Allen in a statement adopted by Sir G. C. Lewis) "a simple-minded, well-meaning man, on whom he could make the impression he chose" (Lewis, Administrations of Great Britain, 33), but because Oswald represented the policy of partition of the empire on terms of reciprocity under which both sections would have prospered as equals, whereas Grenville represented the policy of flinging independence at once on the colonies, and then, when the war was over, and the colonies stripped of their allies, imposing on them any humiliations which the then overwhelming maritime strength of Great Britain might enforce.

To Franklin, Grenville appeared as an ambitious young diplomatist, quite ready to make a sensational stroke which might be considered consistent with the reckless and rollicking politics of the school of young statesmen of which Fox (the "dear Charles" of the Grenville correspondence) was the leader. It was natural that Franklin, aside from the question of two conflicting systems, should have preferred to negotiate with Oswald, an old man, with no desire to distinguish himself by political surprises, representing a mature statesman such as Shelburne, whom Franklin thoroughly knew, and on whose constancy he could rely. And to Franklin, between the two systems—the system of setting the United States adrift, to be afterwards seized and maltreated as it might suit British caprice, and the system of settling not merely independence but all questions of difference in a comprehensive treaty executed at a time when the United States was backed by a powerful European coalition, when peace was a necessity to Great Britain—between two such systems, the first that of Fox and Grenville, the second that of Shelburne and Oswald, there was really no choice.

Had Franklin been left to manage in his own way the negotiation with Shelburne, the probability is that Canada would have passed to the United States as one of the conditions of peace. To Great Britain, at least, the cession would have been of benefit. She had won Canada, in a large measure by the aid of the New England States, at an enormous expense, with no benefit whatever to herself, and with no prospect of future benefit. To her, viewing the question in the statesmanlike way in which it was viewed by Shelburne and Pitt, it was far more important to unite in establishing a powerful friendly state in America, with whom she would be on terms of permanent alliance, than, by keeping Canada, to be exposed, without profit, to constant collision with the United States. As Shelburne was never tired of insisting, Great Britain could find no fixed allies in the Northern European powers, and, great as was his desire for a permanent alliance with France, he admitted that such an alliance, as Pitt subsequently found, was hopeless.

What ally, then, remained? Who else than the United States, with whom Great Britain had the same language, the same literature, the same religion, the same proud and free political traditions, the same aptitude for ship-building and commerce, which would make her at war the most desperate enemy Great Britain could challenge, in peace the most efficient friend? And then it was impossible for Shelburne, Chatham's devoted aid, and for Pitt, Chatham's son, to forget that in one of Chatham's last speeches he had declared that America was destined to exercise on England an influence malign or benignant, as the case might be. If America should be subjugated this would be the subjugation of England. If she would assert and maintain her freedom this would add fresh vigor to the freedom of the parent state. If America was to be thus free, and thus the auxiliary of the enlarging freedom of England; if England was thus, not merely from other conditions, but from this very freedom, left without other allies, what more natural than that she should enter into a permanent alliance, based on liberal terms of reciprocity, with America; and, if so, how important that all causes of irritation should be removed, and that America should be made a powerful state. Such, at least, we may conceive to have been the reasoning of Shelburne and Pitt as they listened without dissent to Oswald's arguments for the cession of Canada. That to Franklin, who was equally with Shelburne and Pitt a holder of Adam Smith's distinctive views, this project of the cession of Canada appeared to be of supreme importance, his papers show. But under Fox's assaults Shelburne lost, at the critical moment, the power of acceding to such a cession, and in pressing it Franklin was hampered in his own councils. Jay gave him no aid; Adams, while insisting on the fisheries as a *sine qua non*, was silent as to Canada, which would have carried with it the control of the fishery coast and excluded all future territorial conflict with Great Britain. And Vergennes, who looked forward to the recovery of Canada, and to exclusive rights to the fisheries, naturally set himself against Franklin's claim to Canada.

From what we can learn from Franklin's notes we may conceive him to have argued that Canada as a British colony, invested with that power of self-government which, after the experience of the American Revolution, could not be refused, would be a constant menace to the peace of the world and a constant drag on British prosperity. Contributing nothing to British income, she would be able to exercise the function of excluding British produce from her ports. She could free herself, therefore, from the expenses of the empire while she would impose on the empire the burden of largely increasing its military and naval expenditure for her defense. She would be able, at any time, by acts of aggression, such as she would not attempt if she were an independent and responsible power, to involve the empire in war; and yet the empire would have no power to restrain her from committing such acts or from taxing exports from the sovereign who was thus made responsible for her caprices. In this way Canada, as thus reconstituted, could not be otherwise than a constant peril and discomfort even to Great Britain. Place her in the American Union, so we may conceive Franklin to continue to argue, and not only will her own grandeur be vastly increased by being introduced into a system of sovereignties bound together in absolute reciprocity of trade, and removed by this union from all the burdens and dangers incident to a close connection with European politics, but as part of a great North American confederacy subjected in foreign affairs to a Federal head, with no pos-

sibilities of territorial collision with Great Britain, she would contribute to build up on this side of the Atlantic an empire, in its main points of constitutional liberalism sympathizing with Great Britain, with which Great Britain would be forever at peace. It is worthy of notice that John Adams, when in Holland, took in substance the same position, holding that between the United States and Great Britain it was essential to a permanent pacification that Canada should be ceded to the United States. But in the hurry of the final negotiations in Paris in 1782, embarrassed as he was by the strained relations which he had worked himself into with both France and England, and absorbed by his provincial interest in the fisheries, it is not surprising that he should have forgotten Canada.

Sir G. C. Lewis, in maintaining that Lord Shelburne never assented to the cession of Canada as recommended by both Franklin and Oswald, relies on a certain memorandum found among the Shelburne papers, in which the objections to the cession of Canada are given. But it does not appear that this memorandum is anything more than a mere jotting down of points to be used in a contingency that did not occur. It is certain that Shelburne informed Franklin that Oswald represented his (Shelburne's) entire mind; that Oswald received from Franklin a specific proposal for the cession of Canada, and that this proposal, on the eve of Oswald's return to Paris for the purpose of communicating to Franklin Shelburne's views, was received by Shelburne without dissent. Now, in view of Shelburne's position that it was important that the United States should become a leading power, in constant alliance based on common interests with Great Britain, was it strange that he should have been not insensible to Oswald's arguments that Canada, as a British dependency, would be a constant source of difficulty with the United States, without adding anything whatever to British strength? Reasoning as Shelburne would have done under the circumstances, the probability is that if the cession of Canada had been pressed, and in part as a basis for refugee relief, he would, with his usual fearlessness, have agreed to such cession. Nor is it likely that this settlement would have been resisted by George III, who then cared nothing for Canada, but whose heart was set on indemnity to the refugees.

Franklin's sympathies, as between England and France, were much discussed by his colleagues, and have been much discussed subsequently. Adams and Jay, as we will see, at first thought he was ready to speak too deferentially to England, and then that he was disposed too much to smooth over matters with France. The truth was that while his colleagues were ready to say rough things to both France and England, he was ready to say rough things to neither. And so far as concerns his personal relations, his past is to be considered. He undoubtedly had been much flattered in France, and pleasantly accepted the courtesies which were part of this flattery. But this flattery, it must be remembered, came not from the Government but rather from philosophical *illuminati* who had nothing in common with the Government, or from political enthusiasts, like Lafayette, who took up the American cause, not, as did Vergennes, as a means of redress for injuries inflicted on France by England, but from a love of liberty and of revolution which Vergennes abhorred. There is nothing, in fact, in the way of extraordinary personal compliment from the French Government to Franklin to be found among his papers, generous as was the aid they contributed through him to his country. On the other hand, it is questionable whether there is an instance in history of homage paid to the emissary of revolted and still belligerent subjects such as

that paid by three successive British administrations to Franklin. Fox, secretary of foreign affairs, sent to him Grenville with a letter of introduction couched in terms of singular conciliation. Shelburne sent to him Oswald, on the ground that Oswald had large American interests, and held the same views on political economy as Franklin; while Franklin was informed that the cabinet was agreed that if another negotiator would be more acceptable to Franklin, such negotiator should be sent. When Shelburne succeeded Rockingham, Oswald was continued at his post, with letters from Shelburne and from Thomas Townshend (who followed Shelburne in charge of the colonies) expressive, with constantly increasing earnestness, of the hope that Oswald would succeed in winning Franklin's confidence. And when the coalition ministry came in, instead, as might have been expected from the fact that they mounted into power by repudiating the peace, of upsetting it, they sent to Paris David Hartley, an intimate friend of Franklin, to say that they accepted the preliminaries as the terms of a definite peace, intimating that, in order to assure Franklin of their sincerity, they had given plenipotentiary powers for the purpose to one with whom he was known to have been associated by the tenderest ties. If Franklin retained bitter animosities towards England in consequence of the insults heaped on him by Wedderburn in the privy council, or of the vituperation which had afterwards been poured on him by the British press, certainly time, old age, and a temper on his part naturally benignant, coupled with such extraordinary attentions from ministries representing the British King, would have soothed such animosities.

But it cannot be said, after an inspection of his papers, that these animosities swayed his course. He undoubtedly remembered that, not many months before, Lord Stormont, British minister at Paris, had said, in reply to a respectful communication from the American commissioners, that he would receive from rebels no communication unless in terms of surrender. He undoubtedly also remembered the cruelties by which the British arms in America had been stained; the employment of Hessians in a mere mercenary warfare; the instigation of atrocious Indian onslaughts. He could not have forgotten that the war had been protracted by the false information and the inflammatory appeals with which the refugees in England had filled the ears of those in power. He could not have forgotten any of these conditions, yet they appear to have receded from his eyes with the single exception of the conduct of the refugees, as a class—conduct which he thought disbarred them from any claim for indemnity from the United States. And on this topic he expressed himself with far more tenderness than did Jay, who declared that some at least of the refugees "have far outstripped savages in perfidy and cruelty" (1 Jay's Life, 162), and who in such cases justified confiscation, if not more condign punishment. But Franklin, while thus looking on the refugees as among the main causes of the obstinacy with which the war was persisted in, and as continual industrious fomenters in England of animosity to the United States, found nevertheless in England friends not only the most cherished but most sympathetic with him in those views of political economy he held to so tenaciously. And with all his just gratitude to France, there is no doubt that in 1782 he looked forward to a permanent alliance between the United States and Great Britain as affording, when based on sound economical principles, the prospects of greater benefit to the United States and to mankind in general than would be such an alliance with any other power. If, in Franklin's letters subsequent to the final determination of the peace, he speaks bitterly of probable British aggression, it must be remembered

that these letters were written after the defeat of Pitt's reciprocity bill, and after the issue by Fox and North of the order in council, whose noxious and insolent injustice to the United States has been already dilated on.

Franklin's relations to Vergennes, in respect to the separation of the two lines of peace negotiations in Paris in 1782, have been already partially noticed when considering the position of Vergennes. It is now to be observed that Franklin, though dissenting from his colleagues on the question of official conference with Vergennes as to the negotiations with Great Britain, and though conscious that such want of conference was in violation of their common instructions, nevertheless kept silence, ceasing to inform Vergennes as to the progress of the negotiations. It must, however, have been with no little pain that he received the following note, of December 15, 1782, from Vergennes:

"I am at a loss, sir, to explain your conduct and that of your colleagues on this occasion. You have conducted your preliminary articles without any communication between us, although the instructions from Congress prescribe that nothing shall be done without the participation of the King. You are about to hold out a certain hope of peace in America without even informing yourself on the state of the negotiations on our part. You are wise and discreet, sir; you perfectly understand what is due to propriety; you have all your life performed your duties. I pray you to consider how you propose to fulfill those which are due to the King. I am not desirous of enlarging these reflections. I commit them to your own integrity. When you shall be pleased to relieve my uncertainty I will entreat the King to enable me to answer your demands."

It is due to Franklin to say that, so far from throwing the discourtesy on his colleagues, he generously took the whole burden on himself. "I received," he said, "the letter your excellency did me the honor of writing to me on the 15th instant. * * * Nothing has been agreed in the preliminaries contrary to the interests of France; and no peace is to take place between us and England till you have concluded yours. Your observation, however, is apparently just; that, in not consulting you before they were signed, we have been guilty of neglecting a point of *bienséance*. But as this was not from want of respect to the King, whom we all love and honor, we hope it will be excused, and that the great work which has hitherto been so happily conducted, is so nearly brought to perfection, and is so glorious to his reign, will not be ruined by a single indiscretion of ours. And certainly the whole edifice sinks to the ground immediately if you refuse on that account to give us any further assistance." (Franklin to Vergennes, December 19, 1782.)

The attitude of Vergennes, after this correspondence, is exhibited in detail in a very interesting letter from him to Luzerne, French minister in the United States, as given by Mr. Bigelow in full in his Life of Franklin, III, 207. In this letter Vergennes, after saying "you will surely be gratified, as well as myself, with the very extensive advantages which our allies, the Americans, are to receive from the peace," goes on to express his grief at the discourtesy shown him by the American commissioners: "I have informed you that the King did not seek to influence the negotiation any further than his offices might be necessary to his friends. The American commissioners will not say I have interfered, and much less that I have wearied them with my curiosity. They have cautiously kept themselves at a distance from me. Mr. Adams, one of them, coming from Holland, *where he had been received and served by our ambassador*, had been in Paris nearly three weeks with-

out imagining that he owed me any mark of attention; and probably I should not have seen him till this time if I had not caused him to be reminded of it. * * * There is no essential difficulty at present between France and England; but the King has been resolved that all his allies should be satisfied, being determined to continue the war, whatever advantage may be offered to him, if England is disposed to wrong any one of them. * * * I accuse no person; I blame no one, not even Dr. Franklin. He has yielded too easily to the bias of his colleagues, who do not pretend to recognize the rules of courtesy in regard to us."

But Vergennes's dissatisfaction did not operate, as we have seen, to suspend the kind offices of France to the United States. On December 23 Franklin writes to Robert Morris, as follows:

"When I wrote to you on the 14th I expected to have dispatched the Washington immediately, though without any money. A little misunderstanding prevented it. That was, after some time, got over, and on Friday last an order was given to furnish me 600,000 livres immediately to send in that ship; and I was answered by the Count de Vergennes that the rest of the 6,000,000 should be paid us quarterly in the course of the year 1783."

In Franklin's letter of July 22, 1783, to Robert R. Livingston, Secretary for Foreign Affairs, the question is thus reviewed:

"I will not now take it upon me to justify the apparent reserve respecting this court (of France) at the signature, *which you disapprove.* We have touched upon it in our general letter. I do not see, however, that they have much reason to complain of that transaction. Nothing was stipulated to their prejudice, and none of the stipulations were to have force but by a subsequent act of their own. I suppose, indeed, that they have not complained of it, or you would have sent us a copy of the complaint that we might have answered it. I long since satisfied the Count de Vergennes about it here."

It was a final movement of Franklin, also, in the same line, that on Friday, November 28, brought the British commissioners to signature of the preliminaries. They were still urging compensation to the refugees when Franklin said: "If another messenger is to be sent to London he ought to carry something more respecting a compensation to the sufferers in America." He then drew the following "draft article" from his pocket: "It is agreed that His Britannic Majesty will earnestly recommend it to his Parliament to provide for and to make compensation to the merchants and shopkeepers of Boston whose goods and merchandise were seized and taken out of their stores, warehouses, and shops by order of General Gage and of his commanders and officers there; and also to the inhabitants of Philadelphia for the goods taken away by his army there; and to make compensation, also, for the tobacco, rice, indigo, and negroes, etc., seized and carried off by his armies under Generals Arnold, Cornwallis, and others, from the States of Virginia, North and South Carolina, and Georgia, and also for all vessels and cargoes belonging to the inhabitants of the said United States which were stopped, seized, or taken, either in the ports or on the seas, by his Government, or by his ships of war, before the declaration of war against the said States. And it is further agreed that His Britannic Majesty will also earnestly recommend it to his Parliament to make compensation for all the towns, villages, and farms burnt and destroyed by his troops or adherents in the said United States." This was the last stroke which concluded the treaty, and it was so from the necessity of the case, since the only answer would have been a revival of the sug-

gestion of ceding Canada to the United States as a fund from which spoliations in America could be made good and refugees in England could be pensioned. For this, however, it seemed to be then too late; and, after retiring for a short time, Oswald stated that he was advised by Fitzherbert and Strachey to sign the preliminaries. They were accordingly signed by him.*

How little Franklin was swayed by French influence is shown by the fact that, though he was aware that France desired to reconquer Canada and the fisheries for herself, and was opposed to encroachments by the United States on Spanish America, and although he was aware, also, that the French envoys in Philadelphia were, under Vergennes' instructions, endeavoring to induce Congress to take ground at least not antagonistic to their views, he did his best to obtain, in his negotiations with England, not merely the Mississippi Valley, but Canada. This course he followed with Vergennes' full knowledge; nor, as far as we can learn from the papers, was there caused by this conflict of purpose the least check to their friendly relations. If Franklin's zeal for the fisheries was less conspicuous than that of Adams, it was because Franklin was of the opinion that the fisheries, without Canada, would cost, in the protection required for them, almost as much as they were worth, and would, as has been said, be the constant source of embroilment with Great Britain.

When Franklin's character as a diplomatist is considered, it must be remembered that to him we owe two treaties, that with France of 1778, and with Great Britain of 1782–'83, which are at once the most beneficial and the most widely and continuously effective of any which are recorded in history; and that these treaties were negotiated by him with colleagues at his side who at least gave him no help, and with no powerful sovereign to back him; himself a plain man, with no diplomatic training, adopting neither in conversation nor in correspondence the formulas of diplomatic science. Yet nowhere in the annals of diplomacy do we find documents so admirably adapted to their object, in simplicity and power of style, in political skill, in dexterity and force of argument, as those which during his Paris service sprung from his pen; nowhere such extraordinary results. The ablest of our older negotiators, next to Franklin, was Gallatin; yet it is impossible to examine Gallatin's dispatches during the negotiations of 1814–'15, and of 1818 without seeing how far he falls behind Franklin, at least in result, if not in style. Conspicuous diplomatists were at the congress of Vienna—Talleyrand, Metternich, Castlereagh, Nesselrode. Yet the treaties they drew were in a few years torn to tatters, and, when they were still in force, were conspicuous chiefly for their perfidious denial to the peoples of Europe of liberties their sovereigns had previously pledged. Canning had great abilities as a secretary for foreign affairs, yet in his boast that he called a new world into existence to restore the equipoise of the old, he claimed what belonged to Franklin, for it was Franklin, who, in obtaining from all the legitimate sovereigns of Europe the recognition of a republic in the new world which had revolted from one of them, made it possible for this equipoise to be restored. But

*The memoirs of Governor Hutchinson show how pernicious was the personal influence brought to bear by him and other refugees on George III. The following note from George III to Lord North dated 1 July, 1774, is one of the illustrations of the way in which this influence worked: "Just seen Mr. Hutchinson, late governor of Massachusetts, *and am now well convinced they will submit.* He owns the Boston port bill to have been the only wise and effectual method." (Brougham's Statesmen, &c., I, 85.) For Hutchinson's report of this conversation, see 1 Diary, &c., of Th. Hutchinson, 157.

Franklin did more than this. By the treaties he negotiated with France and England not only was a liberal revolutionary government in the new world for the first time sanctioned by the legitimate sovereigns of Europe, but the United States, with boundaries sufficient to make a first-class power, was able, before her national spirit and love of liberty had been subjected to the strain which would have been imposed by a further continuance of war, to establish a government both free and constitutional. And of all treaties that have ever been negotiated, that of 1782–'83 is the one, as we have seen, which has produced the greatest blessings to both contracting parties, has been of the greatest benefit to civilization as a whole, and has been least affected by the flow of time.*

What were the qualities which enabled Franklin to effect these great diplomatic triumphs?

These qualities may be summed up as follows:

Determination to make the United States not only an independent but a leading power;

Unrivaled knowledge of the political, social, and physical condition not only of the United States but of England and France;

A mind fully conversant with modern political economy;

Great sagacity in devising means to effect ends;

So keen a perception of those with whom he had to deal as to be able to say what he had to say so as best to win their assent; †

A knowledge of human nature which enabled him to judge with comparative accuracy of the probable action of men in masses;

A scientific, literary, and political reputation which made him the object of great attention wherever he went, particularly in Paris, where, unspoilt by adulation, he was the object of almost universal homage; ‡

Singular pointedness and felicity of illustration, an unrivaled power of terse political and economical expression, and a style, in his native tongue, of rare felicity, purity, and force;

*Mr. Lecky goes further: "It is impossible not to be struck with the skill, hardihood, and good fortune that marked the American negotiations. Everything the United States could with any shade of plausibility demand from England they obtained, and much of what they obtained was granted them in opposition to the two great powers by whose assistance they had triumphed."—4 Lecky, Hist. Eng., 284 (Am. ed.).

† To the homely grace and skillful persuasiveness of his style the greatest critics have paid tribute. Jeffrey, in an elaborate review devoted to him, places him foremost among the masters of political and social reasoning. By Matthew Arnold he is spoken of, in at least a literary sense, as "the most considerable man that America has hitherto produced." And a late dispassionate and acute critic declares that "in France he accomplished as much against England as did Washington with all his victories."—Edinb. Rev., April, 1880, 328.

‡ "Franklin continued to keep the American cause steadily before the public eye. His venerable aspect, his homely sayings, his republican simplicity of dress and manner, combined with the French tact and politeness of his deportment, his anecdotes and his *bons mots*, gained him among all classes admirers, disciples, and friends. Poetasters wrote rhymes in his honor; noble ladies celebrated his greatness in indifferent verses; his portrait was seen in every print-shop; his bust was placed in the Royal Library. One day he was the observed of all observers at the famous Madame de Lessé's; on another Madame d'Houdetot had him plant a tree of freedom in her garden; on a third ladies crowned his snow-white head with flowers. 'No man in Paris,' says Madame Vigée Lebrun, 'was more *à la mode*, more sought after, than was Dr. Franklin. The crowd used to run after him in the walks and in the public resorts; hats, canes, snuff-boxes, everything was *à la Franklin*. Men and women considered it a piece of good fortune to be invited to a dinner at which this celebrated man was to be present.' The Abbé Morellet wrote a chanson to celebrate his virtues:

"'Notre Benjamin:
"'En politique il est grand;
"'A table est joyeux et franc.'"

Rosenthal, America and France, pp. 70–73.

Great patience and courtesy; never permitting himself to be hurried; if unable to effect at once the impressions he desired, waiting calmly till time came to his aid.*

It was objected to Franklin in his earlier days that he was given to sharp practice to effect his ends; and the obtaining the Hutchinson papers has been often cited as an illustration of this sharp practice. Yet that he was concerned in any surreptitious procuring of these papers has never been shown; and to forward them, when handed to him, to his Massachusetts constituents, so far from being wrong in him, was his duty. But whatever may have been his early reputation for "slyness," it was not chargeable to him in his mission to France. Whether it was that he had learned how much more effective in diplomacy are simplicity and straightforwardness than chicanery, or whether it was in obedience to the law, so prevalent with men of large capacity as they grow older, that—

> "The old man clogs the earlier years,
> And simple childhood comes the last,"

certain it is that there is no trace of finesse or double dealing on his part in his voluminous Paris papers. It is true that in arguments with his colleagues he was silent when he found that for him to speak would be useless; but his great strength in his dealings with Vergennes and with Shelburne arose from the fact that what he said could be relied on as true.

The charge of opportunism also has been made against Franklin, it being alleged that he was a statesman of policy and not of principle. Undoubtedly one of his most famous maxims, if read in one way, would seem to make honesty a duty because it is politic; but it must be remembered that it is also susceptible of the same meaning as are the claims so frequently put forth by moralists, that morality is divinely imposed because in the long run, such is its adaptation to human nature, it succeeds. But be this as it may, Franklin was not an opportunist, if by opportunism is meant subjection of principle to immediate local interest. In several matters he maintained what he held to be the right principle against the immediate policy of the United States. He strenuously objected to privateering, and this against not merely the prevalent sentiment, but the unquestionable policy of the United States. He opposed a navigation law, at a time when the temper of the people of the United States was roused to bitter retaliation by the order of council issued by the coalition ministry. He resisted the Fox scheme of recognition of independence as an insulated act, popular as that scheme was in the United States. And against the tenor of home advices,

* Franklin's colleagues objected to his negligence both in diplomacy and in business. He spent his evenings, they said, at dinner parties; a large part of his work was done in informal conversations; his letters, while unquestionably skillful and effective, were not written in diplomatic form; while they were marked by deferential persuasiveness, they were destitute of that proud defiance which should distinguish the utterances of the representative of a sovereign state. As to Franklin's dinner parties, about which so much was said, it may be remarked that, when in his own house, they were admitted to be simple though liberal; and, while he dined out frequently among public men, it was by this kind of intercourse that his mission was effectively served. The style and success of his letters are the best proof of their merit. Had he indulged in such defiance as Jay hurled at Oswald at their first interview, and Adams at Vergennes in the letter which suspended their intercourse, the United States might have been then left without any diplomatic relations whatsoever. And as to Franklin's management of the complicated business duties thrown on him by Congress, it is enough to say that while raising and forwarding immense sums of money for the revolutionary cause, he accounted for all that he received; and, with every opportunity of speculating in the funds, no suspicion of speculation ever rested on him, and he went back home poorer than when he went abroad.

and in antagonism to France by whose political atmosphere he was surrounded, he insisted on the title of the United States to the Mississippi.

It may not be out of place, in view of the correspondence in reference to diplomatic costume noticed in a former volume (vol. i, § 107 b), to touch, for a moment, on the moot question of Franklin's treaty coat. In Wilberforce's diary, edited by his sons, is the following: "Friday Lord St. Helens" (formerly Mr. Fitzherbert) "dined with me *tête à-tête*; pleasant day; free conversation, much politics, and information. Franklin signed the peace of Paris in his old spotted velvet coat (it being the time of a court mourning, which rendered it more particular). 'What,' said Lord St. Helens, 'is the meaning of that coat?' 'It is that in which he was abused by Wedderburn.'" The same story was related to Lord Holland by Lord St. Helens, who "could not speak without indignation of the triumphant air with which Franklin told them he had laid by and preserved his coat for such an occasion;" and a similar account is given by Lord Mahon (5 Hist. of Eng., 495, note), though the coat is there said to be of "figured Manchester velvet." Mr. Sparks (Life of Franklin, 488), noticing the version of the story as given by Lord Brougham, in his sketch of Wedderburn, says that the "coat" was not so worn and displayed; and he cites Mr. Whiteford, who was present, as secretary of the British side, at the signing of the treaty of peace, and who says (Gentleman's Mag. for July, 1785, 561) that "this absurd story has no foundation but in the imagination of the inventor. He supposes that the act of signing the peace took place at the house of Dr. Franklin. The fact is otherwise; the conferences were held, and the treaty signed, at the hotel of the British commissioner, where Dr. Franklin and the other American commissioners gave their attendance for the purpose. The court of Versailles having at that time gone in mourning for the death of some German prince, the doctor, of course, was dressed in a suit of *black cloth*, and it is the recollection of the writer of this, and also he believes of many other people, that when the memorable phillippic was pronounced against Dr. Franklin in the privy council he was dressed in a suit of *figured Manchester velvet*."

Sir G. C. Lewis disposes of the matter, so far as concerns the shape given to it by Lord Holland and Mr. Wilberforce, by showing that Lord St. Helens was not present at Franklin's signature of the articles of 1782 or of 1783. Not only is there no support for the story in the Franklin papers, but in itself it is highly incredible. Franklin was marked for his urbanity and tact, and one of the complaints made against him by his more impetuous colleagues was that he was disposed to go too far to conciliate England in matters of form. That such an insult should have been offered to the British plenipotentiaries is as inconsistent with his natural temper as it was with his policy, which was, by the continuance of his friendly relations with these envoys, to make the treaty of peace the precursor for a treaty of reciprocity.

If it be alleged that Lord St. Helens' report of what he saw refers to the treaty of 1778 with France, the answer is twofold: (1) Lord St. Helens could not have been present at the signature of that treaty, which was virtually a declaration of war against Great Britain; (2) all the traditions as to Franklin's dress at the time negative such a display as is suggested by the Wilberforce anecdote. These traditions are thus summed up in Mr. Rosenthal's recent work on America and France:

"The American envoys, plain in dress, dignified in bearing, were re-

ceived by Louis XVI in March, at Versailles, and the palace of the 'Grand Monarque' rung with the plaudits of the court that greeted the representatives of the new republic. The venerable, white-haired Franklin, in his dark Quaker dress, with his gray hat under his arm, his white woolen stockings, his shoes unadorned by silver buckles, appeared to the courtiers in that splendid hall the embodiment of republican simplicity, a Lycurgus or a Solon of the eighteenth century.

"The Marquise du Deffand wrote to Horace Walpole on 22 March, 1778, as follows (tome iv, p. 33): 'M. Franklin a été préseuté au roi. Il était accompagné d'une vingtaine d'insurgents dont trois ou quatre avaient l'uniforme. Le Franklin avait un habit de velours mordoré, des bas blancs, ses cheveux étalés, ses lunettes sur le nez, et un chapeau blanc sous le bras. Ce chapeau blanc est-il le symbole de la liberté?'" (Rosenthal, America and France, pp. 51, 52.)

It is not likely that if Madame du Deffand thought it worth while to dilate in detail on Franklin's dress at his court presentation in 1778, she would have omitted to notice an item which would have appeared so entertaining both to herself and to Walpole as Franklin bringing out for the occasion the old "Manchester velvet" suit of such conspicuous antecedents.

In Arthur Lee's Journal (Life by R. H. Lee, i, 403) there is also a detailed account of the presentation of the American commissioners to the King and court on the signature of the treaty, but no notice is taken of dress, which would probably have been the case if Franklin's "coat" bore so sensational relation to the ceremonies.

JAY.

Mr. Jay, who was associated with Dr. Franklin, Mr. Adams, and Mr. Laurens in the commission to treat with Great Britain for peace, was, at the time of his appointment, minister to Spain. He was then thirty-seven years of age, and, with the energy and resolution of the Huguenot race from which he sprang, had during the revolutionary war zealously espoused the American cause. His feeling of indignation against Great Britain, which had been aroused to a high pitch by atrocities he had witnessed in New York, was not lessened during his stay in Spain, where he industriously devoted himself to the formation of a league between Spain, France, Holland, and the United States, not merely to achieve American independence, but to at least for a time paralyze British power. England was to be invaded; her navy swept from the seas; her colonial dependencies in America torn from her, and the United States and Spain were to divide America on terms acceptable to themselves.

Mr. Jay reached Paris on June 23, 1782, and immediately proceeded to visit Franklin at Passy. Shortly afterwards, together with Franklin, he called on the Count d'Aranda, the Spanish ambassador; an event not without significance, since it was the first occasion when the American commissioners had been officially recognized by the diplomatic representatives in Paris of any leading continental power. Shortly after this visit, however, Jay was laid up by sickness, though during this period he had occasional conferences with Franklin, who was at that time almost incapacitated by gout and stone.

On August 7 occurred a memorable interview between Jay and Oswald, which Oswald reports at great length in minutes taken by him of the same date, deposited with the Lansdowne papers, of which copies are in the Department of State. "He" (Mr. Jay), says Mr. Oswald, "is a

man of good sense; of frank, easy, and polite manners." After reading Mr. Oswald's commission, Mr. Jay went on to tell Mr. Oswald that independence "ought to be no part of a treaty. It ought to have been expressly granted by act of Parliament, and an order for all troops to be withdrawn previous to any proposals for treaty. As that was not done, the King, he said, ought to do it now by proclamation, and order all garrisons to be evacuated, and then close the American war by a treaty." "By the continued enforcement of the same cruel measures," so Mr. Oswald reports Mr. Jay to have said, "the minds of the people in general all over that continent were almost entirely alienated from Great Britain, so that they detested the very name of an Englishman. That it was true a number of the older people had not forgot their former connections, and that their inclinations might still lean toward England, but when they were gone and the younger generation came to take their place, who had never felt any of these impressions, those inclinations would be succeeded by grudge and resentment of every kind upon reflecting on what they had seen and their parents had suffered; that few of them but could recollect the loss of blood of some relation or other; devastation of their estates, and other misfortunes. On which occasion he ran into a detail of particulars as unnecessary as unpleasant here to be repeated." In reply to some attempted palliation by Mr. Oswald, "Mr. Jay admitted that some blame was justly to be imputed to the representation of the refugees and other correspondents, who, he said, at least many of them, were in a particular manner concerned, on account of their private interest to have things brought back by any means to their original state." Mr. Jay then, according to Mr. Oswald, went on to complain of the injustice of the terms imposed by England on France by the prior treaty of Paris, upon which Mr. Oswald remarked that he thought "it hard that in America there should be such feelings for the conditions to which the French were bound by a treaty which concluded a war so necessary for its (America's) present and future safety." "On this occasion," comments Mr. Oswald, "I could not help thinking that Mr. Jay fell below the idea I wished to entertain of his candor and impartiality regarding objects not strictly American." Mr. Jay further proceeded to insist that the acknowledgment of American independence was not a sufficient equivalent to France for her exertions in the war, and, aside from this, France ought to retain the conquests she had made. "The United States," he urged, "would think themselves obliged to support them (the French Government) in their settlement with us (Great Britain) in general; only, at last, he said, unless unreasonable; then, indeed—and paused, but afterwards went on and said—France had been very kind to them and lent them money very liberally, &c. After enlarging on these obligations and the gratitude they owed to France, he proceeded to Spain and Holland and talked, also, though in a more general way, of their alliances with them, and their great obligations to them for advance of money; and as if, by conditions of treaty, they could not conclude or have peace with Great Britain separately from those two powers. I did not think it right to be over inquisitive as to their intentions regarding them, but it appeared to me as if he (Mr. Jay) considered those two courts as much under their protection as that of France, and as if the commissioners of the colonies would agree or refuse to close with us according as they should consider the terms which those two last powers shall insist on to be reasonable or unreasonable." Of Mr. Jay Mr. Oswald proceeds to say: "We have very little to expect from him in the way of indulgences,

and I may venture to say that although he has lived till now as a British subject, though he never had been to England, he may be supposed (by anything I could perceive) as much alienated from any particular regard for England as if he had never heard of it in his life." He was "much less liberal" in his terms, so Mr. Oswald declares, than was Dr. Franklin.

But Jay did not long continue of this mind. On November 5, 1782, John Adams makes this entry in his diary: "Mr. Jay likes Frenchmen as little as Mr. Lee and Mr. Izard did. He says they are not a moral people; they know not what it is; he don't like any Frenchman; the Marquis de Lafayette is clever, but he is a Frenchman."

Jay's sudden reaction from the distrust of and repugnance to England, as exhibited in his first interview with Oswald, to the distrust of and repugnance to France he subsequently displayed, may be explained in part by the solution given by Adams, that to Jay French morals and manners, when he became familiar with them, were intolerable. Jay's temper, naturally grave, reserved, and austere, coupled with punctilious conscientiousness in the discharge of duty, and a tendency to reason not from the condition of things about him, but from high principles to which those conditions should be forced to bend, found comparatively little in Spain at which to revolt. There might be crime there, but it was hidden out of sight; there was no frivolity; court life was solemn and decorous; certainly there was no tendency to surrender political traditions to fluctuating fashions. But it was otherwise in Paris. The King was undoubtedly personally pure and conscientious; there was not in the court the vulgarity of dissoluteness that had been dominant under Louis XV; but still, in the levity of the Queen, in the reckless folly of the King's brothers, in the unconcealed depravity of some of the chief ecclesiastics about the throne, in the ostentatious immorality of fashion, there was as much to distress a pure and sensitive character such as Jay's as there would have been in the time of Louis XV. And there was something more which made this levity and vice the more monstrous. In the time of Louis XV court favorites played with foreign wars; with the pragmatic sanction; with the conquest of Silesia. But to Jay's eye these dissolute people of fashion were playing with a volcanic revolution seething under their very feet. Then, again, their irreligion, covered over with only a thin veneering of Catholic ritual, was horrible to him. It took him back to the old struggles under the Valois kings between the court and the Huguenots—all that was frivolous and hollow and depraved, with the court; with the Huguenots all that was earnest and pure and devout. As he viewed the more closely the court and the dominant society of the capital he seemed to rise upwards to the level of his Huguenot ancestry, sharing their sombre hatred of their opponents, preferring exile in America and in England to subjection to France where these opponents ruled. Of this exaltation of standpoint on Jay's part we have a remarkable illustration in the following passage from a letter of July 19, 1783, by him to Mr. R. R. Livingston, then Secretary of Foreign Affairs:

"Our little one is doing well. If people in heaven see what is going on below my ancestors must derive much pleasure from comparing the circumstances attending the expulsion of some of them from this country with those under which my family has increased in it."

It may have been in part from this idealizing himself with that high-toned race who, though French in origin, became, as was the case with the Huguenot captains of William III, among the most relentless en-

emies of France, as well as in part from the antagonism of his own stern and stoical morality to the disregard of all morality which he held to be prevalent in Paris, that he lent a willing ear to Oswald's suggestions of French intrigue in London against the United States. But in the character of this intrigue he was greatly mistaken, since Vergennes, while not desirous of seeing the United States take Canada, the Mississippi Valley, and the fisheries, yet nevertheless made the independence of the United States the one essential condition of his policy, and acquiesced without murmur in the provisional treaty giving the United States the Mississippi Valley and the fisheries, though his veto might have killed the settlement in which the concessions were secured. And into one other error Jay was led by the tendency to fall back on his old traditions. As a young man, on the breaking out of the war, he was ardently devoted to the old Whig English historical school. Of that school he and other Whigs in the colonies regarded Fox and Burke as the then orthodox exponents. Nothing could have been more natural than that he should have taken up Fox's cry of independence by grant, and have insisted that the United States should be solemnly recognized as independent by Great Britain before she could be treated with as thus independent. Yet such a position on its face involved a fallacy, since a dissolution of political connection, which is essential to independence, is a bilateral act, and if independence based on treaty was to be rejected, then there could be no acknowledgment of independence at all. And aside from this it was only by a treaty made at the time the United States was sustained on all sides by allies, and when a liberal ministry, acting on wise economical principles, was in power, that a pacification could have been effected that would, from its beneficial relations to both parties, have had any chance of permanency.

In this temper of disgust and distrust of France it was easy for Jay to convince himself that Vergennes was secretly plotting with Shelburne, if not to divide the colonies between France and England, at least to reduce them to the level of a group of petty seaboard provinces. And Jay claimed that he was justified in this suspicion by the fact that Oswald's commission was addressed to the American "colonies and plantations," and that Vergennes advised them that this was a mere matter of form.

The very sending by Vergennes to London of Rayneval as a confidential agent strengthened Jay's distrust; for the mission of Rayneval, so he argued, must have for its object the prejudicing Lord Shelburne against America. To counteract this supposed pernicious intrigue, Jay, without any notice whatever to Franklin, sent Benjamin Vaughan on a special errand of elucidation to Shelburne. A more extraordinary step could scarcely have been taken by a diplomatist so distinguished for integrity and capacity as Jay. Jay and Franklin were the sole members of the commission in Paris, Adams not having yet arrived. Franklin, as Jay well knew, was resolute in maintaining Vergennes' loyalty to the United States, so far as concerned the question of independence; and Franklin had heretofore conducted with singular skill all the negotiations with Shelburne. Yet Jay, himself unacquainted with Shelburne, sent to Shelburne, as a special envoy, Benjamin Vaughan, a gentleman to say the least not distinguished for prudence or diplomatic skill, to counteract with Shelburne the supposed anti-American intrigues of Rayneval, one of the most subtle and seductive diplomatists in the French service. It must have required on Shelburne's part great determination to perfect the peace, and great faith in Franklin's capa-

city to right matters at last, to have enabled him to disregard this singular side action of Jay.

Yet near as were these proceedings of Jay's to imperiling the relations of the United States to both France and Great Britain, in one important respect he brought into prominence a truth which Franklin, while cognizant of it, did not consider it necessary to proclaim. Vergennes determined as he was to have the independence of the United States established, had, as we have seen, made known that he had no desire to see the United States retain her old rights in the fisheries, or absorb Canada, or push Spain out of the Mississippi Valley. But that Jay was wrong in his doubts of Vergennes' loyalty to the cause of America's independence is shown by the fact that after the United States gained, not, indeed, Canada, but the fisheries and the Mississippi Valley, France continued her support as generously and efficiently as she had done before these causes of difference had arisen.* And if Franklin appears in his correspondence to attach comparatively little consequence to Jay's representations in this respect, we must remember that Franklin, while knowing the desire of France not to offend Spain, or to impair her own claims to the fisheries, was also aware that she would not permit her preferences in this respect to stand in the way of the recognition by Great Britain of the independence of the United States.

### JOHN ADAMS.

Mr. Adams was marked by a singular combination of apparently inconsistent characteristics which were displayed in peculiar prominence during the peace negotiations in which he took part. His patriotism was ardent and even fierce; attempts to corrupt or intimidate him would only have intensified its fires. He was capable of bold, sudden action; and he could defend such action by oratory singularly thrilling, exhibiting like lightning the path and the perils ahead, and in doing so dazzling as well as guiding. But with these great qualities were associated great defects. He could recognize no one as in any respect superior to himself. He paid but a grudging obeisance to Washington even when he was Washington's associate in office; and when in Congress he gave a ready ear, if not a sympathetic assent, to the expressions of discontent with which Washington's war policy was sometimes received. It is questionable whether he was ever truly conscious of the supreme grandeur of Washington's character; at least there is nothing in his diary or his confidential letters, from which his true views can be best collected, from which such a consciousness can be inferred. Of Franklin's extraordinary capacity and signal successes as a diplomatist he was equally unconscious; and towards Franklin he showed, when in Congress, a dislike which, in Paris, ripened into a blind jealousy. His vanity was so great as to make all flattery, no matter how delicate, odious to him when offered to others, and no flattery appear to him too gross when offered to himself. In council he could direct and

* Mr. Lecky (4 Hist. Eng., 232) says: "Two of the commissioners had conceived a profound distrust of the French minister. They believed that Rayneval had been sent to England to retard or prevent the recognition of American independence, that the French minister desired to keep America in a state of ferment and humiliating dependence, and that they were acting falsely and treacherously towards her. For this suspicion there does not appear to have been the smallest real ground. The independence of the Americans had been the great aim which France had steadily pursued, and she was not in the least disposed to abandon it; nor does Vergennes ever appear to have opposed American interests on any point on which he had promised to support them."

inspire, but he could not consult; a peculiarity afterwards illustrated during his Presidency, when for long periods he would let his cabinet officers, all of them representing a line of politics distinct from his own, carry out their views without their conferring with him, when suddenly, as in the case with the French mission of February 25, 1799, he would proclaim a new and bold policy without his conferring with them. His enthusiasm for public affairs in fact, splendid as were its occasional manifestations, was not continuous, and was broken in upon, from time to time, by parentheses of torpid seclusion, or, what was stranger, by social displays for which he had no tact, and which consorted but ill with the abruptness, the self-consciousness, and the want of consideration for others, by which he was often marked.

Of these peculiarities of Mr. Adams we have ample illustration in the diary left by him in 1782–'83, during his French negotiations, as published in 1851, by his grandson, the late Mr. C. F. Adams (Works of John Adams, vol. iii, pp. 298 *ff.*) Adams, after a mission to Holland, in which, by singular energy and zeal, he had succeeded in negotiating a treaty recognizing the independence of the United States, arrived in Paris about noon on Saturday, October 26, 1782.

The period was one of extreme anxiety, requiring grave and prompt action by the American commissioners. Adams' name was the first in the list of these commissioners, and his immediate presence in Paris had been earnestly solicited by Franklin and Jay.

Of his action on his first day in Paris, his journal narrates the following:

"The first thing to be done in Paris is always to send for a tailor, peruke-maker, and shoemaker, for this nation has established such a domination over the fashions that neither clothes, wigs, nor shoes made in any other place will do in Paris. This is one of the ways in which France taxes all Europe, and will tax America. It is a great branch of the policy of the court to preserve and increase this national influence over the *mode*, because it occasions an immense commerce between France and all other parts of Europe. Paris furnishes the materials and the manners, both to men and women, everywhere else."

On the next day he meets with "Ridley," apparently one of the outside agitators by whom the commissioners were beset, who informed him that Jay "refused to treat with Oswald until he had a commission to treat with the commissioners of the United States of America. Franklin was afraid to insist upon it." "Ridley," in a subsequent conversation, "was full of Jay's firmness and independence; [Jay] has taken upon himself to act without asking advice, or even communicating with the Count de Vergennes, and this even in opposition to an instruction." On the same day is the entry, "Then to Mr. Jay and Mrs. Izard; but none at home." The following ends the day's comments: "Between two as subtle spirits as any in this world (Franklin and Jay), the one malicious, the other, I think, honest, I shall have a delicate, a nice, a critical part to act. Franklin's cunning will be to divide us; to this end he will provoke, he will insinuate, he will intrigue, he will manœuver. My curiosity will at least be employed in observing his invention and his artifice. Jay declares roundly that he will never set his hand to a bad peace. Congress may appoint another, but he will make a good peace or none."

Yet, in his journal for June 20, 1779, after speaking of Gouverneur Morris as "of a character *très léger*," he says, and with much injustice, so far as concerns Jay, "the character and cause of America has not

been sustained by such characters as that of Gouverneur Morris or his colleague, Mr. Jay."

It was not until Tuesday, October 29, in the evening, that he paid his first visit to Franklin. At this visit, and in the interviews immediately succeeding, Franklin was informed by Adams that he entirely concurred with Jay in the points as to which Franklin and Jay differed—as to Jay's hasty and ill-judged avowal of preference for Fox's scheme of peace to that of Shelburne; as to Jay's demand on Shelburne to amend Oswald's commission so as to call the thirteen States "the United States" before the signature of a treaty in which Oswald was to be authorized to confer this title; as to Jay's singular personal confidential mission to Shelburne without Franklin's knowledge and against Jay's instructions; as to Jay's determination to ostentatiously impress on Vergennes the refusal of the commissioners to formally acquaint him with the character of the negotiations with Shelburne. And Adams, when Franklin took the ground that it was not within the power of Congress to comply with Oswald's "demand of the payment of debts and compensation to the tories," replied that "I had no notion of cheating anybody;" that "the question of paying debts and of compensating tories were two;" and he adds, "I made the same observation that forenoon to Mr. Oswald and Mr. Strachey, in company with Mr. Jay, at his house. I saw it struck Mr. Strachey with peculiar pleasure. I saw it instantly smiling in every line of his face. Mr. Oswald was apparently pleased with it too." Franklin, when thus overruled by his colleagues, simply "listened with patience." He could do nothing else. His colleagues had not only taken their positions resolutely, but declared it openly. It is true that by their course Canada was lost, and the great scheme of partition and reciprocity which he had woven in conference with Oswald imperiled; it is true, also, that the friendly relations of France and the United States were put to a strain which it would require great skill to enable them to bear without rupture; but his dissent would only have made this rupture inevitable, while it could not have made the negotiations with the English ministers any the more auspicious to the United States. So he acquiesced; and by thus moving with his colleagues, at least so far swayed the subsequent correspondence as to prevent, as we have seen, a rupture with France, to save the United States from any burden of indemnity to the refugees, and to retain in the preliminary articles most of those features which make them, of all pacifications known to history, at once the most liberal in temper and the most reciprocally beneficial in result.

On Adams' action, on his arrival at Paris, as above narrated, we have a marked illustration of the tendency, common to Lord Chatham as well as to himself, to alternate periods of intense and heroic action with periods of histrionic seclusion not without preparation for histrionic display. Adams, prior to his arrival, had been, as we have seen, actively and efficiently engaged in the settlement of a treaty with Holland. He was summoned to Paris to take part, as the first on the list of commissioners, in negotiations on which depended the independence of America and the peace of the world. Time was of vital importance. Any delay, as afterwards was shown, might bring into play events by which the interests of America and her allies would be seriously imperilled. Franklin alone was possessed of the threads of the pending negotiations, and, whatever Adams may have thought of him, Franklin was a man advanced in years, who was confined at that period to his chamber by an excruciating disease. Vergennes may have been the peculiar

object of Adams' dislike; but Adams was instructed to take no step without consulting Vergennes, and on Vergennes depended the question whether any treaty at all with Great Britain could be negotiated. It was Adams' duty to at once visit both Franklin and Vergennes. So far from performing this duty, he delayed visiting Vergennes for nearly three weeks,* and would have delayed longer if Vergennes had not gone out of the way of diplomatic routine to good naturedly invite the visit; while the visit to Franklin was delayed three days, until, in the meantime, the peruque-makers and tailors' help had been secured by way of preparation. And then, when the visit to Franklin was at last paid, it was not to obtain information or take counsel, but brusquely to announce conclusions, of which it is only necessary at this point to say that if they had been withheld until the views of Franklin had been heard and duly respected, it would have been far better for the United States.

In addition to the citations already given from Adams' diary, may be noticed the following extracts:

"The compliment of 'Monsieur, vous êtes le Washington de la négociation,' was repeated to me by more than one person. I answered, 'Monsieur, vous me faites le plus grand honneur, et le compliment le plus sublime possible.' 'Et, Monsieur, en vérité vous l'avez bien mérité.' A few of these compliments would kill Franklin if they should come to his ears." (3 John Adams' Works, 309.)

But as to the last point, Adams was mistaken. Franklin, in his public course, was singularly uninfluenced by either slight or adulation. On the one hand, through the impression noticed above, that he was unduly swayed by French preferences, he had provoked the jealousy of Adams, of Izard, and Arthur Lee, and this, with other causes, had led to charges, striking him at the most vital points, being preferred against him in Congress. Yet, on the other hand, while he was overwhelmed in Paris, both by men of science and men and women of fashion, with an adulation which, for its permanency and its ardor, has no parallel, he received from the British ministry the extraordinary honor of being told that the negotiators sent to confer with him were selected because it was supposed they would be acceptable to himself, and that other channels would be selected if he would designate them. But it does not appear that he ever sought to impress his colleagues either with the slights or the honors which had been tendered to him, nor has he even noticed them in his diary. We now hear of them in detail from letters to him, deposited in the Department of State; and from that same correspondence we learn that, without regard either to censure or flattery, he pursued the course which was imposed on him by the great responsibilities under which he was placed.

It would be as unjust as it would be vain to disparage John Adams' splendid services in the revolutionary cause. He was, as Jefferson well said, the "Colossus" on whom depended, so far as oratorical effect was concerned, the contest for independence. But the history of the treaty of peace of 1782–'83 would not be complete without noticing the way in which his character as a negotiator was affected by the weaknesses which have been noticed above. It was not that his ardent devotion to his own country ever dimmed. It is not that he was unduly partial to either of the great powers with whom he had to deal. "'You are afraid,' so he represents Oswald as saying to him, 'of being made the tool of

*As to the invitation to dinner which followed this visit, see *supra*, vol. i, § 107*a*. As to Adams' overbearing treatment of Vergennes, see 4 Lecky Hist. Eng., 190 (Am. ed.).

the powers of Europe.' 'Indeed, I am,' says I. 'What powers?' said he. 'All of them,' said I." (3 John Adams' Works, 316.) Hence it was that distrust of England led him to do all he could to drive off Shelburne by his unwillingness to understand, or at least to accept, Shelburne's liberal system of pacification, and distrust of France led him to do all he could to break up the French alliance. He undoubtedly meant to be just; but his jealousy of Franklin led him to blindly reject Franklin's conclusions whenever they conflicted with those of Jay, or whenever, as in respect to refugee claims, Franklin could be humiliated by their rejection. He was capable of intense labor, yet, in one of those strange fits of lassitude by which he was sometimes overtaken, he permitted himself, on his arrival in Paris, on October 26, 1782, at the most critical period of his country's history as well as of his own life, instead of seizing at once on whatever would enable him to possess himself of the information necessary to judicious action, to lose himself in matters of mere personal decoration, and then, when he sought information, to seek it first from questionable outsiders, and then from Jay, contenting himself, when at last he visited Franklin, with roughly telling Franklin at the very outset, before Franklin had any chance for explanation, that in all matters in contest he sided with Jay. It is true that in the main he had to fall back on Franklin's outlines of peace, for there were none others to fall back upon. Yet even here the concentrated and localized character of his patriotism led him astray. He fought zealously, vigorously, and successfully for the fisheries and for the northeast boundaries. Yet, in the absorption of his vision in the fisheries and on the boundaries, he lost sight of Canada, without which no boundary questions could be definitely settled and no fisheries could be securely enjoyed.

CORRESPONDENCE.

To a letter from Lord Shelburne, of April 6, 1782, introducing Mr. Oswald, Franklin, in a letter of April 18, answered in part as follows:

"I have conversed a good deal with Mr. Oswald, and am much pleased with him. He appears to me a wise and honest man. I acquainted him that I was commissioned with others to treat of and conclude a peace; that full powers were given us for that purpose, and that the Congress promised in good faith to ratify, confirm, and cause to be faithfully observed the treaty we should make; but that we could not treat separately from France; and I proposed introducing him to M. le Comte de Vergennes, to whom I communicated your lordship's letter containing Mr. Oswald's character as a foundation for the interview. He will acquaint you that the assurance he gave of His Britannic Majesty's good disposition towards peace was well received and assurances returned of the same good dispositions in His Most Christian Majesty.

"With regard to the circumstances relative to a treaty, M. de Vergennes observed that the King's engagements were such that he could not treat without the concurrence of his allies; that the treaty should therefore be for a *general*, not a *partial*, peace; that if the parties were disposed to finish the war speedily by themselves, it would perhaps be best to treat at Paris, as an ambassador from Spain was already there, and the commissioners from America might easily and soon be assembled there. Or if they chose to make use of the proposed mediation, they might treat at Vienna, but that the King was so truly willing to put a speedy end to the war that he would agree to any place the King of England should think proper. I leave the rest of the conversation to be related to your lordship by Mr. Oswald, and that he might do it more

easily and fully than he could by letter, I was of opinion with him that it would be best he should return immediately and do it *viva voce*."

Franklin MSS., Dept. of State. 9 Sparks' Franklin, 245; 2 Dip. Corr., 278.

"I have received much satisfaction in being assured by you that the qualifications of wisdom and integrity which induced me to make choice of Mr. Oswald as the fittest instrument for the renewal of our friendly intercourse have also recommended him so effectually to your approbation and esteem. I most heartily wish that the influence of this first communication of our mutual sentiments may be extended to a happy conclusion of all our public differences.

"The candor with which Monsieur le Comte de Vergennes expresses His Most Christian Majesty's sentiments and wishes on the subject of a speedy pacification is a pleasing omen of its accomplishment. His Majesty is not less decided in the same sentiments and wishes, and it confirms His Majesty's ministers in their intention to act in like manner, as most consonant to the true dignity of a great nation.

"In consequence of these reciprocal advances Mr. Oswald is sent back to Paris for the purpose of arranging and settling with you the preliminaries of time and place, and I have the pleasure to tell you that Mr. Laurens is already discharged from those engagements, which he entered into when he was admitted to bail.

"It is also determined that Mr. Fox, from whose department that communication is necessary to proceed, shall send a proper person, who may confer and settle immediately with Monsieur de Vergennes the further measures and proceedings which may be judged proper to adopt towards advancing the prosecution of this important business. In the mean time Mr. Oswald is instructed to communicate to you my thoughts upon the principal objects to be settled.

"Transports are actually preparing for the purpose of conveying your prisoners to America to be there exchanged, and we trust that you will learn that due attention has not been wanting to their accommodation and good treatment."

Lord Shelburne to Dr. Franklin, April 28, 1782. Franklin MSS., Dept. of State; 9 Sparks' Franklin, 265.

"With respect to the commissioners of the colonies, our conduct towards them I think ought to be of a style somewhat different. They have shown a desire to treat and to end with us on a separate footing from the other powers, and I must say in a more liberal way, or at least with a greater appearance of feeling for the future interests and connections of Great Britain, than I expected. I speak so from the text of the last conversation I had with Mr. Franklin, as mentioned in my letter of yesterday. And therefore we ought to deal with them tenderly and as supposed conciliated friends, or at least well disposed to a conciliation, and not as if we had anything to give them that we can keep from them or that they are very anxious to have. Even Dr. Franklin himself, as the subject happened to lead that way, as good as told me yesterday that they were their own masters, and seemed to make no account of the grant of independence as a favor. I was so much satisfied beforehand of their ideas on that head that I will own to your lordship I did not read to the Doctor that part of your letter wherein you mention that grant as if in some shape it challenged a return on their part. When the Doctor pointed at the object of the enabling bill, as singly resting on a dispensation of acts of Parliament they cared not for, I thought it enough for me to say they had been binding and

acknowledged. To which no answer was made. When the Doctor mentioned the report as if there was an expectation of retaining the sovereignty, I ventured a little further (though with a guarded caution) to touch him on the only tender side of their supposed present emancipation, and said that such report was possibly owing to the imagination of people upon hearing of the rejoicings in America on the cessation of war, change of ministry, &c., which they might conclude would have some effect in dividing the provinces, and giving a different turn to affairs; as no doubt there was a great proportion of these people, notwithstanding all that had happened, who, from considerations of original affinity, correspondence, and other circumstances, were still strongly attached to England, &c. To this also there was no answer made.

"At same time I cannot but say that I was much pleased upon the whole with what passed on the occasion of this interview. And I really believe the Doctor sincerely wishes for a speedy settlement, and that after the loss of dependence we may lose no more; but, on the contrary, that a cordial reconciliation may take place over all that country.

"Amongst other things I was pleased at his showing a state of the aids they have received from France, as it looked as if he wanted I should see the amount of their obligations to their ally; and as if it was the only foundation of the ties France had over them, excepting gratitude, which the Doctor owned in so many words. But at same time said the debt would be punctually and easily discharged. France having given to 1788 to pay it. The Doctor also particularly took notice of the discharge of the interest to the term of the peace, which he said was kind and generous. It is possible I may make a wrong estimate of the situation of this American business, and of the chance of a total or partial recovery being desperate. In that case my opinion will have no weight, and so will do no hurt, yet in my present sentiments I cannot help offering it as thinking that circumstances are in that situation that I heartily wish we were done with these people, and as quickly as possible, since we have much to fear from them in case of their taking the pet, and throwing themselves into more close connection with this court and our other enemies."

Richard Oswald to Lord Shelburne, July 11, 1782; 9 Sparks' Franklin, 303, note.

In a draft of a note to Mr. Oswald, July 12, 1782 (Frank. MSS., Dept. of State; 9 Sparks' Franklin, 365; 2 Dip. Corr., 351), Dr. Franklin states that he had received a note from Mr. Grenville stating that Lord Shelburne's opposition to an immediate acknowledgment of "American independency" was the cause of Mr. Fox's resignation; and that this would "be fatal to the present negotiation." But Dr. Franklin evidently did not think that this would follow, and, though he says that an acknowledgment of independence is essential, yet he implies that this can be done as a preliminary to a treaty.

PASSY, *July* 18, 1782.

Earl of SHELBURNE:

MY LORD: Mr. Oswald informing me that he is about to dispatch a courier, I embrace the opportunity of congratulating your lordship on your appointment to the treasury. It is an extension of your power to do good, and in that view, if in no other, it must increase your happiness, which I heartily wish, being with great and sincere respect,

My Lord, your Lordship's most obedient and humble servant,

B. FRANKLIN.

Franklin MSS., Dept. of State.

"I expected to have had the honor to transmit you herewith the King's commission authorizing you to treat and conclude a peace with the American commissioners at Paris, as well as His Majesty's instructions consequent to it. But from the length of time necessary to pass the commission, I have thought it necessary to forward this to you without waiting for it. From the opinion which I have had very good reason to conceive of your ability I have no doubt but that you will acquit yourself, both as to spirit and form, to the satisfaction of His Majesty in this important business.

"As my intention is, and ever will be, in the high office which I have the honor to hold, to conduct my correspondence with the utmost precision and perspicuity, I desire you will without reserve communicate to me any doubts that may arise upon your instructions or any difficulty that may occur in the course of your negotiation. Be assured you will ever find me ready to pay due attention to your opinions upon the arduous undertaking in which you are engaged, and to communicate to you His Majesty's pleasure thereupon.

"I think it necessary to acquaint you that Mr. Fitzherbert, now at Brussels, has orders to join you at Paris to replace Mr. Grenville. I have great pleasure in recommending him to your confidence, as he is a person of whose talents and discretion I have the highest opinion founded in a long acquaintance. Of those with whom you are to treat I have no knowledge of any except Dr. Franklin. My knowledge of him is of long standing, though of no great degree of intimacy. I am not vain enough to suppose that any public conduct or principles of mine should have attracted much of his notice. But I believe he knows enough of them to be persuaded that no one has been more averse to the carrying on this unhappy contest or a more sincere friend to peace and reconciliation than myself. If he does me the justice to believe the sentiments to be sincere he will be convinced that I shall show myself in the transaction of this business an unequivocal and zealous friend to pacification upon the fairest and most liberal terms. Though I have not the pleasure of a personal acquaintance with you, sir, your character is not unknown to me, and from that I derive great satisfaction in seeing this very important negotiation in your hands.

"When the commission is made out you will hear from me again, and receive at the same time His Majesty's instructions for the execution of it."

Thomas Townshend to Richard Oswald, July 26, 1782; Franklin MSS., Dept. of State; printed in part in 9 Sparks' Franklin, 368, note.

"In regard to the question of any national substitution for the dependent connection with Great Britain, you must, in the first place, seek to discover the dispositions and intentions of the colonies by the intimations and propositions of the commissioners; and if it shall appear to you to be impossible to form with them any political league of union or amity to the exclusion of other European powers, you will be particularly earnest in your attention and arguments to prevent their binding themselves under any engagement inconsistent with the plan of *absolute and universal independence*, which is the indispensable condition of our acknowledging their independence on our crown and kingdoms."

Orders and instructions to Richard Oswald, July 31, 1782; Franklin MSS., Dept. of State.

"I went out this forenoon to Dr. Franklin to know whether he was inclined to enter upon business. He told me he had carried the copy

of the commission I gave him to Versailles the day before, and had some conversation on the subject with Monsr. de Vergennes, who was of opinion with him that it would be better to wait until a real commission arrived, this being neither signed nor sealed, and could be supposed as only a draft or order in which there might be alterations, as in the preamble it said only 'to the effect following, &c.' To this objection I had nothing to say, as I did not incline to show them the instructions, though signed and sealed.

"Finding no alteration in the Doctor's manner, from the usual good-natured friendly way in which he had formerly behaved to me (as I had reason to apprehend from what had lately passed with his colleague), and having a quiet and convenient opportunity, I was anxious to learn whether the Doctor entertained those ideas, which, in the preceding papers, I suspected Mr. Jay had in view regarding the *means* of preventing future wars, by settling the peace in such a manner as it should not be the interest of the parties to break it.

"With that intent I told the Doctor I had had a long conversation with Mr. Jay, of which no doubt he had been informed, and in which he had not spared us in his reflections on what had passed in the American war; and that I could not but be sorry he had just reason for the severity of some of them; at same time I was pleased to find he was equally well disposed to peace, and to bring it quickly to a conclusion as we were, and also that it should be a lasting one, as he, the Doctor, had always proposed, and that I was only at a loss as to how that could be ascertained other ways than by treaty, which Mr. Jay declared he paid no regard to, and said it could only be depended upon as lasting by its being settled so as it should not be the interest of any of the parties to break it. I told the Doctor this was certainly the best security, if one could tell how to accommodate the terms so justly to the mutual interests of the parties as to obviate every temptation to encroachment or trespass.

"The Doctor replied the method was very plain and easy, which was to settle the terms in the first projection on an equal, just, and reasonable footing, and so as neither party should have cause to complain; being the plan which Monsr. de Vergennes had in view, and had always recommended in his conversations with him on the subject of peace; and the Doctor said it was a good plan, and the only one that could make the peace lasting; and which also put him in mind of a story in the Roman history in the early times of the Republic. When being at war with the state of Tarentum, and the Tarentians having the worst of it they sent to the Senate to ask for peace. The ambassador being called in, the Senate told him they agreed to give them peace, and then asked him how long he thought it would last. To which he answered that would be according to the conditions; if they were reasonable the peace would be lasting; if not, it would be short. The Senate seemed to resent this freedom of expression. But a member got up and applauded it as fair and manly, and as justly challenging a due regard to moderation on their part.

"It is not easy for me to say how happy I felt myself at the conclusion of this quotation. The terms and conditions, it's true, remained undecided, and comprehend, no doubt, a very serious question, although not material to what I aimed at. Nor did I conceive them to lie so much in my way as in that of another department, by the concern which the French minister took in settling the principle. Nor did I trouble myself about the possible inefficacy of it as still depending in some degree

on the obligations of treaty, however cautiously adjusted. And therefore I did not think it proper to touch upon that point nor to say anything on the subject of terms and conditions.

"I thought myself sufficiently satisfied in getting clear of my apprehensions of those ill-founded suspicions of a supposed American *guarantee* being intended, as mentioned in the papers of the 9th instant. And at the same time asking pardon of those to whom that design was unjustly imputed. And which, upon my return from this visit, I should have certainly struck out of those papers if I did not with all submission incline to think that by remaining under the eye of Government they might help to show that the question of the possibility of such guarantee taking place on some future occasion may still not be undeserving of attention. As to the consequences of such measure whenever it happens (as pointed out in the said papers of the 9th) there can be no doubt, nor do I think it requires much ingenuity in the Americans quickly to discover the expediency and benefit of resorting to it on a variety of occasions, particularly in case of our insisting on terms in the present treaty, or acting a part in our future correspondence with them, which we cannot support in such manner as to make it appear to them to be their interest (and consistent with their engagements and the character they have adopted) quietly and contentedly to submit to.

"I am the more ready to hazard the freedom of these observations and the danger of exciting into action the least experiment of this kind of combined interposition of the American provinces upon reflecting on Dr. Franklin's hint of caution, as reported in one of my letters of last month, 'not to force them into the hands of other people,' which I hope will never happen, but on the contrary, after laying the foundation of peace, the best manner that can be done on the bottom on which the Congress wish it to stand, by an amicable and final agreement with their commissioners here, every possible measure may thereafter be taken to promote a temper of reconciliation and amity over the whole of that country. As yet there has been nothing done in a separate way, however unjustly suspected, to interfere with the plan of such preliminary and regular settlement. And I hope the same will be followed out in such a manner as to show to the Americans that all such concessions as are required and can be reasonably granted do actually flow from a desire of His Majesty and his ministers of laying this foundation on the most just and equitable principles, and in a mutual relation to the benefit of one party as well as the other.

"After that is done and consequently every pretense and occasion of jealousy is obviated, and constitutionally out of the question, I must take the liberty to say that it will concern the interest of Great Britain in the most sensible degree, as well in the hopes of returning benefit as in that of avoiding contingencies of critical danger, to concert from this time every possible method of facilitating and perpetuating a friendly correspondence with those countries.

"The second thing the Doctor touched upon was independence. He said by the quotations of acts of Parliament he saw it was included in the commission; but that Mr. Grenville had orders to grant it in the first instance. I replied it was true; and that though supposed to be granted under this commission and in the course of the treaty I hoped it would make no difference with gentlemen who were so well disposed to put an end to this unhappy business as I knew him to be.

"He then asked if I had instructions. I said I had, and that were under His Majesty's hand and seal; and that by them it appeared inde-

pendence, unconditional in every sense, would be granted, and that I saw no reason why it should not make the first article of the settlement or treaty; that I was sorry Mr. Jay should have hesitated so much on that head, as if it ought to have been done separately and by act of Parliament. And now Parliament being up, that the grant should be made by proclamation. That I did not pretend to judge whether the right and authority of a grant of that kind, so conveyed, would be proper and effectual. There seemed, however, to be one inconveniency in it that a proclamation became an address to the Congress and to every part of their provinces jointly and separately, and might in so far interfere with the progress of the present commission under which we hoped that all pretensions would be properly and expeditiously settled. That in this matter he was a better judge than I could pretend to be. I was only sure of one thing, that the affair might be as effectually done as in the way proposed by Mr. Jay.

"The Doctor replied that Mr. Jay was a lawyer, and might think of things that did not occur to those who were not lawyers. And at last spoke as if he did not see much or any difference; but still such mode of expression as I could not positively say would preclude him from insisting on Mr. Jay's proposition, or some previous or separate acknowledgment. I was glad to get clear of the subject without pushing for further explanation or discussion, or yielding further, as I have mentioned, than to a preliminary acknowledgment in the course of the treaty.

"I then said after that was done I hoped there would not be many things to settle; and that the articles called necessary, which he specified on the 10th of July, would pretty nearly end the business; and that those called advisable, which as a friend to Britain and to reconciliation, he had then recommended, would be dropped or modified in a proper manner; that I had fairly stated the case at home, and could not but confess that I had this answer from one of his friends. To this I cannot say I had any reply.

"I then told the Doctor there was a particular circumstance which, of myself, I wished to submit to his consideration, as a friend to returning peace.

"England had ceased all hostilities against America by land. At sea it was otherwise, and however disposed we might be to stop these proceedings there also, I could not see how it could be done until the people of America adopted the same plan. At the same time I was sensible that by the strict letter of their treaty with France the Americans could not well alter their conduct before we came to a final settlement with that nation. That this was an unfortunate dilemma for both of us, that we should be taking each other's ships when perhaps we might, in other respects, be at perfect peace, and that notwithstanding thereof, we must continue in this course, waiting for a conclusion with France and other nations, perhaps at a distant period. That although I had no orders on this head, yet as a continuance in this species of hostility seemed to be so repugnant to the motives and principles which had determined a cessation on the part of England by land, and was certainly a bar to that cordial reconciliation which he so much wished for, I could not avoid submitting the case to his consideration, to see whether he could find some remedy for it. The Doctor replied he could not see how it could be done; it would be a difficult thing. However, at last he said he would think of it.

"I next touched upon the subject of the loyalists, but could not flatter myself with the hopes of its answering any good purpose; the Doc-

tor having from the beginning assured me they could take no part in that business, as it was exclusively retained under the jurisdiction of the respective States upon whom the several claimants had any demands; and there having been no power delegated to the Congress on that head, they, as commissioners, could do nothing in it. I only said that I was sorry that no method could be suggested for a reasonable accommodation in a matter which I could not but suppose he would admit had a natural claim to the consideration of Government. I thought it to no purpose to go any further upon the present occasion. If afterwards things of a more immediate concern and importance should get into a smooth train of proceeding, and be established, and I could venture freely to appeal to their unprejudiced humanity and good sense I would try it, although without hopes of their taking any other part than in suggesting of means and expedients, and perhaps favoring the proposals in the way of private recommendation to their countrymen. As to the ungranted or unappropriated lands, although they were undoubtedly the reserved property of His Majesty in all the States, I am afraid when I come to state that claim as a fund towards indemnification the commissioners will pretend these lands fell with the States as much as the King's court-houses, &c.

"Upon the whole of this matter the Doctor said nothing, but that he was advised that the board of loyalists at New York was dissolved by General Carleton, which he was glad of.

"The Doctor at last touched upon Canada, as he generally does upon the like occasions, and said there could be no dependence on peace and good neighborhood while that country continued under a different government, as it touched their States in so great a stretch of frontier. I told him I was sensible of that inconveniency. But having no orders, the consideration of that matter might possibly be taken up at some future time. At my coming away the Doctor said that although the proper commission was not come over, yet he said Mr. Jay would call on me with a copy of their credentials. This being Sunday, he said the copy would be made out on Monday. On Tuesday he must go to Versailles, being the levee day, but on Wednesday they would call with their papers. So that to-morrow I shall probably have the honor of seeing those gentlemen, and of course may have something still to add to these tedious writings."

Richard Oswald to Thomas Townshend, August 11 and 13, 1782; Franklin Papers, Dept. of State; printed in part in 9 Sparks' Franklin, 386–389, notes.

"In the conclusion of the papers of the 13th instant, I said that Dr. Franklin and Mr. Jay were to call on me yesterday to exchange credentials, but they did not call. I went out, therefore, this morning to the Doctor to inform him that the commission had come to hand, of which I told him I would have informed him sooner if I had not expected him yesterday. He excused himself on account of company coming in, which made it too late for coming into Paris that forenoon, but that to-morrow he and Mr. Jay would certainly call. He said he was glad the sealed commission was come. There was nothing material said on the subject of business. I returned to Paris and called on Mr. Jay to inform him in like manner of the commission being arrived. At meeting with this gentleman I own I was under some concern on account of our former conversation; but I was agreeably disappointed, having found him in

the best humor, and disposed to enter into friendly discussion on the business I came about.

"He did not seem desirous of going back upon past transactions, as on the former occasion, and chiefly pointed at the object of a present settlement. He said we had it now in our power to put a final period to the misfortunes we complained of by carrying into execution what had been solemnly intimated to them, and which Sir Guy Carleton had orders to communicate to the Congress in America, a copy of whose instructions they were in possession of, one article of which says that His Majesty was to grant unconditional independence to the thirteen States of North America. But that the way proposed of making the same rest upon the events and termination of a treaty did not come up to that description, and was a mode of performance which would not give satisfaction to the Congress or people of America, and could not be considered by them as absolute and unconditional, if only standing as an article of a depending treaty, and upon the whole that they could not treat at all until their independence was so acknowledged so that they should be on an equal footing with us and take rank as parties to an agreement.

"That in this they had a fair precedent in the settlement of the Dutch with the Spaniards, who refused to enter into any treaty until they were declared free states. That if we wished for peace, that was the only way to obtain it; and if done with a becoming confidence and magnanimity we should not only get a peace in the result, but, by the concurrence of better management hereafter, he also hoped that a happy conciliation and friendship would be restored and perpetuated between both countries, notwithstanding all that has happened, which he said would give him great pleasure. But that if we neglected this opportunity, and continue in our hesitation on that head, as we had done, we should then convince them of the justice of their suspicions of designs which he would not name, and should force them into measures which he supposed I had discernment enough to guess at, without coming to further explanation. That he should be extremely sorry to see things run into that strain, and, therefore, as the method proposed was indispensable, he could not but seriously advise and recommend it. A good deal more this gentleman said to the same purpose, without any appearance of resentment or disgust. On the contrary, he delivered his sentiments in a manner the most expressive of a sincere and friendly intention towards Great Britain. I should not do him justice if I said less, and I am the more inclined to be particular in this part of the report that I was so free in my remarks on his former conversation; especially in my suspicions of an actual or premeditated connection with foreign states, on account of his particular idea of guarding against the violation of treaties, as mentioned in the preceding papers, but which, although I could perceive was present to his mind on this occasion also, yet I am now convinced had gone no farther than speculation, and as he said himself, and which I really believe, he would be heartily sorry they should have recourse to.

"At proper times I said what occurred to me as necessary to bring this question to some sort of desirable period; and in particular wished to have Mr. Jay's idea of such way of declaring this unconnected ascertainment of independence as would satisfy them.

"His former proposal of doing it by proclamation he gave up, as liable to sundry objections needless to be here repeated. He then proposed that it should be done by a particular and separate deed, or pat-

ent under the great seal, in which my commission for a treaty might also be narrated: and that such patent should be put into the possession of the commissioners, to be by them sent over to Congress; and accordingly Mr. Jay brought me a draft of the patent. As I could see no other way of satisfying those gentlemen, and it appearing highly necessary that some beginning should be made with them, since until that was done the foreign treaty could not proceed in its course, I agreed to send the draft over to His Majesty's secretary of state by a courier express for that purpose, with my own opinion rather in favor of the proposal than otherwise. And so it was settled with the commissioners. However, afterwards in casting my eye over the preamble of the draft, where it is stated, *as if Sir Guy Carleton had orders to propose treaties of peace, &c., to the Congress*, and believing this to be a mistaken quotation of memory from the copy of Sir Guy's instructions in the possession of the commissioners, and as such inferring an unjust imputation on the consistency of the conduct of administration, and apprehending also that the commissioners entertained a doubt of this nature, might have been the reason why they wished to be guarded with all this caution, in requiring this special acknowledgment under the great seal, besides keeping their minds in suspense in all future proceedings, where confidence in good faith ought to smooth the path in many occasions to a happy termination, I say, in reflecting on these things, I thought it my duty, and I confess I was, on my own particular account, a little anxious, to have an explanation of this matter, and therefore, after it had been agreed in the presence Dr. Franklin and Mr. Jay that I should send off the draft, I took the liberty to point out to them the said preamble, telling them that there might be a possibility of mistake or misquotation in the last part of the paragraph. Mr. Jay said he had not the copy of Sir Guy's instructions, and acknowledged he had inserted those words from a general impression that remained on his memory, and could not positively say but there might be some mistake. Dr. Franklin said he had a copy of the instructions and would send a duplicate to Mr. Jay in a few hours. He did so, and I waited on Mr. Jay to see the papers. Upon the perusal he owned he had been mistaken, and that Sir Guy's instructions went no further than an order of communication to inform the Congress and General Washington that His Majesty intended (or had given directions) to grant free and unconditional independence to the thirteen States, &c. Finding this prejudice entirely removed, and that Mr. Jay was perfectly satisfied that the whole course of proceedings in this matter was fair and consistent, I asked him what occasion there was then for this extraordinary caution of insisting on the solemnity of such separate deed under the great seal, &c., since a preliminary clause or article in the treaty, as always intended, might do the whole business by making it absolute and not depending in [*sic*] the view of ascertainment on the event of other or subsequent articles, and which might be expressed [*sic*] as to remove every doubt as to the independence being as free and unconditional as they desired it to be. In confirmation of the greater expediency and dispatch of this method, and that it was the sincere intention of His Majesty to make this grant in the precise way they desired, I thought myself warranted in telling him that I had a full power in my instructions to give them entire satisfaction on this head, and made no scruple in showing it to him as it stood in the fourth article thereof. Upon the perusal Mr. Jay said that was enough, and he was fully satisfied; and there was no occasion for any other writing on the subject. That resting upon this would save time

and he was happy also that this discovery of this mistake prevented their asking of His Majesty any further proof of his good intentions towards them than what were actually meant and conveyed in those instructions. Upon this I promised immediately to send off this representation and also to desire leave and permission to make an absolute acknowledgment of the independence of the States to stand invariably as the first of the proposed treaty with those gentlemen. Meantime I think it proper to send inclosed the intended draft (though now of no use here), to show by the words scored in the preamble the ground of those gentlemen's hesitation and what gave occasion to their insisting on a separate deed under the great seal.

"I have now to add, in relation to my last conversation with Mr. Jay, that after having quitted the subject of their particular affairs, and thinking myself at liberty to enter into a greater freedom of conversation, I wished to take the opportunity of saying something relative to foreign affairs to a man of good sense and temper, who, in his present and future situation, may have it in his power, here and elsewhere, to exemplify by his good offices those favorable inclinations respecting Great Britain which he so freely and warmly expressed on the present occasion.

"Accordingly at proper periods I made no scruple in throwing out the following observations: That after settling with them, which I hoped would end to the satisfaction of both parties, our next concern regarded a settlement with France and other foreign nations. That as yet I understood we could make no guess at what France aimed at. They kept themselves on the reserve, perhaps partly with a view of being in some measure governed in their proposals by the manner in which our settlement of American affairs may proceed.

"That in the course of the American war they had taken the opportunity of making separate conquests for themselves, and encouraged by this late alteration in our system, it may be supposed they were projecting some hard terms of settlement for us, by their delay in coming to particulars, excepting only their declaration of having no interest or concern in the article of American independence; and consequently that in every view of equivalent it is to have no place in abatement of their claims of retention or further requisition.

"That having taken the Spanish and Dutch concerns also under their cover, and so as not to treat but jointly or in concurrence with them, the prospect of a speedy and favorable settlement for Great Britain became still the more unpromising, unless they, the commissioners of the colonies, should interfere to check the exorbitancy of the terms which thus might be expected to be insisted on by such combination of foreign states.

"And this prospect I said was still the worst that I understood he himself (Mr. Jay) had concluded, or was about to conclude, a treaty with Spain on the same footing with that which the Congress had settled with France. That the restraining clause in those treaties regarding truce or final peace between England and America until there was also a final settlement with those foreign states was a most unlucky circumstance, and, therefore, the more of those treaties the commissioners entered into, so much the worse for England.

"A great deal more I said, but being chiefly of a speculative kind, regarding future times, and the different situation we should be in from what had formerly been, and the need we should feel of a friendly intention on the part of the colonies, with other things of so general a nature, not necessary to be repeated here.

"In answer, Mr. Jay replied to the following purpose: That we had only to cut this knot of independence to get rid of many of those apprehensions; that if we looked better to our conduct in future we might be sure of recovering and preserving a solid and beneficial friendship with the Americans; that for the last twenty years he could not say much for us, yet he said more particularly regarding the fairness and sincerity of our professions than I choose to repeat. He continued by saying that England, under a wise administration, was capable of great things. Such a country, such a people, and blessed with such a constitution, had nothing to fear, and in thirty years would forget all her present difficulties, &c.

"That as to the Spanish treaty, he had not proceeded far in it, and unless we forced them into those engagements he did not see that the people of America had any business to fetter themselves with them, and in the mean time he assured me he would stop as to this of Spain, which I was very glad to hear of.

"He said he supposed the terms of France would be moderate, and in that case he would give his advice that when they came to light that the court of England would consider them with temper; and after making a deliberate estimate of the price they can afford to give for peace, to strike at once without haggling about it. That if their independence was once settled, he hoped that next winter would put an end to the war in general. That it was true there was a look here toward another campaign, and what might be the possible consequences of the operations in the interim, and touched upon the East Indies, as if great expectations from thence were entertained at this court, &c. Amongst other things, I omitted, when we were talking of independence, that I mentioned, by the by, as if it was understood, that when America was independent of England they would be so also of all other nations. Mr. Jay smiled, and said they would take care of that, and seemed in his countenance to express such disapprobation of any question being put on that head as would make one cautious as to the manner in which any stipulations on that subject should be proposed to those gentlemen."

Richard Oswald to Thomas Townshend, August 15 and 17, 1782; Franklin Papers, Dept. of State; printed in part in 9 Sparks' Franklin, 389-391, note.

"By the packet of this date you'll please to observe that the American business is now brought to that point that independence must be absolutely and unconditionally granted, otherwise all further correspondence with the commissioners must cease, as well as Mr. Fitz-Herbert's negotiation in the foreign treaties. I was so well convinced of that being the event of a delay, and the disagreeable consequence thereof, that I have promised to the commissioners that I would dispatch this courier express on that subject, with my opinion of the necessity of complying with their demand, having them [*sic*] at same time such assurance as I can venture upon that they will not meet with either delay or refusal.

"By the third page of the packet of this date you will please to observe that the commissioners have given up their demand of a certification of the grant by a separate deed, or patent under the great seal, and will be satisfied with its being included in the treaty and standing as an article thereof. Only that it must upon being inserted there be ratified or declared as absolutely and irrevocably acknowledged and as not depending upon the event of other or subsequent articles. It will

be easily settled in that manner to the satisfaction of those gentlemen, for which I shall only want your permission to make the declaration. If the commissioners should desire an extract of that article, I can certify it, and they will be satisfied, as Mr. Jay assures me. If it is His Majesty's pleasure that the grant should be made, the sooner I have a return to this the better; there having been of late an anxiety and appearance of diffidence in those gentlemen as to this matter, which I presume to think it would be proper to put an end to, if only to have the chance of proceeding more agreeably and advantageously through the rest of the treaty."

Richard Oswald to T. Townshend, August 17, 1782; Franklin MSS., Dept. of State.

"The commissioners here insist on their independence and consequently on a cession of the whole territory. And the misfortune is that their demand must be complied with in order to avoid the worst consequences, either respecting them in particular or the object of general pacification with the foreign states, as to which nothing can be done until the American independence is settled. Allow me, then, sir, to propose that you give me permission to declare this independence as the first article of the treaty, and to certify the same as so much absolutely finished in the process; and which thereby becomes a ratified act, let what will happen afterwards in the subsequent demands of either side in the course of the treaty. Which is, I believe, what the commissioners will insist on or will not treat at all."

Richard Oswald to T. Townshend, August 18, 1782; Franklin MSS., Dept. of State.

"I have received and laid before the King your letters of the 17th, 18th, and 21st instant, together with the three packets of papers containing conversations with Dr. Franklin and Mr. Jay, and your observations thereupon enclosed in your letter of the 17th, and I am commanded to signify to you His Majesty's approbation of your conduct in communicating to the American commissioners the fourth article of your instructions, which could not but convince them that the negotiations for peace and the cession of independence to the thirteen united colonies were intended to be carried on and concluded with the commissioners in Europe. Those gentlemen having expressed their satisfaction concerning that article, it is hoped they will not entertain a doubt of His Majesty's determination to exercise in the fullest extent the powers with which the act of Parliament hath invested him, by granting to America full, complete, and unconditional independence, in the most explicit manner as an article of treaty. But you are at the same time to represent to them, if necessary, that the King is not enabled by that act to cede independence, unconnected with a truce or treaty of peace, and that therefore the cession of independence cannot stand as a single, separate article, to be ratified by itself; but may be (and His Majesty is willing shall be) the first article of the treaty, unconditionally of any compensation or equivalent to be thereafter required in the said treaty. You will observe that the very article of your instructions referred to is conformable to this idea, as it is expressly mentioned to be offered by His Majesty as the price of peace; and that independence, declared and ratified absolutely and irrevocably, and not depending upon the event of concluding an entire treaty, might in the end prove a treaty for the purpose of independence alone, and not for a peace or truce; to which objects all the powers of the act refer.

"I should think it unnecessary here to advert to the treaty of 1607, between the court of Spain and the United Provinces, were it not that you represent Mr. Jay as having quoted the conduct of the Dutch on that occasion by way of precedent. If you look into the Corps Diplomatique and the other books upon the subject you will see this gentleman is mistaken in his opinion. It appears that the Spaniards did indeed declare, previous to the truce in 1607, that they would treat with the states *en qualité et comme les tenans pour etre provinces et pais libres sur les quels ils ne pretendent rien.* But it is to be observed that this declaration is itself conceived in very qualified terms, and though (as appears from Jeannin's account of the subsequent negotiation) the states endeavored to insert the words *pour toujours* and to omit the word *comme*, so as to make the declaration absolute and final, it remained in the original shape. The declaration was itself inserted *as the first article* in the body of the truce, and *no ratification* of this declaration was received from the King of Spain *till after the truce was agreed upon*, and what is still stronger, the ratification, when it came, actually *restricted* by express terms, the acknowledgment of independence *to last no longer than the time of the truce.* The same declaration was again inserted as the *first article* of the twelve years' truce in 1607, and afterwards a final and complete acknowledgment of the independence of the states was inserted as the *first article* in the preliminaries of peace settled in 1646, and afterwards in the same manner as the *first article* in the peace of Munster in 1648, which put the *last completion to the business.*

"If the American commissioners are, as His Majesty is, sincerely disposed to a speedy termination of the calamities of war, it is not to be conceived that they will be inclined to delay and to embarrass the negotiation by refusing to accept the independence as an article of the treaty, which by that means may be to them secured finally and completely, so as to leave no possible ground of jealousy or suspicion. But in order to give the most unequivocal proof the King's earnest wish to remove every impediment I am commanded to signify to you His Majesty's disposition to agree to the plan of pacification proposed by Dr. Franklin himself, including as it does the great point in question as part of the first article.

"The articles as specified by Dr. Franklin to you and recited in your letter to the Earl of Shelburne of the 10th July last are as follows, viz:

"(1) Of the first class *necessary* to be granted independence full and complete in every sense to the thirteen States, and all the troops to be withdrawn from thence.

"(2) A settlement of the boundaries of *their* colonies and the loyal colonies.

"(3) A confinement of the boundaries of Canada at least to what they were before the last act of Parliament, you think in 1774, if not to a still more contracted state, on an ancient footing.

"(4) A freedom of fishing on the banks of Newfoundland and elsewhere, as well for fish as whales.

"These articles were stated by you as all that Dr. Franklin thought necessary; and His Majesty, trusting that they were suggested with perfect sincerity and good faith, has authorized you to go to the full extent of them. The third article, however, must be understood and expressed to be confined to the limits of Canada as before the act of 1774. As to the fourth, *the liberty of fishing*, the privilege of drying not being included in Dr. Franklin's demand, it is taken for granted that it is not meant to be inserted in the treaty. His Majesty is also pleased,

for the salutary purposes of precluding all future delay and embarrassment of negotiation, to waive any stipulation by the treaty for the undoubted rights of the merchants whose debts accrued before the year 1775, and also for the claims of the refugees for compensation for their losses, as Dr. Franklin declares himself unauthorized to conclude upon that subject. Yet His Majesty is well founded, it is hoped, in his expectation that the several colonies will unite in an equitable determination of points upon which the future opinion of the world with respect to their justice and humanity will so obviously depend. But if, after having pressed this plan of treaty to the utmost, you should find the American commissioners determined not to proceed unless the independence be irrevocably acknowledged without reference to the final settlement of the rest of the treaty, you are to endeavor to obtain from them a declaration that if this point of independence were settled they would be satisfied as far as relates to America with such further concessions as are contained in the four articles as above stated. You are then, but in the very last resort, to inform them in manifestation of the King's most earnest desire to remove every impediment to peace that His Majesty is willing, without waiting for the other branches of the negotiation, to recommend to his Parliament to enable him forthwith to acknowledge the independence of the thirteen united colonies absolutely and irrevocably, and not depending upon the event of any other part of the treaty.

"But upon the whole, it is His Majesty's express command that you do exert your greatest address to the purpose of prevailing upon the American commissioners to proceed in the treaty, and to admit the article of independence as a part, or as one only of the other articles which you are hereby empowered to conclude."

T. Townshend to Richard Oswald, Sept. 1, 1782. Franklin MSS., Dept. of State. Printed in part in 9 Sparks' Franklin, 403, 404, note.

"By the courier Ranspach, who arrived here on the 3d, I had the honor of your letter of the 1st instant. Upon receipt of it I went out to Dr. Franklin. He askd me if I had any directions relative to the point upon which the last courier had been dispatched to England, regarding a previous declaration of their independence before a commencement of treaty. I told him I had got instructions upon that head, which although they empowered me only to make such declaration as in the first article of the treaty, yet I hoped upon a due consideration of the matter they would appear to be fully satisfying. He said if there was no particular objection he could wish to have a copy of that instruction. I told him it should be sent to him. He was ill at the time, and as he could not come to town, he gave me a letter to Mr. Jay, desiring him to come out to him in the evening. I called on that gentleman, when, informing him of the manner in which I was authorized to treat, he said he could not proceed unless their independence was previously so acknowlcdged as to be entirely distinct and unconnected with treaty. In the course of this conversation, and the day thereafter, a good deal was said of the same nature with what had passed on former occasions relative to this subject, as advised in my letters of last month.

"Two days ago Dr. Franklin sent to me, desiring a copy of the instructions which I had promised as above mentioned. I copied out the first part of your letter of the 1st instant, leaving out some immaterial words, and sent it inclosed in a letter from myself, of both of which papers there is a duplicate under this cover.

"Since then I have seen Mr. Jay frequently, and have used every argument in my power to get him over his objections to treating without a separate and absolute acknowledgment of independence. And for that purpose I found it necessary (although unwillingly), yet, as of my own private opinion, to tell him that there might be a doubt whether the powers in the act of Parliament went so far as to allow of making that grant otherwise than as in the course of a treaty for peace; which, as you are pleased to observe, was the sole object of the act.

"I said, moreover, that if they persisted in this demand, there could be nothing done until the meeting of Parliament, and perhaps for some considerable time thereafter. That certain articles had already been agreed upon, and if he went on and settled the treaty on that footing, with independence standing as the first article of it, we might give opportunity to the foreign treaties to be going on at the same time; so as, for a conclusion of a general peace, there might be nothing wanting at the meeting of Parliament but a confirmation of the first article in case it should be then thought necessary; which I imagined would not be the case.

"In answer to this Mr. Jay said there could be no judgment formed as to when the foreign treaties would end, and that until that with France was concluded they of the colonies could not give us either peace or truce, nor could they presume so much as to give an opinion of the demands of France, whatever they might be, since until their independence was acknowledged, absolute and unconnected with treaty, they were as nobody (?) and as no people, and France could tell them so if they were to pretend to interfere; having failed to acquire that character for which they had jointly contended, and therefore they must go on with France until England gave them satisfaction on the point in question. That to this they were bound by treaty, which their constituents were determined honestly and faithfully to fulfill. That being the case, it could not be expected that they as servants could take it upon them to dispense with the said acknowledgment.

"That by looking over the sundry resolves of their Congress, I might see that that assembly did not mean to seek for their character in any article of any treaty; and for that purpose Mr. Jay recommended to me the perusal of sundry parts of their proceedings as they stood in the journals of the Congress which he would mark out for me, and if I would extract and send them to England they would serve at least as an excuse for them as commissioners, in thinking themselves bound to abide by their demand. Mr. Jay accordingly gave me four volumes of their journals, with sundry passages marked out as above. Mr. Whiteford has been so good [*sic*] to copy them out; and they are inclosed.

"Mr. Jay was kind enough also to read to me an article of their instructions to the same purpose, and likewise containing paragraphs of two late letters from his colleague, Mr. John Adams, in Holland, expressly declaring that they ought not to proceed in a treaty with England until their independence is acknowledged.

"In the course of these conversations it may be supposed this gentleman took frequent opportunities to refer to the offer by Mr. Grenville to acknowledge their independence in the first instance, which they always considered to be absolute and unconnected in every shape with a treaty; and could not conceive the reason why that which we were willing to give them in May should be refused in August. If it proceeded from there being less confidence on our side, on this occasion, the change ought to make them still more cautious than usual on their

part. Mr. Jay also insisted on that offer of Mr. Grenville as a proof that the same thing being denied now could not proceed from any supposition of restraint in the enabling act.

"To avoid being tedious I forbear repeating a great many more things to the same purpose which passed in those conversations with Mr. Jay. Mr. Franklin being so much out of order, I could not think of disturbing him by frequent visits to Passy, and therefore continued taking proper opportunities of talking to Mr. Jay; and the more readily that by any judgment I could form of his real intentions, I could not possibly doubt of their pointing directly at a speedy conclusion of the war; and also, leaning as favorably to the side of England as might be consistent with the duties of the trust he has undertaken.

"To convince me that nothing less than this stood in the way of agreeing to my request of accommodating this difficulty in some shape or other, he told me at last if Dr. Franklin would consent, he was willing, in place of an express and previous acknowledgment of independence, to accept of a constructive denomination of character, to be introduced in the preamble of the treaty, by only describing their constituents as the thirteen United States of America. Upon my appearing to listen to this and to consent to the substitution, he said, 'But you have no authority in your commission to treat with us under that denomination, for the sundry descriptions of the parties to be treated with, as they stand in that commission, will not bear such application to the character we are directed to claim and abide by as to support and authenticate any act of your subscription to that purpose, and particularly to the substitution now proposed, there are such a variety of denominations in that commission that it may be applied to the people you see walking in the streets as well as to us.'

"When, in reply, I imputed that variety to the official style of such like papers, Mr. Jay said it might be so, but they must not rest a question of that importance upon any such explanation. And since they were willing to accept of this, in place of an express declaration of independence, the least they could expect was that it should appear to be warranted by an explicit authority in that commission.

"I then asked if, instead of States, it would not do to say provinces; or States or provinces. Mr. Jay said neither of these would answer.

"I then begged the favor of him to give me in writing some sketch of the alteration he would have to be made in the commission. He readily did so in a minute which is inclosed; to be more largely explained, if necessary, when the commission comes to be made out. He also said that this new commission must be under the great seal as the other was.

"Before I quitted this subject I tried one other expedient for saving time and avoiding the necessity of a new commission; by reading to Mr. Jay the second article of my instructions, which empowers me to treat with them as commissioned by constituents of any denomination whatever, and told him that although this power meant only to apply to character as assumed by them, and not to an admission by me without exception, yet in the present described character of States I would not only admit their assuming that appellation in the preamble of the treaty, but I would venture to repeat it, so as it should appear to be an acknowledgment on my part. In doing so I could not suppose any hazard of objection at home, considering what had passed on a former occasion above mentioned, together with the said power in my instructions. But Mr. Jay said they could admit of no authority but what was

explicitly conveyed to me by a commission in the usual form, and therefore to put an end to this difficulty there was an absolute necessity for a new commission.

"He at the same time told me that to satisfy His Majesty's ministers of the propriety of their conduct, as persons under trust, he had sketched out a letter to me, which I might send home if I pleased. He read the scroll of it to me, and promised to write it out fair, and give it to me before the departure of a courier.

"So the affair rested yesterday, the 9th, when I received a letter from Dr. Franklin, desiring a copy of the fourth article of my instructions, which I had shown to Mr. Jay, as formerly advised. Inclosed there is a copy of the Doctor's letter.

"Doubting as to the propriety of giving such things in writing, I thought it best to go out to the Doctor, carrying the instructions along with me, to see whether a reading of that article would satisfy him; but after reading it, as he still expressed a desire of having a copy, I told him that although I had no orders to that purpose, yet at any hazard whatsoever, since he desired it, I would not scruple to trust it in his hands, and then sat down and wrote out a copy and signed it, which, after comparing with the original, he laid by, saying very kindly that the only use he proposed to make of it was, that in case they took any liberties for the sake of removing difficulties not expressly specified in their instructions, he might have this paper in his hands to show in justification of their confidence, or some words to that purpose, for I cannot exactly quote them. The Doctor then desired I would tell Mr. Jay he wished to see him in the evening. He did go out that night and again this morning, no doubt with a view of agreeing upon an expedient for removing those obstacles to their proceeding, as hinted at in the Doctor's letter to me.

"At noon, and since writing the above, Mr. Jay called and told me that upon further consultation and consideration of the matter, it was thought advisable not to press upon His Majesty's ministers those arguments which he proposed to make use of in the letter he intended to write me (and which it was understood I might send home), as considering it somewhat more than indelicate for them to pretend to see more clearly than the King's ministers might do the expediency, if not the necessity, at this critical time, to decide with precision and dispatch upon every measure that can be reasonably taken for extricating Great Britain from out of the present embarrassing situation in which her affairs must continue to be involved while there remains any hesitation in coming to an agreement with the States of America.

"I liked the scroll of the letter so much when it was read to me yesterday that I was sorry it was withheld; I even pressed to be intrusted with it, in gratification of my own private wish that the writer of it might receive from good men that share of applause that is due to those who wish well to the peace of mankind in general, and who seem not to be desirous of expunging altogether from their breast the impressions which had been fixed there by those habits and natural feelings by which individuals are tied in attachment to particular combinations of society and country. But I could not prevail, and was obliged to be contented with a recommendation to say what I thought proper in my own way. Finding it so, there remained for me only to ask a single and final question of Mr. Jay, whether in this his last conference with Doctor this morning (for he was just then come in from him) it was settled between

them that upon my receiving from His Majesty a new commission, under the great seal, such as the last, with an alteration only as before mentioned, of my being empowered to treat with them as commissioners of the thirteen United States of America, naming the said States by their several provincial distinctions, as usual, I said whether in that case they would be satisfied to go on with the treaty, and without any other declaration of independence than as standing as an article of that treaty.

"Mr. Jay's answer was that with this they would be satisfied, and that immediately upon such commission coming over they would proceed in the treaty, and more than that, said they would not be long about it, and perhaps would not be over hard upon us in the conditions.

"Having stated those conversations and other circumstances as they actually passed, to the best of my remembrance, it would not become me to go farther by giving any opinion as to the measures proper to be taken in consequence thereof. Yet, sir, I hope you will excuse, and I think it my duty to say, this much, that by what I have been able to learn of the sentiments of the American commissioners, in case the compromise now proposed (which with great difficulty they have been persuaded to agree to) is refused, there will be an end to all further confideuce and communication with them. The consequence of which I will not presume to touch upon, either as regarding America or foreign affairs. On the other hand, if the expedient of a new commission is adopted, I beg leave to say that no time ought to be lost in dispatching it. There being now four couriers here, and as they may be wanted at home, it is thought proper that one of them, as extra, may go along with the courier Lawzun, who goes from Mr. Fitzherbert's office."

Richard Oswald to Thomas Townshend, Sept. 10, 1782; Franklin papers, Dept. of State; printed in part in 9 Sparks' Franklin, 405–407, notes.

A memorandum is attached to Mr. Oswald's letter to Mr. Townshend of September 11, 1782, entitled, "Minutes regarding the intended treaty with the commissioners of the colonies, and what is required of me by His Majesty's instructions on that head, 29th August, 1782."

In this memorandum occurs the following:

"Article 4. A freedom of fishery on the banks of Newfoundland and elsewhere, said to be another indispensable article.

"This was proposed and read out of the minutes by Dr. Franklin on the 10th July, under the general description. I did not then think it proper to ask for an explanation: nor whether he included a privilege of drying fish on the island of Newfoundland.

"As to fishing on the Great Bank, or any other bank, I did not think it material to ask any questions, as I supposed the privilege would not be denied them; or, if denied, I doubted whether their exclusion could be maintained but by continuing in a state of perpetual quarrel with the people of the New England governments. An explanation was still the less necessary, that a question on the same subject would come under consideration in our treaty with France. In the determination of this last point, perhaps, it may be no loss to Great Britain that the Americans are admitted to an equal privilege with the French. Those four articles were, to the best of my remembrance, all that were said by the Doctor on the 10th July as indispensable in a settlement of any kind."

Franklin MSS., Dept. of State.

In a letter from Mr. Strachey, of the British legation, to Mr. T. Townshend, Paris, November 29, 1782, "eleven at night," it is said, "a very few hours ago we thought it impossible that any treaty could be made. We have at last, however, brought matters so near a conclusion that we have agreed upon articles and are to meet to-morrow for the purpose of signing. Inclosed are such of the articles as are altered, and an additional one which we mean as a security in case it be true that Bermuda is taken. The article on the fishery has been difficult to settle, as we thought the instructions were rather limited. It is, however, beyond a doubt that there could have been no treaty at all if we had not adopted that article."

Franklin MSS., Dept. of State.

In a letter from Mr. Oswald to Mr. T. Townshend, dated Paris, November 30, 1782, it is said: "If we had not given way in the article of the fishery we should have had no treaty at all, Mr. Adams having declared that he would never put his hand to any treaty if the restraints regarding the 3 leagues and 15 leagues were not dispensed with, as well as that denying his countrymen the privilege of drying fish on the unsettled parts of Nova Scotia."

Franklin MSS., Dept. of State.

"The clamor against the peace in your Parliament would alarm me for its duration if I were not of opinion with you that the attack is rather against the minister. I am confident none of the opposition would have made a better peace for England if they had been in his place; at least I am sure that Lord Stormont, who seems loudest in railing at it, is not the man who could have mended it."

Dr. Franklin to the Bishop of St. Asaph (Dr. Shipley), Mar. 17, 1783. Franklin MSS., Dept. of State; 9 Sparks' Franklin, 498.

"As Lord Shelburne had excited expectation of his being able to put a speedy termination to the war, it became necessary for him either to realize those expectations or to quit his place. The Parliament having met while his negotiations with us were pending, he found it expedient to adjourn it for a short term, in hopes of then meeting it with all the advantages which he might naturally expect from a favorable issue of the negotiations. Hence it was his interest to draw it to a close before that adjournment expired, and to obtain that end both he and his commissioner prevailed on themselves to yield certain points upon which they would probably have been otherwise more tenacious. Nay, we have, and then had, good reason to believe that the latitude allowed by the British cabinet for the exercise of discretion was exceeded on that occasion."—Draft of Mr. Jay to Mr Livingston, 18th July, 1783, "concluded to be left out."

Franklin MSS., Dept. of State.

In the original draft of Dr. Franklin's letter of July 22, 1783, to Mr. R. R. Livingston, as on file in the Franklin papers in the Department of State, is the following: "I will only add, with respect to myself, neither the letter to Mr. Marbois, handed to us through the British negotiators, (a suspicious channel) nor the conversations respecting the fishery, the boundaries, the royalists, &c., recommending moderation in our

demands, are of weight sufficient in my mind to fix an opinion that this court (of France) wished to restrain us in obtaining any degree of advantage we could prevail on our enemies to accord; since those discourses are fairly resolvable by supposing a (very natural, *interlined*) apprehension that we, relying too much on the ability of France to continue the war in our favor (or supply us constantly with money, *interlines*) might insist on more advantages than the English would be willing to grant, and thereby lose the opportunity of making peace, so necessary to all our friends.

"I ought not, however, to conceal from you that one of my colleagues is of a very different opinion from me in these matters. He thinks the French minister one of the greatest enemies of our country, that he would have straitened our boundaries to prevent the growth of our people, contracted our fishery to obstruct the increase of our seamen, and retained the royalists among us to keep us divided; that he privately opposes all our negotiations with foreign courts, and afforded us during the war the assistances we received only to keep us alive that we might be so much the more weakened by it; that to think of gratitude to France is the greatest of follies, and that to be influenced by it would ruin us. He makes no secret of his having these opinions, expresses them publicly sometimes in presence of the English ministers; and speaks of hundreds of instances which he could produce in proof of them, none of which, however, have yet appeared to me, unless the conversations and letter above mentioned are reckoned such. If I were not convinced of the real inability of this court to furnish the farther supplies we asked, I should suspect these discourses of a person in his station might have influenced the refusal, but I think they have gone no further than to occasion a suspicion that we have a considerable party of Antigallicans in America who are not Tories, and consequently to produce some doubts of the continuance of our friendship. As such doubts may hereafter have a bad effect, I think we cannot take too much care to remove them; and it is therefore I write this to put you on your guard (believing it my duty, though I know that I hazard by it a mortal enmity), and to caution you respecting the insinuations of that gentleman against this court, and the instances he supposes of their ill-will to us, which I take to be as imaginary as I know his fancies to be, that Count de V. and myself are continually (plotting against him and, *interlined*) employing the newswriters of Europe to depreciate his character, &c., but, as Shakespeare says, 'Trifles light as air,' &c. I am persuaded, however, that he means well for his country, is always an honest man, often a wise one, but sometimes and in some things, absolutely out of his senses.

"When the commercial article mentioned in yours of the 26th was struck out of our proposed preliminaries by the then British ministry, the reason given was that sundry acts of Parliament still in force were against it, and must be first repealed, which, I believe, was really their intention; and sundry bills were accordingly brought in for that purpose. But new ministers with different principles succeeding, a commercial proclamation totally different from those bills has lately appeared. I send inclosed a copy of it. We shall try what can be done in the definitive treaty towards setting aside that proclamation. But if it should be persisted in, it will then be a matter worthy the attentive consideration of Congress whether it will be now prudent to retort with a similar regulation in order to force its repeal (which may possibly tend to bring

on another quarrel, *interlined*), or to let it pass without notice, and leave it to its own inconvenience (or rather impracticability, *interlined*) in the execution, and to the complaints of the West India planters, who must all pay much dearer for our produce under those restrictions. I am not enough master of the course of our commerce to give an opinion on this particular question, and it does not behoove me to do it; yet I have seen so much embarrassment and so little advantage in all the restraining and compulsive systems, that I feel myself strongly inclined to believe that a state which leaves all her ports open to all the world upon equal terms will by that means have foreign commodities cheaper, and sell its own productions dearer, and be on the whole the most prosperous. I have heard some merchants say that there is 10 per cent. difference between *Will you buy?* and *Will you sell?* When foreigners bring us their goods they want to part with them speedily, that they may purchase their cargoes and dispatch their ships which are at constant charges in our ports; we have then the advantage of their *Will you buy?*—and when they demand our produce we have the advantage of their *Will you sell?* and the concurring demands of a number also contribute to raise our prices. Thus both these questions are in our favor at home, against us abroad. The employing, however, of our own ships and raising a breed of seamen among us, though it should not be a matter of so much private profit as some imagine, is nevertheless of political importance and must have weight in considering this subject."

This letter, as received by Mr. Livingston, is published in 2 Dip. Corr., 462.

In the draft I give above are noted some of the more important changes made by Dr. Franklin before giving the letter to be copied.

In the original draft of Dr. Franklin's letter to Mr. Morris, of July 27, 1783, after speaking of the financial difficulties which the legation was under, and the generous conduct of the French "Farmers General" in withholding all pressure for payment during the war, the following is entered on the margin: "I ought and do as warmly recommend to you the doing them justice as speedily as may be, and favoring them where it is practicable, for we are really under great obligations to them."

Franklin MSS., Dept. of State.

"Inclosed is my letter to Mr. Fox. I beg you would assure him that my expressions of esteem for him are not mere professions. I really think him a *great* man, and I would not think so if I did not believe he was at bottom, and would prove himself a good one. Guard him against mistaken notions of the American people. You have deceived yourselves too long with vain expectations of reaping advantage from our little discontents. We are more thoroughly an enlightened people with respect to our own political interests than perhaps any other under the heavens. Every man among [us] reads, and is so easy in his circumstances as to have leisure for conversations of improvement and for acquiring information. Our domestic misunderstandings, when we have them, are of small extent, though monstrously magnified by your microscopic newspapers. He who judges from them that we are upon the point of falling into anarchy, or returning to the obedience of Britain, is like one who being shown some spots in the sun should fancy that the whole disk would soon be overspread with them and that there would be an end of daylight. The great body of intelligence among

our people surrounds and overpowers our petty dissensions, as the sun's great mass of fire diminishes and destroys his spots. Do not, therefore, any longer delay the evacuation of New York, in the vain hope of a new revolution in your favor, if such a hope has had any effect in occasioning the delay. It is now nine months since the evacuations were promised. You expect, with reason, that the people of New York should do your merchants justice in the payment of their old debts; consider the injustice you do them in keeping them so long out of their habitations and out of their business by which they might have been enabled to make payment.

"There is no truth more clear to me than this, that the great interest of our two countries is a thorough reconciliation. Restraints on the freedom of commerce and intercourse between us can afford no advantage equivalent to the mischief they will do by keeping up ill humor and promoting a total alienation. Let you and I, my dear friend, do our best towards advancing and securing that reconciliation. We can do nothing that will in our dying hour afford us more solid satisfaction."

Dr. Franklin to David Hartley, Sept. 6, 1783; Franklin MSS., Dept. of State; 10 Sparks' Franklin, 1.

The letter to the Mr. Fox, above alluded to, is dated September 5, 1783, and is in the following words:

"I received in its time the letter you did me the honor of writing to me, by Mr. Hartley, and I cannot let him depart without expressing my satisfaction in his conduct towards us, and applauding the prudence of that choice which sent us a man possessed of such a spirit of conciliation, and of all that frankness, sincerity, and candor which naturally produce confidence, and thereby facilitate the most difficult negotiations. Our countries are now happily at peace, on which I congratulate you most cordially, and I beg you to be assured that as long as I have any concern in public affairs I shall readily and heartily concur with you in promoting every measure that may tend to promote the common felicity."

In the draft of Dr. Franklin's letter of September 13, 1783, to Mr. Boudinot, President of Congress (9 Sparks' Franklin, 15; 2 Dip. Corr., 484), is the following:

"This court (of France) continues favorable to us. Count de Vergennes was resolute in refusing to sign the definitive treaty with England before ours was signed. The English ministers were offended, but complied. I am convinced that court (of Great Britain) will never cease endeavoring to disunite us. We shall, I hope, be constantly on our guard against those machinations, for our safety consists in a steady adherence to our friends and our reputation in a faithful regard to treaties, and in a grateful conduct to our benefactors. [The malignity of the refugees in England is outrageous. They fill the papers with falsehoods to exasperate that nation against us and depreciate us in the eyes of all Europe. They may do us some present mischief, but time and prudence will draw their teeth, pare their claws, and heal the scratches they are making on our national character.]"

The passage in brackets is marked out in the draft, and does not appear in the letter as actually sent. But its statement as to the efforts of the refugees to prevent peace and to embitter the relations between

Great Britain and the United States is abundantly verified by the subsequently published letters and memoirs of Curwen and Hutchinson.

"The affairs of Ireland are still unsettled. The Parliament and volunteers are at variance; the latter are uneasy that in the late negotiations for a treaty of commerce between England and America the British minister had made no mention of Ireland, and they seem to desire a separate treaty of commerce between America and that Kingdom.

"It was certainly disagreeable to the English ministers that all their treaties for peace were carried on under the eye of the French court. This began to appear towards the conclusion, when Mr. Hartley refused going to Versailles to sign there with the other powers our definitive treaty, and insisted on its being done at Paris, which we in good humor complied with, but at an earlier hour, that we might have time to acquaint le Comte de Vergennes before he was to sign with the Duke of Manchester. The Dutch definitive was not then ready, and the British court now insists on finishing it at London or the Hague. If, therefore, the commission to us, which has been so long delayed, is still intended, perhaps it will be well to instruct us to treat either here or at London, as we may find most convenient. The treaty may be conducted even there in concert and in the confidence of communication with the ministers of our friends, whose advice may be of use to us.

"With respect to the British court, we should, I think, be constantly upon our guard, and impress strongly upon our minds that though it has made peace with us it is not in truth reconciled either to us or to its loss of us, but still flatters itself with hopes that some change in the affairs of Europe, or some disunion among ourselves, may afford them an opportunity of recovering their dominion, punishing those who have most offended, and securing our future dependence. It is easy to see by the general turn of the ministerial newspapers (light things, indeed, as straws and feathers, but like them they show which way the wind blows) and by the malignant improvement their ministers make, in all the foreign courts, of every little accident or dissension among us, the riot of a few soldiers at Philadelphia, the resolves of some town meetings, the reluctance to pay taxes, &c., all which are exaggerated, to represent our Governments as so many anarchies, of which the people themselves are weary, and the Congress as having lost its influence, being no longer respected. I say it is easy to see from this conduct that they bear us no good will, and that they wish the reality of what they are pleased to imagine. They have, too, a numerous royal progeny to provide for, some of whom are educated in the military line. In these circumstances we cannot be too careful to preserve the friendships we have acquired abroad, and the union we have established at home, to secure our credit by a punctual discharge of our obligations of every kind, and our reputation by the wisdom of our councils; since we know not how soon we may have a fresh occasion for friends, for credit, and for reputation.

"The extravagant misrepresentations of our political state in foreign countries made it appear necessary to give them better information, which I thought could not be more effectually and authentically done than by publishing a translation into French, now the most general language in Europe, of the book of Constitutions, which had been printed by order of Congress. This I accordingly got well done, and presented two copies, handsomely bound, to every foreign minister here, one for himself, the other, more elegant, for his sovereign. It has

been well taken, and has afforded matter of surprise to many who had conceived mean ideas of the state of civilization in America, and could not have expected so much political knowledge and sagacity had existed in our wildernesses. And from all parts I have the satisfaction to hear that our Constitutions in general are much admired. I am persuaded that this step will not only tend to promote the emigration to our country of substantial people from all parts of Europe, by the numerous copies I shall disperse, but will facilitate our future treaties with foreign courts who could not before know what kind of Government and people they had to treat with. As in doing this I have endeavored to further the apparent views of Congress in the first publication, I hope it may be approved and the expense allowed. I send herewith one of the copies."

Dr. Franklin to Thomas Mifflin, President of Congress, Dec. 25, 1783; Franklin MSS., Dept. of State; 10 Sparks' Franklin, 37, *ff.*

"I have received your favor of the 30th of September, for which I thank you. My apprehension that the union between France and our States might be diminished by accounts from hence was occasioned by the extravagant and violent language held here by a public person, in public company, which had that tendency; and it was natural for me to think his letters might hold the same language, in which I was right; for I have since had letters from Boston informing me of it. Luckily here, and I hope there, it is imputed to the true cause, a disorder in the brain, which, though not constant, has its fits too frequent. I will not fill my letter with an account of those discourses. Mr. Laurens, when you see him, can give it to you; I mean of such as he heard in company with other persons, for I would not desire him to relate private conversations. They distressed me much at the time, being then at your earnest instances soliciting for more aids of money, the success of which solicitation such ungrateful and provoking language might, I feared, have had a tendency to prevent. Enough of this at present."

Dr. Franklin to Robert Morris, Dec. 25, 1783; Franklin MSS., Dept. of State; 10 Sparks' Franklin, 43.

Mr. Laurens, on February 28, 1784, in a heretofore unpublished letter to Dr. Franklin (Franklin MSS., Dept. of State), writes from London:

"A large meeting of merchants and West India proprietors are at this moment assembled to deliberate on the trade between the British islands and the United States. You will perceive from the contents of Mr. Edward's pamphlet that the West India planters and plantation holders are not a little alarmed. I am promised the result of the meeting some time this evening; if it reaches me in time you shall be informed in a postscript. But it is boldly asserted here by certain persons, instructed as I apprehend by the late ministry, and encouraged, perhaps, by the impolitic droppings of a friend, that there is no power at present subsisting on the part of America to treat for commerce with Great Britain. I can only reply that I believe this a mistake, and hope to be soon fully informed. Meantime the United States seem to have at length felt the effect of the proclamation of 2d July, 1783. No doubt that of December will be a provoking aggravation. Let our people determine to act wisely, and these conjurers [*sic*] will soon be compelled to act with more wisdom and with a little more sincerity than we have experienced from them in the last eleven months, or so many years."

To this Franklin replied in a letter from Passy, of March 12, 1784. In this letter occurs the following passages (see 10 Sparks' Franklin, 73):

"I thank you much for your information of the proceedings of the West India people. It seems to me that we cannot be much hurt by any selfish regulations the English may make respecting our trade with their islands. Those who at present wish to kick the hedgehog will grow tired of that sport when they find their toes bleed."

In a letter from Mr. Laurens, London, April 18, 1784, to Dr. Franklin (heretofore unpublished), is the following:

"Nothing further done by administration respecting American intercourse and commerce. * * * A judicious, intelligent friend, who has been much consulted, called upon me last night and assured me 'nothing liberal or to good effect would be done, or he very much feared so; that he was tired and would be done with them. Mr. Pitt is well disposed, having been well advised, but the weight of the council is against him.' I feel no regret on this account. Difficulties will have an excellent effect on our side. I think my countrymen appear to most advantage when they have a rub to encounter, and they seem to be at this moment taking measures which should have been adopted upon the first appearance of the proclamation of 2d July, 1783. The West India merchants and planters, every sensible man in trade with whom I converse, every unemployed manufacturer, and many who dread loss of future orders, are uneasy, and all will come right when we determine to act right.

Franklin MSS., Dept. of State.

## § 150*a*.

### JAY'S TREATY.

For Mr. Hamiltou's vindication of the treaty, see Essays of Camillus, 4 and 5 Lodge's Hamilton; 8 *ibid.*, 386, 421, 423. For Mr. Hamilton's objections to the treaty when first promulgated, see 1 Gibbs' Adm. of Washington, &c., 223.

## § 150*f*.

### CLAYTON-BULWER TREATY.

An interesting article on the Clayton-Bulwer treaty is in 99 Quar. Rev. (June, 1856), 235 *ff*. This article is attributed by Mr. Hayward (Letters, &c., 290) to Sir E. L. Bulwer; see, also, article by Sir H. Bulwer (Lord Dalling) 104 Edinb. Rev., 280 (July, 1856).

## § 172*a*.

### MATRICULATION AND RESTRICTIONS ON UNITED STATES CITIZENS ABROAD.

"The attention of the Department has recently been drawn to a 'Notice to Americans' published by the legation of the United States in Mexico in August last, and of which the following is a copy:

"'Americans are hereby notified that, in conformity with Article I, Chapter V, of the Law of Foreigners of June, 1886, foreigners who may

have acquired real estate or have had children born to them within (the) Republic will be considered by the Mexican Government as Mexican citizens, unless they officially declare their intention to retain their own nationality and to that effect obtain from the department of foreign affairs a certificate of nationality on or before December 4, 1886.

"'Said certificates may be obtained for Americans through the legation of the United States in this city. Applications for same must be accompanied by one dollar for the necessary revenue stamps.

"'(Signed): Legation of the United States, Mexico, August 20, 1886.'

"A copy and a translation of the law in question were transmitted to the Department in Mr. Jackson's No. 241, of the 21st of June last, but as the dispatch contained copies and translations of other Mexican laws, to which specific references were made for the Department's guidance, the provisions of Article I of Chapter V of the Law of Foreigners, to which no reference was made, were overlooked, until the notice above quoted, which was not submitted nor communicated to the Department, was subsequently and only incidentally brought to its attention. A comparison of the notice with the law shows that there are certain provisions of the latter to which the notice does not refer; but they do not in any way tend to remove, but rather to increase, the dissent of this Government from the position of Mexico as disclosed in the notice. The law in question, having been adopted for the purpose of denationalizing certain classes of foreigners in that country, unless they take some affirmative action to preserve their nationality, contains a principle which this Government is compelled to regard as inadmissible.

"The United States, while claiming for aliens within its jurisdiction, and freely conceding to its citizens in other jurisdictions, the right of expatriation, has always maintained that the transfer of allegiance must be by a distinctly voluntary act, and that the loss of citizenship cannot be imposed as a penalty nor a new national status forced as a favor by one Government upon a citizen of another.

"Not only is this believed to be the generally recognized rule of international law, but it is pertinent to notice that it was accepted and acted upon by the mixed commission under the convention of July 4, 1868, between the United States and Mexico. The first umpire of that commission, Dr. Francis Lieber, held, and the commissioners subsequently followed his decision, that a law of Mexico declaring every purchaser of land in that country a Mexican citizen unless he expressed a desire not to become so, did not operate to change, against their will, the national status of citizens of the United States who had purchased land in Mexico, but who had omitted in so doing to disclaim an intention to transfer their allegiance.

"The notice in question is not interpreted by the Department as an admission by the legation of the defensibleness, on generally accepted principles of international intercourse, of legislative decrees changing the national status of foreigners without their consent. Americans are

notified that, unless they do certain things, they 'will be considered by the Mexican Government as Mexican citizens.' This, it is to be observed, does not assert or imply that the legation acceded to the Mexican position. But in order to avoid any question of this kind hereafter you will take occasion to make known to the Mexican Government that this Department does not regard the publication of the notice above referred to as admitting the doctrine of involuntary change of allegiance, or that the same can be held conclusive upon our citizens; and that this Government is constrained to withhold its assent from that doctrine, as embodied in Article I, Chapter V, of the law referred to.

Mr. Bayard, Sec. of State, to Mr. Manning, Nov. 20, 1886. MSS. Inst., Mex.; For. Rel., 1886.

"By article 28, chapter iii [of the Salvadorian law of September 29, 1886], it is provided that matriculation concedes privileges and imposes special obligations, which are called by the laws of the Republic 'the rights of foreigners.' These rights of foreigners, as stated in article 29 of the same chapter, are as follows:

"1. To appeal to the treaties and conventions existing between Salvador and their respective Governments.

"2. To have recourse to the protection of their sovereign through the medium of diplomatic representation.

"3. The benefit of reciprocity.

"Unless a foreigner possesses a certificate of matriculation no authority or public functionary of Salvador, as has been seen, is permitted to concede to him any of these rights; and it is further provided in article 27 of the chapter in question, that the certificate of matriculation shall not operate retroactively upon a claim of right arising anterior to the date of matriculation. Thus the object and purport of the law in question is to make the enjoyment and assertion by a foreigner in Salvador of the consequent rights and privileges of his national character, whether they are guaranteed by treaty or secured by the general rules of international law, conditional upon his contemporaneous possession of a paper prescribed by the municipal law of the country as the proper proof of his citizenship.

"In order to appreciate the significance of such a requirement it is only necessary to consider that, if admitted, its effect would be to leave the question of the national status of a foreigner wholly to the determination of the Salvadorian authorities, and that, in the event of his failure to exhibit such proofs of citizenship as they may deem sufficient his right to claim the protection of his Government would be lost. Conversely the right of his Government to interpose in his behalf would also be destroyed; for to deny to a foreigner recourse to his Governernment by necessary implication questions and denies the right of that Government to intervene.

"Thus, by making the compliance of a foreigner with a municipal regulation a condition precedent to the recognition of his national character, the Salvadorian Government not only assumes to be the sole judge of his status, but also imposes upon him, as the penalty of noncompliance, a virtual loss of citizenship.

"Nothing would seem to be required beyond the mere statement of these propositions, fully sustained as they appear to be by the context of the law in question, to confirm the conviction that its enforcement would give rise to continual and probably grave controversies. Such has been to result of the occasional attempts elsewhere than Salvador to enforce similar regulations, and such would seem to be the necessary result of the attempt of particular Governments to enforce laws which operate as a restriction upon the exercise and performance both by states and by citizens of their relative rights and duties according to the generally accepted rules of international intercourse. Such intercourse should always be characterized by the utmost confidence in the good faith of nations, and by the careful abstinence of each from the adoption of measures which, by operating as a special restriction upon the action of other Governments in matters in which they have an important if not the chief concern, seem to imply distrust of their intentions. It is proper to observe that the Government of Mexico, guided by the experience of an ample trial of her law of matriculation, modified it in June last by the repeal of those provisions which made the matriculation of foreigners compulsory and a condition of the exercise of their right of appeal to their Governments.

"It may be said that the question of citizenship is one which peculiarly concerns the Government whose protection is claimed and in the decision of which that Government has a paramount sovereign right. This results not only from the relation of a Government to its citizens, but from the fact that international law recognizes the right of each state to prescribe the conditions of citizenship therein and regulate for itself the process whereby foreigners may, if they so desire, expatriate themselves and become naturalized. In the United States this process is defined by a statute, the administration of which is committed to the courts, who issue to the naturalized citizen certain evidence of his compliance with the law. The efficiency of this law, the basal principle of which is the voluntary action of the alien, is fully recognized by all states that concede the right of expatriation, and among these is Salvador.

"The principle and validity of our naturalization law being thus admitted, it would seem that the mere question of its administration, and of the proper evidence of its administration, was one for the determination of this Government. But, by the matriculation law of Salvador, that Government is made the first and the final judge of the sufficiency of the evidence of American citizenship, even in the case of a naturalized citizen of the United States not of Salvadorian origin.

"In this relation it is pertinent to advert to the recent case of Julio R. Santos, a naturalized citizen of the United States of Ecuadorian origin, who was arrested, while residing in his native country, on a charge of complicity in a revolutionary movement there. The Government of Ecuador contended that he had lost his American citizenship by a residence of more than two years in his native country, under that article of the naturalization treaty with the United States which provides that a residence of more than two years in the native country of a naturalized citizen shall, subject to rebuttal, be construed as an intention on his part to remain there. The United States, however, having ascertained and established to its own satisfaction the intention of Mr. Santos to return to the country of his adoption, held its judgment in the matter to be conclusive, and demanded for him the rights and privileges of a citizen of the United States.

"The effect of the Salvadorian statute in question is to invest the officials of that Government with sole discretion and exclusive authority to determine conclusively all questions of American citizenship within their territory. This is in contravention of treaty right and the rules of international law and usage, and would be an abnegation of its sovereign duty towards its citizens in foreign lands, to which this Government has never given assent.

"Articles 39, 40, and 41, chapter iv, of the law in question, purport to define the conditions under which diplomatic intervention is permitted in behalf of foreigners in Salvador whose national character is admitted. I regret that the Department is unable to accept the principle of any of these articles without important qualifications.

"The article first enumerated provides that only in the event of a denial or a voluntary retardation of justice, and after having resorted in vain to all the ordinary remedies afforded by the laws of the Republic, may foreigners appeal to their Governments. The succeeding article defines what is meant by a denial of justice, and declares that such denial exists only when the judicial authority refuses to decide the matter before it; and that, consequently, the fact that a judge may have pronounced a decision, although it may be said to be iniquitous or in express violation of law, cannot afford a ground for resort to the diplomatic channel.

"Article 41 declares that delay in the administration of justice is not to be considered voluntary when the judge alleges any legal or physical impediment which he is unable to remove.

"The comment made above on the law of matriculation is equally applicable to these provisions, that the denial to the foreigner of the right of appeal to his Government necessarily implies the denial in the particular case of his Government's right to intervene; and as this denial is based upon the decisions of the tribunals of Salvador, the judgments of those tribunals are made internationally binding as to all questions of municipal or of international law coming before them.

"It may be admitted as a general rule of international law that a denial of justice is the proper ground of diplomatic intervention. This, however, is merely the statement of a principle, and leaves the question in each case, whether there has been such denial, to be determined by the application of the rules of international law.

"By articles 39, 40, and 41, as they are understood by this Department, the Government of Salvador would avoid this question, especially where the act complained of was committed by the authorities of the Republic in pursuance of its laws. This doctrine is novel to this Government, which has maintained and acknowledged in its treaties and otherwise, as a settled principle of international policy, the rule that in cases of violation of international right by the authorities of a state in pursuance of municipal regulations, the final decision of the national tribunals, sustaining the action of the authorities, is a consummation of the wrong complained of and constitutes no bar to international discussion."

Mr. Bayard, Sec. of State, to Mr. Hall, Nov. 29, 1886. MSS. Inst., Cent. Am.

## § 174a.

### IMPEACHMENT OF NATURALIZATION.

The following was inadvertently omitted in the first edition:

"It is at the same time not to be doubted but that a decree of naturalization, like any other judgment, may be impeached for fraud in its procurement, by a direct and proper judicial proceeding instituted for that purpose, and it is equally incontrovertible that the party to such decree who may have been guilty of fraud in its procurement, and all persons aiding and abetting him in such purpose, are liable to be proceeded against criminally and punished under the laws of the United States, and if the decree of naturalization should be found to have been procured by fraud, it would, as in the case of any other judgment thus corruptly obtained, be set aside and held for naught.

"With the facts now in possession of the Department in regard to the naturalization of Mr. M— N—, it is difficult, if not impossible, to resist the conclusion that his pretended naturalization is the result of a deliberate and preconcerted fraud on his part; he is now without the jurisdiction of the United States, where its judicial process cannot reach him. It cannot be that a fraudulently obtained decree of a court, which would be set aside if the process of the court could reach and bring within its jurisdiction the party holding it, is to be considered conclusive upon this Government merely because the party has placed himself without its jurisdiction, and is availing himself of the first fraud to practice another. It is the executive department of the Government to which, in this case, he appeals. The executive department of the Government must therefore see that the good name and good faith of the Government be not compromitted by sustaining a claim resting on fraud and falsehood, and which the courts would set aside, could the case be brought within their jurisdiction. While the executive depart-

ment bows with deference to the decrees of the judicial department of the Government within the limits of their reach, it is not bound to claim for these decrees in foreign countries when manifestly obtained by fraud or perjury, a validity which might not be conceded, and which could neither be enforced or defended on the grounds of truth, or justice, or equity."

Mr. Fish, Sec. of State, to Mr. Maynard, Feb. 11, 1876. MSS. Inst., Turkey.

Under Revised Statutes of the United States, § 2163, an applicant for naturalization cannot be indicted for perjury as to his residence, the statute virtually prohibiting taking an oath as to residence.

(U. S. *v.* Grottkau, 30 Fed. Rep., 672; citing State *v.* Helle, 2 Hill, S. C., 290.)

That decrees of naturalization are judgments, and that the certificate proves itself, see State *v.* Papen, 1 Brewst., 263; 14 Op., 511 (Williams). In McCoppin, *in re*, 5 Saw., 632, the right of the court decreeing naturalization to open the decree is treated as unquestioned. While such decrees, when on their face valid, cannot be opened or vacated by the Department of State, they will not, if found by the Department to have been granted on the faith of fraudulent misrepresentations by the party naturalized, be made the basis of a claim on a foreign power. The Department has supreme jurisdiction, under the directions of the President, of the foreign relations of the United States, in conducting which it is not subject to the control of the judiciary. *Supra*, § 174*a*. This has been held to be the case as to the adjudications of prize courts, which it will not press if it believe them to be in conflict with justice or law; and on the same reasoning it refuses to press the awards of even treaty arbitrators, though invested with the highest judicial powers, when it holds that such awards ought not to be pressed in justice or honor. *Supra*, § 329*a*. *A fortiori* is thus the case with naturalization decrees, which from the nature of things must be often improvidently entered.

## § 176.

### ABANDONMENT OF CITIZENSHIP.

"So far as concerns the evidence contained in the annexed papers, there can be no question that Julio R. Santos is a domiciled citizen of the United States. It is very rarely that in cases of this class such strong evidence is produced. The acquaintances of Mr. Santos, who are brought up to testify as to his history and his expectations, are not persons who would either observe carelessly or speak lightly. They include a series of college officers and students of high character, with whom he has passed a number of years, and business associates, who would best know his plans. It is impossible to ascribe to persons of this class either want of opportunities of knowledge or want of conscientious accuracy. And the case is one of more interest because it represents a type of much importance to the business welfare both of the United States and of the countries with which we are brought into close mercantile relations. It is highly conducive to the beneficial developments of these relations that in selecting selling and other agents in a foreign land, our producing and manufacturing houses should be able to avail themselves of the services of such natives of the countries to be dealt with as have become citizens of the United States. In this way we obtain for ourselves the agent's knowledge of the language and other conditions of the country to which he is sent, while, from the fact of his naturalization in the United States, we have a political hold on him, and are able, to some extent, to guarantee his personal rights.

Hence it is a common practice of our great producing and exporting houses to send to Europe, as well as to South America, agents who are natives of the country of their agency, but who have intermediately become loyal citizens of the United States. There can be no doubt that this practice has proved very beneficial to the country of the agency, as well as to the country from which the agent is sent forth. To limit such an agency to two years would greatly destroy its efficiency. By the rules of international law, as recognized by all civilized nations, an agent of this class may live and do business in the place of his agency (if his intention is to return and dwell permanently in the place from which he is sent) without acquiring a domicil, or being subjected to a citizenship in the place of his agency. Nor, so far as concerns citizenship, is this rule modified by the treaty between the United States and Ecuador."

Opinion appended to instructions of Mr. Bayard, Sec. of State, to Mr. Beach, May 1, 1885. Printed in For. Rel., 1886. See *infra*, § 179.

"Mr. B. resided in the United States from 1852 to 1865; and in 1860 appears to have been naturalized here, but, in view of what follows, no opinion is necessary as to the regularity of this procedure. In 1865 he returned to Spain. Thither he carried his wife, recently married, there his children were born, and there he has since remained—over twenty years. The fact that he has never voted or held office in Spain, or taken part in any political demonstration there, may show that he is not a zealous Spaniard, but does not prove him to have been a loyal citizen of the United States.

"While there is no allegation that he intended to return to the United States, the inference to the contrary is rendered very strong by his settlement in Spain after his marriage, the selection of Spain as the place of his children's birth and education, and by his failure even now to make any effort to return. Moreover there is no evidence that he ever contributed by payment of taxes or otherwise to the support of this Government. The facts furnish a presumption, not rebutted, that he has abandoned his nationality, involving his minor children in the same abandonment. Under these circumstances thus understood the legation will not accede to the request by Mr. B. for a United States passport."

Mr. Porter, Acting Sec. of State, to Mr. Curry, Jan. 4, 1886. MSS. Inst., Spain.

"In this case, as in Wedemeyer's and several others of recent occurrence, the Department is indisposed to intervene. Generally speaking, when a German, naturalized in the United States and returning to Germany, voluntarily applies to be reinstated in his German subjection, and only appeals to the legation for protection as an American citizen when the native authorities decline to readmit him as a German, the evidence of his devotion to the United States is not strong. It would in such cases be as reasonable for us to intervene to demand that Germany take back the applicant as to demand that he may in-

definitely reside in Germany under the thin guise of a citizenship he sets no store by and has attempted to renounce."

Mr. Porter, Acting Sec. of State, to Mr. Pendleton, Feb. 2, 1886. MSS. Inst., Germ.

## § 179.

### PRESUMPTION FROM TWO YEARS' RESIDENCE.

"The provision in respect of two years' residence in the original country, after return thither, which is found in most of our naturalization treaties, is designed to afford presumptive evidence merely of the *intent* which is necessary to a valid resumption of the original allegiance. That presumption, like any other presumption, is open to rebuttal by satisfactory evidence, and the right of such rebuttal is inherent in the case and available in the party's behalf, even where the treaty may be silent on the point. In our treaty with Ecuador, however, the right of rebuttal of the presumption of intent which may grow from two years' residence is expressly stipulated, and this point is therefore removed from the field of argument.

"It is part of the sovereignty of every nation to prescribe the terms on which the allegiance of its own citizens shall be acquired and preserved. In the treaty with Ecuador the United States waive a part of such right of decision by admitting that two years' residence in Ecuador may create a presumption that their citizen intends to remain there. By stipulating for the right of rebuttal evidence on this point of intention, the United States wholly and absolutely regain that right of deciding as to the status of their citizens in a given case. That right is not transferred in any part to Ecuador; it is to be exercised exclusively by the United States as an attribute of their sovereignty. And Ecuador cannot meet that reserved right by any mere denial of the sufficiency of the rebutting evidence which may be satisfactory to the United States. The only privilege of surrebuttal which might remain open to Ecuador would be to show that the party had done some act working an overt, voluntary, and positive renunciation of his United States citizenship of which the laws of Ecuador take cognizance, or which they may prescribe as a condition to the acquisition or recovery of Ecuadorian citizenship. * * *

"This Government has pushed its construction of the sufficiency of the rebutting evidence beyond the needs of what would have been enough in any ordinary case in order that its conclusion, when reached, should not only be final as of right, but convincing also to the Government of Ecuador, to which it may be communicated as a matter of courtesy."

Mr. Bayard, Sec. of State, to Mr. Beach, May 1, 1885. For. Rel., 1886. See *supra*, App., § 176.

"Nor does this Government concur in the proposition that a naturalized citizen of the United States can have such citizenship extin-

guished solely by residence, however protracted, in the country of his origin. The question of his loss of such citizenship is to be determined by the intent of the party, to be inferred from his acts and all the surrounding circumstances of the case, and is not to be conclusively settled by mere lapse of time or term of residence in the country of his origin. We maintain this as a rule of international interpretation of naturalization treaties, and in the case of Germany have lately held that two years' stay creates only a presumption of abandonment of the acquired citizenship, which is open to rebuttal."

Mr. Bayard, Sec. of State, to Mr. Winchester, May 17, 1886. MSS. Inst., Switz. See App., vol. iii, § 172*a*.

## § 185.

### CHILD BORN ABROAD.

"By the law of nations, apart from any municipal legislation, he (a child born in France to a citizen of the United States, such child having always resided in France) would be entitled, when of full age, to elect which of the two allegiances he will accept; and with the law of nations in this respect coincides, according to your dispatch, the municipal law of France. But this election cannot be made by Victor Labrone until he arrives at full age, in September, 1886, and the election, to be operative, must not only be formally and solemnly declared, but must be followed by his coming to and taking up his abode as soon as is practicable in the United States. Should he remain voluntarily in France after the period when the French law as well as the law of nations requires him to make his election, this may properly be regarded as an abandonment of American and an acceptance of French allegiance."

Mr. Bayard, Sec. of State, to Mr. Vignaud, July 2, 1886. MSS. Inst., France; For. Rel., 1886.

## § 189.

### PROTECTION TO CITIZENS ABROAD.

"I have to acknowledge the receipt of your note of January 19, 1887, making certain inquiries as to the citizenship of Charles Dewaele and of Emile Dewaele, his son.

"Great as is my desire to give any information which it is within the range of my duties to communicate, I feel compelled to say that the information you request is not within such range. The reasons are as follows:

"(1) When there is an issue likely to arise between an alleged citizen of the United States and the Government of a foreign country in which he resides, the question whether the position taken by the foreign Government is to be resisted by such citizen, as well as the quali-

fications attending his position in such respect, are to be determined primarily by himself. This Government, for instance, would say to such a party, 'Whether you abjure your allegiance to us, or whether you render a qualified submission in the performance of local, civic, or military duties, is for you in the first place to determine.'

"(2) Questions of this class are acted on by this Department, adopting the practice of the judiciary under similar circumstances, on the basis of affidavits, and other documentary evidence exhibiting the exact state of facts, which affidavits and evidence a foreign sovereign could not be called upon to produce.

"(3) It is not in accordance with the polity of our institutions that the question of the citizenship of a person claiming, or likely to claim, the protection of the United States, should be determined *ex parte* by this Department on the application of the Government against whom such protection may be sought. Citizenship in the United States has two aspects. On the one side, in this country, it carries with it electoral privileges, and other prerogatives and immunities, as to which the naturalized citizen, no matter how destitute in other respects, has the same political rights with native-born citizens, no matter what may be their other advantages. On the other side, it gives such citizens, when abroad, the right to the protection of the United States to the full extent of its capacity, against foreign powers. Such rights cannot be divested unless on a hearing in which the party whose citizenship is questioned is notified to appear; and, in so far as the question of protection is concerned, they can be denied in this Department only on issue made by the party himself, after a full hearing of his case, with every opportunity given to him to present it in detail."

Mr. Bayard, Sec. of State, to Mr. de Bonnder de Melsbroeck, Apr. 11, 1887. MSS. Notes, Belgium.

## § 208.

### NORTH AMERICAN INDIANS.

Indian tribes in the United States are subject to the laws of Congress, but not, as tribes, to State legislation.

U. S. *v.* Kagama, 118 U. S., 375.

## § 213.

### PRESENTATION OF CLAIMS.

"While this Department is at all times ready to lend the good offices of its representatives abroad for the presentation of all valid claims founded on justice and equity of its citizens upon foreign Governments in accordance with its established regulations, and also to assist in the promotion of American interests in all proper cases and by those methods known and approved internationally, yet it is not unmindful of the concurrent obligation imposed by our professions of amity and comity

with other nations, as well as by the injunctions of our own self-respect, upon which we invite those nations confidently to rely, which should secure such previous scrutiny and examination of the law and facts upon which such claims are based by their proponents as shall *prima facie* assure both parties of their justice." * * *

"To discriminate against speculative and unjust claims by our citizens upon foreign Governments and in favor of those founded in justice and equity, will cause our recommendations to have that weight which we desire, and create confidence in our international action."

Mr. Bayard, Sec. of State, to Mr. Jarvis, Sept. 6, 1886. MSS. Inst., Brazil; For. Rel., 1886.

## § 221.

### AUTHORITY OF AWARDS.

The action of the Department of State in referring a claim to arbitration by the United States against a foreign power does not bind it to the position that the claim is just. The whole question of the justice of the claim is open to revision on the facts and arguments reported by the arbitration. Nor are the arbitrators precluded, by the fact of reference, from examining into the justice of the claim on its merits.

Mr. Bayard, Sec. of State, report on Pelletier's case, Jan. 20, 1887. Sen. Ex. Doc. 64, 49th Cong., 2d sess.

"The duty of the Executive to refuse to enforce an award which, notwithstanding the unimpeachable character, as in the present case, of the arbitrator, turns out to have been inequitable or unconscionable, has been maintained in repeated rulings of this Department, and is sanctioned by the Supreme Court of the United States."

*Ibid.*

As to *res adjudicata*, see *infra*, § 238; and as to control by Department of such cases, see vol. ii, § 220.

## § 223.

### DOMESTIC BELLIGERENT INJURIES TO ALIEN RESIDENTS.

See *infra*, § 243.

A Government is responsible to foreign friendly Governments for outrages committed by its soldiers, as such, on subjects of such Governments.

"The mere fact that soldiers, duly enlisted as such, commit acts without orders from their superiors in command, does not exempt their Government from liability for such acts. A Government may be responsible for the misconduct of its soldiers when in the field, or when acting, either actually or constructively, under its authority, if such misconduct, even though it had been forbidden by it, was in contravention of the rules of civilized warfare."

Mr. Bayard, Sec. of State, to Mr. Buck, Aug. 24, 1886. MSS. Inst., Peru.

"'If in that (a foreign) country,' said Mr. Webster, 'he (a citizen of the United States) engages in trade or business, he is considered by the law of nations as a merchant of that country;' and in this and other cases ruled in this Department on this principle, it was held that citizens of the United States who engaged in insurrectionary movements in Cuba thereby exposed their property to seizure by Cuban authorities, and had no claim on this Government to secure indemnity for them from Spain. Nor can Spanish subjects (under similar circumstances) make claim against the United States for losses incurred by them through confiscation of their goods by the Federal authorities in the late civil war, such confiscation being in conformity with the laws of war."

Mr. Bayard, Sec. of State, to Mr. Muruaga, Dec. 3, 1886. MSS. Notes, Spain. See more fully *infra*, § 356.

## § 228.

### FOREIGN BELLIGERENT'S LIABILITY TO NEUTRAL RESIDENT.

"It is not disputed that a neutral person domiciled in a belligerent country cannot claim from the opposing belligerent redress for injury inflicted by the latter in due course of war. The present case, however, is taken out of this rule by evidence herewith forwarded, showing that the injuries in question were not inflicted in due course of war, but were in violation of the rules of civilized warfare. For such violations of international duty the sovereign of the injured neutral has a right to call for redress."

Mr. Bayard, Sec. of State, to Mr. Hall, May 27, 1886. MSS. Inst., Cent. Am. See § 225.

## § 235.

### INJURIES TO REAL ESTATE.

The Haytian Government is liable for damages wantonly inflicted, by soldiers in its employ, on real estate belonging to citizens of the United States. Nor is it a defense in such cases "that by the Haytian law foreigners cannot 'acquire' (acquérir) real estate in Hayti, and that as they had no title to the real estate for injury to which they sue they cannot now claim damages for such injury. To this the answer is threefold:

"1. The statute only prohibits 'acquiring,' which is a term convertible with 'purchasing.' It does not cover the case of real estate coming by descent.

"2. By the Roman law, in force in Hayti, an alien's title, even as to 'purchased' real estate, can only be contested by suit brought by the Government itself in the nature of an inquisition. If the Government undertakes to turn the possessor out by violence without a trial, this makes the Government liable for damages in proportion to the violence

applied and the damage done. And for such summary outrages on an alien, *as an alien*, the Government of such alien has, by international law, a right to interpose and claim redress.

"3. Even supposing that the prohibition extended to the house and lot of the claimants (which, for the present purpose, it did not) it did not preclude the claimants from possessing furniture, or leading lives of quiet, secure from lawless attack. In any view, therefore, the statute before us does not prevent the claimants from recovering damages for the destruction of their furniture, their expulsion from their homes, and the peril to which their lives were subjected.

Mr. Bayard, Sec. of State, to Mr. Thompson, Mar. 9, 1886. MSS. Inst., Hayti.

## § 238.

### RES ADJUDICATA.

"This decision of the commission [dismissing a claim for want of jurisdiction] does not prevent this claim from being a proper subject for diplomatic treatment. It is true that Mr. Acosta's naturalization, the validity of which was admitted by the advocate for Spain, on the 30th October, 1882, was subsequent to the executive order of sequestration of his property by about five months. But while for losses accruing prior to his naturalization he cannot claim such interposition, it is otherwise as to losses accruing subsequent to his naturalization. The case may be likened to a series of continuous injuries sustained by a person before and after reaching full age. The disabilities attaching to him as a minor, however much they might prevent him by the *lex fori* from suing when a minor, would not preclude him from suing when of full age in his own name, at least for damages sustained subsequent to his majority. Hence the claimant in the present case, as to matters not barred by the decision of the arbitrators, is entitled to the intervention of this Department, at least for injuries sustained by him subsequent to his naturalization."

Mr. Bayard, Sec. of State, to Mr. Curry, Apr. 9, 1886. MSS. Inst., Spain.

"It is a settled principle of international law that a sovereign cannot be permitted to set up one of his own municipal laws as a bar to a claim by a foreign sovereign for a wrong done to the latter's subject.

Mr. Bayard, Sec. of State, to Mr. King, Oct. 13, 1886. MSS. Inst., Colombia.
*Supra*, § 60; *infra*, § 242.

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

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

Mr. Bayard, Sec. of State, to Mr. Muruaga, Dec. 3, 1886. MSS. Notes, Spain.

"Action of this class can no more be regarded as *res adjudicata* than can the preliminary binding over of a defendant, on the bare case of the prosecution, be regarded as *res adjudicata* when the case, both sides being in court, comes on for trial. Now for the first time has Pelletier's claim, together with Hayti's reply, appeared for adjudication in this Department; and with this full case before me, and with this very question reserved by the learned arbitrator who has made the award, I report that, in my judgment, after carefully reviewing the proofs, the claim, for the reasons I have stated above, cannot be entertained by the United States. And I may add that in this particular case, my opinion is sustained by the report of the Senate committee, by whom both sides were heard, and, on the question of disturbance of port tranquillity, by numerous adjudications of this Department.

"It may be finally urged that the award in the present case is conclusive and cannot be disturbed. But this proposition cannot be maintained. No matter how solemn and how authoritative may be a judgment, it is subject to be set aside by the consent of the parties. To the awards of international commissions, were the award in this case to be considered as such, this position applies with peculiar force, since, as is elsewhere noticed in this report, it is a settled principle of international law that no sovereign can in honor press an unjust or mistaken award even though made by a judicial international tribunal invested with the power of swearing witnesses and receiving or rejecting testimony. But the award before me is not that of a judicial international commission invested with such powers.

"To constitute such a tribunal, either a treaty, duly approved by the Senate so as to be the law of the land, or an enabling statute, is necessary. The judicial and the executive departments are distinct, and unless by a treaty or an act of the legislature, in subordination to the Constitution, the functions of the former, so far as concerns the determination of litigated issues of fact, cannot be vested in the latter. The Department of State, therefore, cannot either through its own officers or a commission appointed by it, take and mold sworn testimony in order to determine litigated issues of fact. Hence the conclusions of an international commission, sanctioned solely by the executive department of the Government, are to be regarded, to adopt the language of a learned judge of the Supreme Court, as an award 'which would have bound nobody and would have been at most a friendly recommendation.' (Miller, J., Great West. Ins. Co. *v.* U. S., 112 U. S., 197.)

It does not cure the proceedings in the present case that the distinguished gentleman who acted as arbitrator administered oaths to witnesses, issued commissions, and determined as to what questions were to be put to witnesses, in this way shaping the testimony produced. In the opinion of this Department these proceedings, so far as they were matters of distinctively judicial prerogative, were *ultra vires*, and so was the judgment entered, so far as it partook of a distinctively judicial type.

"In taking this position I am in no way impeaching the right of the Executive, either through the Secretary of State or through agents appointed by him, to negotiate the settlements of private claims with foreign powers. Such negotiations may be likened to the conferences, in matters of private litigation, of parties through their counsel or through referees, to settle, on the basis of affidavits or voluntary statements of the parties, the matter in dispute.

"Informal conferences of this class have been found, and will be found hereafter, of great use. But not being in the shape of a treaty they do not, in the United States, have the effect of a law investing the officers in question with the judicial power of taking and limiting testimony and deciding judicially on the questions submitted to them. Hence the awards of such tribunals, being inchoate and merely recommendatory, are to be regarded as less obligatory than are awards made under treaties. And as awards under treaties when the arbitrator had judicial powers, and when the witnesses testifying could be held criminally responsible for false testimony, will not be enforced if shown to be unconscionable and unjust, *a fortiori* is this the rule with awards in cases in which the arbitrator had no judicial powers, and when the oaths administered were nullities."

Mr. Bayard, Sec. of State, report in Pelletier's case, Jan. 20, 1887. Sen. Ex. Doc. 64, 49th Cong. 2d sess. See also *supra*, §§ 220,221.

"It remains to notice the position that a re-examination of the merits of this case is precluded by the announcement of the President, in his annual message of 1885, that the arbitration had closed and a final award been given. But such an announcement no more precludes such a re-examination than an announcement of the close of the late Mexican Commission precluded a re-examination of the Weil and La Abra cases, or an entry of a judgment by a court precludes the hearing of a motion to open such a judgment on proof of fraud or mistake. I must repeat in this connection the position with which this report opened, that, essential as it is that the intercourse between nations should be marked by the highest honor as well as honesty, the moment that the Government of the United States discovers that a claim it makes on a foreign Government cannot be honorably and honestly pressed, that moment, no matter what may be the period of the procedure, that claim should be dropped."

Pelletier's case; *Ibid.*

## § 239.

### LIMITATION OF CLAIMS.

"The same presumption may be almost as strongly drawn from the delay in making application to this Department for redress. Time, said a great modern jurist, following therein a still greater ancient moralist, while he carries in one hand a scythe by which he mows down vouchers by which unjust claims can be disproved, carries in the other hand an hour-glass, which determines the period after which, for the sake of peace, and in conformity with sound political philosophy, no claims whatever are permitted to be pressed.

"The rule is sound in morals as well as in law; and applies with peculiar force to claims infected with taints which the claimants refuse to submit to judicial examination when the facts are attainable."

Mr. Bayard, Sec. of State, to Mr. Muruaga, Dec. 3, 1885. MSS. Notes, Spain.

While international proceedings for redress are not bound by the letter of specific statutes of limitations, they are subject to the same presumptions, as to payment or abandonment, as those on which statutes of limitation are based. A Government cannot any more rightfully press against a foreign Government a stale claim which the party holding declined to press when the evidence was fresh than it can permit such claims to be the subject of perpetual litigation among its own citizens.

It must be remembered that statutes of limitations are simply formal expressions of a great principle of peace which is at the foundation not only of our own common law, but of all other systems of civilized jurisprudence. It is good for society that there should come a period when litigation to assert alleged rights should cease; and this principle, which thus limits litigation when wrongs are old and evidence faded, is as essential to the administration of justice as is the principle that sustains litigation when wrongs are recent and evidence fresh. "Rules for the application of such limitations," said Mr. Justice Swayne in Wood *v.* Carpenter, 101 U. S., 139, "are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together."

In the English common law, long before statutes of limitation took formal shape, this principle of peace was applied in the rulings that indebtedness, which has existed for so long a period as to enable its payment or its extinguishment to be logically inferred, is to be presumed to have been paid. What this period is varies, so it has always been held at common law, with extraneous conditions. In newly-settled communities, or in communities in which men come and go on comparatively brief business errands, the period in which a debt is presumed to be still alive is much shorter than it would be in a community of persons of continuous residence, of settled business habits, and with facilities which enable the vouchers of the past to be carefully guarded, and witnesses of past transactions to be, within the ordinary limits of life, appealed to. When the question is one of diplomatic negotiation, then the circumstances of the nations interested, as well as of individual claimants, is to be taken into consideration; the fact of intermediate war, for instance, when it does not extinguish a claim, operates to excuse delay in pressing it. But, in all cases, when the rule to be applied is not one of statute, but of common or public law, then the question of the presumption of the effect on indebtedness of lapse of time is one to be settled by tak-

ing into consideration not merely the general principle of peace above stated, but all the conditions which would divert the application of that principle to the particular case.

The application of these principles to our consular courts in China is considered *supra*, § 125.

## § 241.

### NON-USE OF JUDICIAL REMEDY.

"As, under the principle of United States *v.* O'Keefe, 11 Wall., 178, the claimants had access to the Court of Claims within the limit specified, to purge themselves, at a time when the evidence bearing on the question was fresh, from the charge of aiding and comforting the Confederacy, it is impossible not to view their failure to avail themselves of that opportunity, and their holding back their claim for twenty years as greatly strengthening that charge. I do not desire to insist, as I well might under the circumstances, that the claimants are barred by the limitations of the statute. Municipal limitations undoubtedly do not as a general rule bar an international claim. It may, however, be rightfully maintained, as has frequently been done by both this Government and that of Great Britain, that when a sovereign rests his administration, so far as concerns claims against himself, primarily on his judiciary, and when such tribunals are open to aliens for redress, to them aliens claiming to be aggrieved should at first resort. I do not desire, however, to confine myself to this position, but I maintain that when claimants on whom ostensibly rests the charge of aiding an insurrection against the United States, decline to present their claim before a tribunal before which, when the evidence was on all sides attainable, the charge could have been judicially disposed of, and then wait twenty years before bringing the claim before this Department, which, by reason of its organization, has no means of taking testimony as to disputed facts, and which, even if it could, would at this late date find these facts obscured by the lapse of time, then such claimant cannot, under that common system of ethical jurisprudence which is acknowledged by Spain as well as by ourselves, be admitted to a hearing unless they produce a strong array of testimony to disprove their culpability, and give satisfactory explanation for their delay in presenting their case. The same presumption may be almost as strongly drawn from the delay in making application to this Department for redress."

Mr. Bayard, Sec. of State, to Mr. Muruaga, Dec. 3, 1886. MSS. Notes, Spain.

As to limitations, see *supra*, § 239.

## § 242.

### SOVEREIGN NOT PROTECTED BY WRONGFUL DECREES OF HIS COURTS.

"The position that a sovereign is internationally liable for rulings of his courts, in violation of international law, was taken by us early in the wars growing out of the French Revolution, and was finally acceded

to by the British Government against whom it was advanced. It was also accepted by us, as respondents, after the late civil war, when, the relations of the parties being reversed, we agreed that we could not set up as a bar to a British claim for damages for illegal seizure, a decision of our courts that the seizure was legal. It is impossible for us to yield to Mexico a principle that we successfully maintained against Great Britain when she was belligerent and which we yielded to her when she was neutral.

"The question, then, in the present case, is whether the ruling of the Mexican court sustaining the seizure in question was right by international law. And I have no hesitation in instructing you that the seizure was wrong by that law, since it was virtually an execution issued in a suit in which not only was a hearing refused to the defendant, but in which an offer on his part to produce testimony which would have exculpated him was followed by an order of court directing his arrest. Such action was in itself a gross violation of those rules of justice which, in order to give judgments international validity, require that the parties should have full opportunity to be heard. If so, such judicial action is no more a defense to the Government of Mexico than would be an order for the same seizure if issued wrongfully by the executive department of that Government. As a foreign sovereignty we cannot inquire by what municipal agency of Mexico the wrong was done. To us the Government of Mexico is a unit, and responsible for whatever wrongs either of its several departments may inflict upon us.

"It may be said that the position here taken is inconsistent with the rule frequently declared by this Department, that when a Government opens its courts to alien suitors in claims against itself or its officers, the judicial remedy must be exhausted by aliens who feel themselves aggrieved before they can rightfully apply to their own sovereigns to intervene. But the two positions are not only consistent, but one supplements the other. In the present case, for instance, it was the duty of the claimant, if possible, to exhaust his remedy in the Mexican courts before he came to this Department for its intervention. But when he was precluded from so doing by the adverse proceedings instituted against him by the Mexican authorities, by which he was prevented from making out his case, we must hold that justice was not only denied him, but denied in violation of settled principles of international law. It then becomes the duty of this Department to intervene in his behalf and to press his claim on Mexico as a debt which Mexico is bound to pay."

Mr. Bayard, Sec. of State, to Mr. Jackson, Sept. 7, 1886. MSS. Inst., Mex.
See also § 329*a*, as to prize courts and as to Rebecca case, *supra*, § 60.

## § 243.

### CULPABILITY OF CLAIMANT.

For an alien, or his agents, to contribute towards investing in cotton subject to the control of the Confederacy was, under the circumstances,

giving "aid and comfort to the enemy of the United States," and therefore no suit can be maintained on such a cause of action.

Field, J. Radich *v.* Hutchins, 95 U. S., 212; adopted by Mr. Bayard, Sec. of State, to Mr. Muruaga, Dec. 3, 1886. MSS. Notes, Spain. See *infra*, § 356.

"On the general question of turpitude of cause of action as barring the present claim, I am now prepared to give an emphatic, and, I trust, final decision. Even were we to concede that these outrages in Haytian waters were not within Haytian jurisdiction, I do now affirm that the claim of Pelletier against Hayti, on the facts exhibited, must be dropped, and dropped peremptorily and immediately, by the Government of the United States. 'The principle of public policy,' said Lord Mansfield, in Holman *v.* Johnston, Cowper's Rep., 343, 'is this: *Ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.' *Ex turpi causa non oritur actio;* by innumerable rulings under the Roman common law, as held by nations holding Latin traditions, and under the common law as held in England and the United States, has this principle been applied. The *lex fori* determines the question of turpitude; and nowhere, and with better reason, has the slave-trade been stamped with such infamy and turpitude as in England and the United States."

Mr. Bayard, Sec. of State, report in Pelletier's case, Jan. 20, 1887. Sen. Ex. Doc. 64, 49th Cong., 2d sess.

## § 261.

### SOLEMNIZATION OF MARRIAGE.

"Information has reached the Department that it is the practice with some of its diplomatic and consular representatives to issue, at the request of American citizens proposing to marry abroad, certificates as to the freedom of such parties from matrimonial disabilities, and as to the law in the United States regulating the mode of solemnizing marriage.

"Waiving other objections to certificates of this class, it is enough now to say that the practice of issuing them is objectionable, because they may contain erroneous statements which may be productive of difficulty.

"Diplomatic and consular agents can ordinarily certify in respect to the matrimonial disabilities of individuals (*e. g.*, as to prior marriage or parental control) upon hearsay only and therefore unreliably.

"In certificates as to the laws in the United States regulating the solemnization of marriage the possibilities of error are great and manifest. Of these laws no accurate or reliable summary could be given. It is essential, for instance, to the validity of a marriage solemnized in Massachusetts and other New England States, that it should be solemnized by a local clergyman or magistrate after a license taken out in the office of the town clerk, which is virtually a publication. In other States, it is alleged, it is necessary to the ceremony that it should be solem-

nized by a minister of the Gospel. In most States a marriage by consent, so far as concerns ceremonial form, is valid; but even in these States law is frequently undergoing alteration.

"Serious consequences may ensue from errors made in this relation in diplomatic or consular certificates. A foreign local official may solemnize a marriage on such a certificate; but, when a question involving the validity of the marriage arises in a superior court of law it may well be decided that such certificate cannot prove matters of fact, nor the law in that particular State, Territory, or district of the United States in which the parties were domiciled.

"The issue of these certificates is not authorized by statute nor by the instructions to diplomatic agents or consuls.

"The withholding of such certificates may prevent serious disaster. If citizens of the United States desire to be married before a foreign officer who requires information as to their individual *status* and the laws of their domicil, the information can be obtained from persons familiar with the facts, or from experts acquainted with the laws of such domicil; and in matters involving the validity of marriages, and the legitimacy of children, too great trouble in this respect cannot be taken.

"To the position that it is not competent for diplomatic or consular officers to state the law of the United States as to marriage, there is, however, one important exception to which your attention has been heretofore directed. Throughout the United States is recognized the principle of international law that a solemnization of marriage valid by the law of the place of solemnization will be regarded as valid everywhere. Hence, where persons domiciled in any part of the United States propose to be married in a foreign land, the forms of solemnization prescribed by the law of the domicil are of consequence only when the law of such foreign land adopts those forms as sufficient.

"Nothing in this order is intended to preclude a chief diplomatic representative of the United States, having obtained permission of the Department for that purpose, from certifying as to the law of any particular jurisdiction in the United States when called upon by a judicial tribunal, or a consul, who is an expert as to such law, from testifying thereto when called upon in a court of justice, or from certifying thereto when excused from testifying in such court."

Mr. Bayard, Sec. of State, circular to diplomatic and consular officers, Feb. 8, 1887.

ORDERED BY THE SECRETARY.

"It is not competent, without the special authority of this Department, for diplomatic agents, consuls, or consular agents, to certify officially as to the *status* of persons domiciled in the United States and proposing to be married abroad, or as to the law in the United States, or in any part thereof, relating to the solemnization of marriages.

"T. F. BAYARD."

"By the law of nations the forms of solemnization of a marriage must be in accordance with the law of the place of solemnization, and the only exceptions are when those forms are such as the parties cannot conscientiously comply with, or when the solemnization is in a barbarous or semi-civilized land. It is true that it is said by some authorities that a marriage in a foreign legation is governed only by the laws of the country such legation represents, but this is so much a matter of doubt that the British foreign office has instructed its diplomatic agents that although such marriages, performed in British legations, are valid in Great Britain by statute, their validity elsewhere cannot be assumed. Under these circumstances you very properly declined to sanction the solemnization of the marriage in question until you have information that it would be solemnized in conformity with Belgian law. Whether the marriage as actually solemnized is valid it is not the province of this Department to decide.

"Questions of private international law as to the past are for the judiciary; it is as to the future, and this only by way of caution, that this Department in such matters speaks."

Mr. Bayard, Sec. of State, to Mr. Tree, June 5, 1886. MSS. Inst., Belgium.

"I have before me your No. 462, of date of the 18th ultimo, and note your comment upon a circular order lately issued by this Department, that 'it is not competent, without special authority of this Department, for diplomatic agents, consuls, or consular agents to certify officially as to the *status* of persons domiciled in the United States, and proposing to be married abroad, or as to the law of the United States, or any part thereof, relating to the solemnization of marriages.'

"Among the causes which induced this order were statements made to this Department that not only had the law as to marriage in the United States been erroneously certified to by its representatives abroad, but that for such certificates excessive fees had been exacted. Printed certificates had also been issued by certain United States consuls in Europe, which stated, without qualification, that in no part of the United States are banns, or prior publication, or the assent of parents, or the presence of any particular civic or ecclesiastical official essential to the due celebration of marriage. I need scarcely say that such certificates are on their face erroneous.

"Your remark that the practice of granting certificates as to both *status* and marriage laws 'has existed at this [your] consulate for many years past;' and after saying that you recognize 'the propriety' of the Department carefully inquiring 'into the competency of a consular officer authorized to give certificates of this character,' you proceed to give reasons why you, from your prior experience and knowledge, and from the books at your command, are to be considered as 'competent' to give such certificates.

"It is evident that you have misapprehended the meaning and application of the word 'competent,' as used in the circular order. It had no bearing upon the individual qualifications of the parties addressed, nor their capacity as legal experts, but related solely to the extent of their *official* functions and their *official* capacity or competency to perform certain acts. No reflection was implied or intended upon your professional attainments as a lawyer nor your ability to give reliable opinions in the line of that profession.

"But as it is not within the competence of any officer of the executive branch of this Government to create new law or in any degree to exercise legislative powers, it is equally outside of executive duty or power to invade judicial functions and to certify *construction* of laws. The *status* of the parties to a projected marriage may be a matter of contestable fact, and equally the legal requisites of marriage in a particular jurisdiction may be a matter of contestable law. To neither of these is a consul of the United States legally competent to certify.

"It is proper for this Department and its representatives to advise citizens of the United States proposing to marry in foreign countries to comply in all respects with the *lex loci* of the solemnization, but it cannot authorize its representatives to certify to disputed or disputable facts, nor as to the condition of law throughout the United States. Certificates of such a character having no legal authority could have no effect whatever on the judiciary before whom such questions of law or fact would necessarily come for decision. Many illustrations could be given of the danger of exposing marriages contracted abroad in reliance upon such official certificates to being invalidated by the subsequent judgments of courts having jurisdiction of the parties and the contract.

"The order in question is intended to restrain the official action of consuls, but in no degree to prohibit unofficial advice and counsel to individuals, or giving personal opinions or testimony as to laws or facts with which the consuls themselves may be familiar. The inhibition applies only to official certification of facts or law outside the scope and function of official duties and power."

Mr. Bayard, Sec. of State, to Mr. Walker, Apr. 7, 1887. MSS. Inst., Consuls.

That a marriage valid by the law of the place of solemnization is valid everywhere, see Mr. Adee, Acting Sec. of State, to Mr. Winchester, Jan. 30, 1886. MSS. Inst., Switz.

"I have received your No. 370, of the 2d ultimo, in which you request that this Department reconsider, so far as the legation of the United States in France is concerned, the recent circular of February 8 last, instructing the diplomatic agents, consuls, and consular agents of the United States to refrain from certifying officially, without the special authority of this Department, as to the *status* of persons domi-

ciled in the United States and proposing to be married abroad, or as to the law in the United States or in any part thereof, relating to the solemnization of marriages.

"The question to which the circular relates being one of very grave importance, the Department has given it the most careful consideration before and since the issuance of this circular, and has found no reason to change the conclusions therein stated. Whilst always solicitous to aid in every proper way and by all legitimate means citizens of the United States in foreign lands, the Department is of opinion that in respect to marriage there are more important considerations than that of the mere convenience of the contracting parties. As was said in the circular, 'If citizens of the United States desire to be married before a foreign officer who requires information as to their individual *status* and the laws of their domicil, the information can be obtained from persons familiar with the facts, or from experts acquainted with the laws of such domicil; and in matters involving the validity of marriages and the legitimacy of children, too great trouble in this respect cannot be taken.'

"It appears, however, from your dispatches, as well as from other sources, that in recent years a practice has sprung up in France and certain other countries, of diplomatic and consular officers of the United States giving official certificates not only as to the personal *status* of Americans desiring to be married abroad, but as to the law of their supposed domicil in respect to the forms of solemnization of marriage. This arose in France [as you state in your No. 370] from the fact that it was deemed necessary, under the law, 'for an American desiring to be married in France to produce an official document showing when and where he was born, and to furnish evidence that, if he is above age, he can marry in the United States without the consent of his parents, and that publication of banns is only necessary where the marriage is solemnized.'

"But all these requisites could, it is supposed, be proved, and before the practice in question sprang up must have been proved, by other evidence than the official certificate of a consular or diplomatic officer of the United States; and although such certification may be the most convenient form of proof, there are, in the opinion of the Department, serious objections to its use for the purpose indicated. Aside from the impropriety of consular or diplomatic officers certifying generally as to the law in different parts of the United States, such certification as you describe requires a judgment upon matters of fact. It is obvious that such a judgment, while it may expedite the performance of a marriage ceremony, is not conclusive as to the validity of that ceremony, and is not known to be receivable as evidence by judicial tribunals before whom the marriage might be called in question. Neither is it known to be receivable, under the laws of France, by the French magistrates; and this doubt is increased by the statements in your No. 334 that

when the practice of issuing the certificates in question began they were frequently rejected by the French mayors; that 'gradually, however, the practice established itself, and the Duke Decazes, minister of foreign affairs, having countenanced and recommended it—although unofficially—it was respected by the French authorities; but that even now, occasionally, a new mayor or an unreasonable subordinate refuses one or more of these papers and compels thereby the legation to ask the interposition of the higher authorities.'

"These statements suggest two conclusions: (1) That there is no law that makes those papers competent evidence in France of what they purport to prove; (2) that their reception is a matter of grace, brought about or aided by the unofficial advice of the French minister of foreign affairs acting, it may be presumed, on the assurance of the minister of the United States that the marriages of Americans upon such certificates would be valid in the United States.

"It is, as stated in Department's circular of February 8, a principle of international law, recognized throughout the United States, that a solemnization of marriage, valid by the law of the place of solemnization, will be regarded as valid everywhere.

"This rule is the principal safeguard of persons marrying abroad, and when it is relaxed in favor of the law of the domicil of the parties, it is important that the greatest care should be taken to ascertain what that law is, in order that the ceremony may not only be performed, but performed validly. The Department is not, however, aware that the law of France in respect to marriage makes any difference between citizens and foreigners. It was declared at the time of the preparation of the French codes, in answer to the question of the First Consul, with respect to marriages of foreigners in France, 'foreigners residing in France are subject to French law.' (See article on the International Law of Marriage, by the late W. B. Lawrence, 11 Albany Law Journal, 33.) It is true that the French law may, as to certain elements of personal capacity, employ the law of the domicil as the test of such capacity, but the Department is not informed that under that law the requirements of a valid marriage between foreigners are in any other respects different from those of a marriage between citizens.

"Now as to the personal *status* or capacity of the parties to a projected marriage, there may be both questions of contested or contestable law and of contested or contestable fact; and to neither of these is a diplomatic or consular officer of the United States competent to certify officially. In an instruction to Mr. Fay, minister of the United States to Switzerland, under date of November 12, 1860, Mr. Cass said that when 'the inquiry is made in Europe how a marriage must be celebrated there, not only to be valid but to carry with it its proper rights in the United States, no general answer can be given to the question. The answer must embrace not only the provisions of the laws of the United States

so far as regards the places governed by those laws, but must embrace also the laws of thirty-three States, beside the Territories.'

"It may be observed that Mr. Cass, while Secretary of State, gave special attention to the subject of foreign marriages, and it was by his instruction, which has never been revoked, that an end was put to the practice of performing marriage ceremonies in legations, in supposed conformity with the law of the place of the American domicil of the parties. So decided was he in the opinion that the *lex loci celebrationis* should be followed, that on the occasion of the marriage of his own daughter, while he was minister of the United States at Paris, to the American secretary of legation, he did not consider the marriage of the parties at his hotel as sufficient, notwithstanding their extraterritorial immunities, and after taking the advice of the most eminent French lawyers, obliged the parties to be married at the mayoralty and to fulfill all the formalities required of a French citizen by the Code Napoleon. (11 Alb. L. J., 34.)

"In your No. 334, of December 31 last, you inclosed blank forms of the certificates which the legation has of late years been issuing. The first of these states generally that proof having been made to the legation of certain facts as to the birth of a certain person, it is given to take the place of an extract from the register of the civil state. The second certificate states that according to the terms of the American laws the consent of parents is not necessary to a marriage of persons twenty-one years of age. The third form states that, according to the American laws, the publications of the marriages of Americans, celebrated in a foreign country, is not required at the domicil of the parties in the United States.

"The second of these certificates is regarded as the least open to objection, and may, indeed, be regarded in the light of a '*certificat de coutume*,' twenty-one years being the age of majority and emancipation from parental or other control all over the United States.

"The first is open to the serious criticism that, while it takes the form of an official judgment upon questions of fact, it is not authorized by any law, and while it may expedite the performance of a marriage ceremony, would not, as has been already remarked, necessarily be received by any judicial tribunal before whom the marriage might be called in question, as evidence of the facts stated. The third form of certificate states a general conclusion of law, which the Department is not competent to authorize. Publication of banns is a matter under the regulation of the different States and Territories, and this Department certainly is not competent to declare what the law in this relation of those States and Territories either is or may be ascertained by their judicial courts to be. The danger of such an attempt is shown by Circular No. 39, to which you refer as furnishing reliable information. The requisites of a valid marriage in the different States and Terri-

tories are sometimes matters of judicial ascertainment, as well as of statutory enactment. For example, Circular No. 39, in giving the requisites of a valid marriage in Massachusetts, wholly omits to state what has since been decided by the supreme judicial court of that Commonwealth, that a consensual marriage, without the presence of an officiating clergyman or magistrate, and to which neither party was a Friend or Quaker, is invalid (Com. *v.* Munson, 127 Mass., 459). It has also recently been held in the District of Columbia that a marriage in the District by consent, without some religious ceremony, is not sufficient to make a valid marriage by the law there existing.

"In a general note to Circular No. 39 it is stated that in 'the several States and Territories penalties are imposed by the statutes for a failure to comply with the requirements as to license or return of the certificate * * *; but in none of the States or Territories is the marriage null and void because of a non-compliance with the requirements of the statute.' It is, however, understood that by an old statute of North Carolina marriages solemnized without a license first had are null and void, and the same rule has been held to exist in Tennessee, where the statute of North Carolina was in force. (Whart. Con. of L., § 173, note 1, 2d ed.). Whether the same rule would be held to be in force in other places in the United States, under the special provisions of statutes, it is not within the province of this Department to declare, and can only be conjectured.

"It is important to observe that in recent years the tendency of the courts in the United States has been to require a stricter compliance than formerly with forms and ceremonies in the solemnization of marriages. As population has increased, and the difficulty of complying with forms has been diminished, considerations of convenience have been given less and less weight. And, on the other hand, there has been a growing tendency both in legislation and in judicial decisions to place some check on inconsiderate and informal alliances.

"Under these circumstances it would be highly inexpedient for this Department to undertake to declare in advance what *may* be the decisions of the judicial branch with whom the sole power to decide in these important matters rests. The function of delivering judgments, whether orally or in the form of certificates, is wholly judicial, and is not under our system confided to the executive branch. The authentication of a statute, or other matter of record, may be the duty of an executive officer, but not to declare its effect.

"Holding these views, it would be a breach of duty in this Department to authorize its diplomatic or consular agents to issue, in matters which from the nature of things are uncertain, certificates which, if erroneous, would be productive of consequences so disastrous as the illegitimation of marriages, however innocently solemnized, on the faith of such certificates, and the bastardizing of the issue of such marriages.

"All these serious responsibilities and dangers are avoided by the parties conforming to the *lex loci celebrationis*."

Mr. Bayard, Sec. of State, to Mr. McLane, May 9, 1887. MSS. Inst., France.

## § 268.

### NO EXTRADITION WITHOUT TREATY.

The United States Government "has always acted on the assumption that our legislation gives to consuls in countries of extraterritorial jurisdiction no right of decreeing extradition, whether to the United States or to a third country demanding the fugitive. Although our treaty of 1830 with the Ottoman Porte gives to the United States extraterritorial jurisdiction in Turkey in all criminal cases, yet recognizing that it did not embrace the function of extradition, and that our laws confer no such authority on our representatives in Turkey, a formal treaty of extradition was entered into with the Porte, August 11, 1874, and has been duly executed during a term of years."

Mr. Porter, Acting Sec. of State, to Mr. Hubbard, Feb. 3, 1886. MSS. Inst., Japan.

That there should be no extradition without treaty, see Mr. Bayard, Sec. of State, to Mr. Hubbard, Mar. 7, 1886, MSS. Inst., Japan; same to Mr. Parker, Apr. 2, 1886, MSS. Inst., Corea.

That Japan surrendered a fugitive from justice in 1886 without treaty, see same to same, Mar. 24, 1886; *ibid.*

## § 303.

### FISHERY TREATIES AFFECTED BY WAR.

In 1768 the law officers of the Crown gave an opinion that the fishery clauses in the treaty of 1686 with France were permanent, and not affected by subsequent war.

2 Blaine's Twenty Years in Congress, 617; 2 Chalmers Op. Eminent Lawyers, 344. See more fully *supra*, §§ 150, 303.

## § 316.

### UNANIMITY OF ARBITRATORS.

The following was inadvertently omitted in the first edition.

"The question presented on the face of the award of the Halifax Commission, viz, whether the concurrence of the three commissioners in their award was required by the treaty, was made a matter of public discussion both in Great Britain and in the provinces before and during the sitting of the commission. In this discussion, so far as it has fallen under my notice, the legal, political, and popular organs of opinion seemed quite positive that this unanimity was required by the treaty. In this country the matter was little considered, either because the British view of the subject was accepted, or because complete confidence in our case, on its merits, superseded any interest in the question.

The point comes up now for the first time for consideration between the two Governments, and will need attention from either only in case Her Majesty's Government should fail to concur in the views of this Government, which condemn the award on the grave grounds already presented.

"The question involves nothing more than the interpretation of the treaty, and it is quite clear of any intermixture with the substance of the award, as satisfactory or unsatisfactory to either party. It turns, first, upon the mere text of the treaty; and, second, upon the surrounding circumstances and the different subjects to be treated by the various boards of arbitration framed by the Treaty of Washington, so far as they may be rightly resorted to in aid of a just construction of the text.

"By the Treaty of Washington, four boards are constituted for the determination of certain matters to be submitted to their respective decisions:

"First. The Geneva Arbitration was composed of five members, in regard to whose deliberations and conclusions Article II of the treaty expressly provides that 'all questions considered by the tribunal, including the final award, shall be decided by a majority of all the arbitrators.'

"Second. A board of assessors under the Geneva Arbitration, in case the tribunal should not award a gross sum, was to be composed of three members. In the action of this board, Article X of the treaty declares that 'a majority of the assessors in each case shall be sufficient to a decision.'

"Third. A commission of three members, to determine reciprocal claims between the two countries arising during the civil war. Article XIII provides that 'a majority of the commissioners shall be sufficient for an award in each case.'

"Fourth. The Halifax Commission, composed of three members, undistinguished, among themselves, by any ascription of umpirage to either, and with no provision in any form for an award by less than the whole number. The treaty expressly accepts awards, signed by the assenting arbitrators or assessors or commissioners under the other articles, while in the case of the Halifax Commission, this provision takes the place of such acceptance: 'The case on either side shall be closed within a period of six months from the date of the organization of the commission, and the commissioners shall be requested to give their award as soon as possible thereafter.'

"The argument from this comparison is obvious. The high contracting parties possessed a common system of jurisprudence, according to which a reference to *arbitrators*, *ex vi termini*, required the award to be the act of the arbitrators—that is, of all of them. The *parties* to an arbitration, public or private, might accord to any lesser number the power of award, but express stipulations in the submission alone could carry that authority. Acting in full view of this rule, to which a desired ex-

ception needed to be expressed in *three* cases, in the same deliberate and solemn instrument, the high contracting parties imparted the authority to a majority by careful and solicitous provisions to that end. In the case of the Halifax Commission, last in the order of the treaty, and with the previous arrangements in this regard in their minds and under their eyes, this power is withheld.

"It is impossible, because it is plainly irrational, to say that a treaty provision containing power to a majority to bind, and a treaty provision expressing no such authority, mean one and the same thing. The high contracting parties have excluded any such conclusion by the sedulous discrimination which the text of the treaty discloses.

"To the countervailing suggestion that this variation from the system of the treaty, in the case of the Halifax Commission, is most reasonably accounted for by inadvertence on the part of the high joint commissioners, the answer is obvious. If either of the high contracting parties should so allege, which it certainly would not do without much deliberation, the suggestion would not affect the argument as to the meaning of the treaty as it stood, but would be in the nature of an appeal to the other high contracting party to waive the objection and reform the treaty. No doubt cases may exist where such appeals should be frankly responded to, though against interest.

"But you will say to Lord Salisbury that the suggestion of inadvertence in the negotiations, never to be lightly indulged in, overlooks an adequate and, presumptively, the real reason for the requirement of unanimity in the case of the Fisheries Commission, while it was expressly waived in the other submissions of the treaty.

"In the matters of computation submitted in the several other references of the treaty, two circumstances distinguished them from that submitted to the award of the Halifax Commission. First, they were wholly matters of determinate proof—an appraisement of the ships and cargoes destroyed by the Alabama and her consorts—an estimation of damages to persons or property suffered by individual British subjects, or American citizens, for which reparation should be made: these were matters of definitive affirmative proof, in pounds or dollars, before any award could be asked, and were subject to correction by equally definite opposing proofs before any award could be granted. Second, the assessments carried no measurement of any still-subsisting interests between the high contracting parties which would survive the payment of the several awards. It was, then, quite suitable to the these references to accept the judgment of a majority and dispense with the concurrence of both parties, as represented in the Commissions, in the result of the contentions before them."

Mr. Evarts, Sec. of State, to Mr. Welsh, Sept. 27, 1878. MSS. Inst., Gr. Brit.; For. Rel., 1878.

§ 321.

DISPLAY OF FORCE.

"This instruction will be handed to you by Commander Mahan, of the U. S. S. Wachusett, who revisits the waters of Ecuador by direction of the Secretary of the Navy for that purpose. Commander Mahan will be instructed to remain within reach pending the prompt disposal of Mr. Santos' case, and in the probable event of his release, he will be afforded an opportunity to return to the United States on the Wachusett, by way of Panama, should he so desire.

Mr. Bayard, Sec. of State, to Mr. Beach, May 1, 1885. For. Rel., 1886.

§ 328.

RIGHT OF CAPTOR TO HAUL DOWN FLAG.

"It seems hardly necessary to say that it is not until after condemnation by a prize court that the national flag of a vessel seized as a prize of war is hauled down by her captor. Under the fourteenth section of the twentieth chapter of the Navy Regulations of the United States the rule in such cases is laid down as follows:

"'A neutral vessel, seized, is to wear the flag of her own country until she is adjudged to be a lawful prize by a competent court.'

"But *a fortiori*, is this principle to apply in cases of customs seizures, where fines only are imposed and where no belligerency whatever exists. In the port of New York, and other of the countless harbors of the United States, are merchant vessels to-day flying the British flag which from time to time are liable to penalties for violations of customs laws and regulations. But I have yet to learn that any official, assuming, directly or indirectly, to represent the Government of the United States, would under such circumstances order down or forcibly haul down the British flag from a vessel charged with such irregularity; and I now assert that if such act were committed, this Government, after being informed of it, would not wait for a complaint from Great Britain, but would at once promptly reprimand the parties concerned in such misconduct and would cause proper expression of regret to be made."

Mr. Bayard, Sec. of State, to Mr. Phelps, Nov. 6, 1886. MSS. Inst., Gr. Brit.; For. Rel., 1886.

For the act in this case of hauling down the flag of a fishing vessel seized for breach of port rules an apology was made in a letter from the Canadian authorities forwarded by the British Government. See Sir L. West to Mr. Bayard, Dec. 7, 1886. For. Rel., 1886.

§ 338.

CONFISCATION.

"A belligerent has, in time of war, the right to seize munitions of war or military engines in his enemy's territory, or material stored for the purpose of conversion into such military engines. And such, un-

questionably, was the case with the cotton in question during its storage under the Confederate States control."

Mr. Bayard, Sec. of State, to Mr. Muruaga, Dec. 3, 1886. MSS. Notes, Spain. See *infra*, § 356. As to cotton, see *infra*, § 373.

## § 349.

### WANTON DESTRUCTION IN WAR.

"Every species of reprisal or annoyance which a power at war employs, contrary to liberality or justice, of doubtful propriety in the estimation of the law of nations, departing from that moderation which, in later times, serves to mitigate the severities of war, by furnishing a pretext or provocation to the other side to resort to extremities, serves to embitter the spirit of hostilities and to extend its ravages. War is then apt to become more sanguinary, more wasting, and in every way more destructive. This is a ground of serious reflection to every nation, both as it regards humanity and policy; to this country it presents itself accompanied with considerations of peculiar force. A vastly extended sea-coast, overspread with defenseless towns, would offer an abundant prey to an incensed and malignant enemy having the power to command the sea. The usages of modern war forbid hostilities of this kind, and though they are not always respected, yet, as they are never violated, unless by way of retaliation for a violation of them on the other side, without exciting the reprobation of the impartial part of mankind, sullying the glory and blasting the reputation of the party which disregards them, this consideration has, in general, force sufficient to induce an observance of them."

Letters of Camillus, No. 21. 5 Lodge's Hamilton, 104.

## § 352.

### SEIZURE OF NEUTRAL GOODS.

"This Department, in its instructions to our ministers at those courts which recognized the Southern insurgents as belligerents, has maintained that those nations after such recognition must be content to have their subjects who were domiciled, as merchants, in belligerent territory, considered as belligerents, and the same argument would embrace all aliens residing in the enemies' country for business purposes or represented by agents there. It has likewise been held by the Supreme Court of the United States in a case where the private property of a noncombatant was destroyed, that property left by its owner in the country of a belligerent is subject to the chances of war and to confiscation by the other belligerent.

"A similar rule was enforced in the case of the losses of British subjects through the Dutch bombardment of Antwerp in 1830, and was assented to by Great Britain and all the other powers whose citizens suffered loss. The same was the case with the property of American citizens in Naples in 1807, and likewise in the case of losses incurred

by foreigners by our bombardment of Greytown, in 1853, France and Great Britain acquiescing.

"If claims for losses of goods belonging to neutral owners, which happen to be at the time of hostilities in the enemy's territory, cannot be entertained, how much less valid are they when goods were the subject of a voluntary contract entered into by the owners with the leaders of a revolt, the two contracting parties taking the chances of loss through the failure of the Confederacy, or of the profits to result from its success, which doubtless would in the present case have been enormous. The contracting parties were partners in a speculation in contraband of war, which was subject to the vicissitudes of war, and which failed, and the resulting loss can become no basis for a claim which, if admitted, might embarrass Spain, among other nations, as furnishing a precedent in possible future cases where the integrity of her colonial possessions should be at stake."

Mr Bayard, Sec. of State, to Mr. Muruaga, June 28, 1886. MSS. Notes, Spain.

## § 356.

### WAR: TERMINATION OF.

"I have yet to learn that a war in which the belligerents, as was the case with the late civil war, are persistent and determined, can be said to have closed until peace is conclusively established, either by treaty when the war is foreign, or when civil by proclamation of the termination of hostilities on one side and the acceptance of such proclamation on the other. The surrender of the main armies of one of the belligerents does not of itself work such termination; nor does such surrender, under the law of nations, of itself end the conqueror's right to seize and sequestrate whatever property he may find which his antagonist could use for a renewal of hostilities. The seizure of such property, and eminently so when, as in the present case, it is notoriously part of the war capital of the defeated Government, is an act not merely of policy and right, but of mercy, in proportion to the extent to which the party overthrown is composed of high-spirited men, who are ready to submit only when their military resources are wholly exhausted, and not until then. This, in the summer of 1865, was the condition of things in the Southern and Southwestern States of this nation. The period was one in which the maintenance of military rule, and the taking into the possession of the United States of all the property capable of use as military resources of those States, was essential to the permanent restoration of order, peace, and a common municipal law. This was so from the nature of things; and such was the course of public action. It is in accordance with this principle that the Supreme Court of the United States has formally decided that the late civil war terminated in the particular sections of the United States at the period designated in the proclamations of the President of the

United States. (Brown *v.* Hiatts, 15 Wall., 177; Adger *v.* Alston, *ibid.*, 555; Batesville Institute *v.* Kauffman, 18 Wall., 151.) And by the President's proclamation of April 2, 1866, 'the insurrection which heretofore existed in the States of Georgia, South Carolina, Virginia, North Carolina, Tennessee, Alabama, Louisiana, Arkansas, Mississippi, and Florida is at an end, and is henceforth to be so regarded.' Up to and before that date the insurrection in those States was held to exist. After that date it was held to be at an end."

Mr. Bayard, Sec. of State, to Mr. Muruaga, Dec. 3, 1886. MSS. Notes, Spain. See *supra*, § 223. As to termination of Indian wars, see Mr. Evarts, Sec. of State, to Sir E. Thornton, May 27, 1879; For. Rel., 1879.

## § 373.

### EFFECT OF TREATIES ON CONTRABAND.

The treaty of 1778 between the United States and France having been annulled by act of Congress of July 7, 1798, having been subsequently treated by the French Government as not in force, and being, at most, a bilateral arrangement intended to give special advantages to France, cannot be held to give an authoritative list of articles contraband of war.

Mr. Bayard, Sec. of State, to Mr. Muruaga, Dec. 3, 1886. MSS. Notes, Spain.

Neither the United States nor Spain was a party to the declaration of Paris of 1856, and neither, therefore, is bound by the list of articles contraband of war therein contained.

*Ibid.*

"I apprehend it to be the settled rule of international law that the question of contraband is to be determined by the special circumstances of each case. Horses, for example, would not ordinarily be spoken of as contraband, yet all authorities agree that they may be so regarded when their supply is so essential to a particular belligerent that he cannot carry on operations successfully without them. *A fortiori* is this the case with cotton and the late Confederacy. You mistake the position of the United States, you will permit me respectfully to say, when you suppose that it is proposed by us formally to insert cotton in the list of articles contraband of war. We do not so propose. All we say is that when cotton is the prime military engine or muniment of one belligerent, then it may be seized and treated by the other belligerent as contraband of war."

*Ibid.* See same to same, June 28, 1886; and see Young *v.* U. S., 97 U. S., 58. As to confiscation, see *supra*, § 338.

## § 396.

### ISSUING OF BELLIGERENT CRUISERS.

Great Britain "had (in 1794) a colorable ground to claim compensation for *all captures* made by vessels armed in our ports, whithersoever car-

ried in, or howsoever disposed of, especially where their equipment had been tolerated by our Government."

Mr. Hamilton, "Camillus." 5 Lodge's Hamilton, 42.

"The Sieur Cunningham, captain of an American armed vessel, after having wasted the British commerce, entered the port of Dunkirk. He there disarmed his vessel, and declared that he was about to load with merchandise for one of the ports of Norway. As this declaration appeared suspicious, security was demanded of Cunningham; he presented two, the Sieurs Hodge and Allen, both British. Cunningham sailed in reality from the port of Dunkirk without being armed; but clandestinely, and in the night, he caused seamen, guns, and warlike stores to be put on board his vessel, which was in the road. He set sail and in a short time made prize of a British packet-boat, the Prince of Orange. As soon as the French Government was made acquainted with the fraud of Cunningham, they caused the Sieur Hodge, one of his securities, to be arrested and conducted to the Bastile; and the packet-boat was restored to the court of London without further trial, because the offense of Cunningham was evident and public."

Observations on the Justificative Memorial of the Court of London, by Pierre Augustin Caron de Beaumarchais, English translation, Philadelphia, 1781.

My attention was directed to this case by the Hon. A. B. Hagner, of Washington, who presented a copy of the rare pamphlet from which it is cited to this Department in 1879. Of this pamphlet, Hon. Caleb Cushing, in a letter to Hon. A. B. Hagner, of January 7, 1874, speaks as follows:

"The memoirs which it contains are of the highest possible historical and juridicial value. The English memoir was written by Edward Gibbon. The several memoirs constitute the first example and precedent of regular discussion of the great question, Under what circumstances may a neutral Government recognize the independence of the rebels or seceders of another and a friendly Government?

"My knowledge of these memoirs is derived from the 'Code Celébrè' of Martens; but I find, to my surprise, on comparing Martens with your English copy, that the original has been greatly mutilated by Martens."

A copy of this pamphlet, printed in 1779, is in the Harvard University Library.

The expeditions of Cunningham (or Conyngham) are narrated in detail in Hale's "Franklin" in France, 136, 174, 309, 346-8, 375.

See also the same work for notices of the French evasion of their own neutrality laws in rendering aid to American privateers prior to the declaration of war by France against England.

## § 402.

### VIGILANCE AS TO NEUTRALITY.

"The complaint that Mr. Baiz makes is, that the steamship City of Mexico, a passenger and freight vessel, claimed to be entitled to carry the flag of the United States, took on board at Belize, January 12 last, when on her ordinary coasting route, some political refugees, who it is supposed were meditating hostile action against the Government of Honduras.

"It will scarcely be contended that an act such as this, even supposing it would be regarded as a breach of neutrality if committed within the jurisdiction of the United States, can be imputed to the United States when committed in a foreign port; nor can it be justly urged that, because the vessel in question sails under the flag of the United States, it is the duty of this Government to send cruisers to watch her to prevent her from committing breaches of neutrality when on her passage from one foreign port to another. For this Government to send armed vessels to such ports to control the actions of the City of Mexico would be to invade the territorial waters of a foreign sovereign. For this Government to watch its merchant and passenger vessels on the high seas, to stop them if they carry contraband articles or passengers meditating a breach of neutrality, would impose on the United States a burden which would be in itself intolerable, which no other nation has undertaken to carry, and which the law of nations does not impose.

"In what has been stated I have referred exclusively to the international obligations imposed on the United States by the general principles of international law, which are the only standards measuring our duty to the Government of Honduras. Whether the City of Mexico, when she returns to her home port, or those concerned in her or in this particular voyage, may be subject to adverse procedure under our neutrality statutes, I have not deemed it necessary here to discuss or decide."

Mr. Bayard, Sec. of State, to Mr. Hall, Feb. 6, 1886. MSS. Inst., Cent. Am.; For. Rel., 1886. On this topic, in connection with right of search, see able articles by President Welling in Nat. Int., for June 1, 1858, and other issues.

## § 403.

### MUNICIPAL STATUTES NOT EXTRATERRITORIAL.

"Breaches of neutrality may be viewed by this Government in two aspects: First, in relation to our particular statutes; and, secondly, in respect of the general principles of international law. Our own statutes bind only our own Government and citizens. If they impose on us a larger duty than is imposed on us by international law, they do not correspondingly enlarge our duties to foreign nations, nor do they abridge our duties if they establish for our municipal regulation a standard less stringent than that established by international law."

Mr. Bayard, Sec. of State, to Mr. Hall, Feb. 6, 1886. MSS. Inst., Cent. Am. For. Rel., 1886.

## § 410.

### SHIP'S PAPERS AND SEA LETTERS.

"A like question is now asked as to foreign-built vessels purchased and owned by citizens of the United States, viz, whether the act of 1884, chapter 121 (June 26, 1884), includes these amongst those vessels for services to which consuls are not to charge fees.

"Inasmuch as in the same connection in which that statute provides for the fees in question it expressly refers to and operates upon the 'Consular Regulations, issued by the President,' and as the term 'American vessel' is one employed *passim* in such regulations, I am of opinion that it has the same meaning in the statute (§ 12) as in the regulations.

"Upon a perusal of these regulations I do not find that the term in question is applied by them to designate foreign-built vessels purchased and owned by citizens of the United States. It seems rather, so far as I can determine, to be employed synonymously with that other term so usual with us in both statutes and regulations, viz, 'Vessels of the United States.' (See, e. g., Reg., §§ 111, 128, 219.) I do not know whether there has been in your Department any long-continued practical administration of these regulations to the effect that the term 'American vessel' therein contained includes in any case as well foreign-built vessels owned by citizens of the United States. Such practice would, of course, be entitled to great respect, otherwise, however, I conclude as above; and consequently that the act of 1884 does not exempt such foreign-built ships owned by citizens from the fees in question."

Mr. Brewster, Atty. Gen., Feb. 5, 1885. Misc. Letters, Dept. of State.

"Vessels not built in the United States owned by citizens of the United States are recognized by the statutes of the United States as a class of sea-going vessels. They are the property of American citizens, entitled to bear the flag and receive the protection of the Government. (6 Op., 638; 16 *ibid.*, 533; Consular Reg. (1881), § 344.) But, with the exceptions made in the statute, they are not 'vessels of the United States.' (Rev. Stat., §§ 4132, 4133.) Are they 'American vessels,' within the meaning of twelfth section of the act, chapter 121, approved June 26, 1884?

"A careful examination of the statutes convinces me that the expressions 'vessel or ship of the United States' 'American vessel of the United States,' and 'American vessel' are used synonymously, and apply only to regularly documented vessels. And in the Revised Consular Regulations (1881), § 200, for the purpose of those regulations, the terms 'American vessel' and 'vessel of the United States' are declared synonymous. In both statutes and regulations are many provisions relative to foreign-built ships owned by American citizens, and the designation is in that distinctive language. In the statute, the twelfth section of which is under consideration, both terms, 'vessel of the United States' and 'American vessel' are used, and in view of the previous statutes and regulations must be considered, I think, as used interchangeably.

"I conclude, therefore, that foreign-built vessels owned by citizens of the United States are not embraced in the provisions of the act of

1884 forbidding the collection of fees by consular officers from American vessels."

Mr. Garland, Atty. Gen., July 20, 1885. Misc. Letters, Dept. of State.

The following opinion in respect to the privileges of foreign-built non-registered vessels owned by citizens of the United States was given in April, 1887, to the editor, by Morton P. Henry, Esq., of the Philadelphia bar, author of a recent treatise on Admiralty Jurisdiction and Procedure:

THE RELATION OF FOREIGN-BUILT VESSELS WHOLLY OWNED BY AMERICAN CITIZENS TO THE LAWS OF THE UNITED STATES.

The publication of the International Law Digest of the United States, edited by Dr. Wharton of the Department of State, calls attention to the subject of this article, which at the time of the European wars under the Directory and Consulate became a matter of grave consideration by the United States, and in the near future may again rise into importance.

It must be taken for granted that in regard to foreign nations the political department of the United States has declared that all vessels owned exclusively by citizens of the United States are American property, and are covered by the protection of the American flag, in any question in which neutrality is involved, without regard to the origin of the vessels; and the courts hold that a warranty of the American nationality of such vessels is fulfilled by American ownership independently of registry as a vessel of the United States.

Such vessel property is also by statutes of the United States entitled to documents from the Government of the United States to enable the owners of such vessels to claim American protection (Rev. Stat., §§ 4190, 4308); and such vessels were exempted by statute from the payment of the same light dues as were imposed upon foreign vessels. (Rev. Stat., § 4226.)

The importance of this last section consists in this: it repeats the provisions of the act of March 3, 1805, the title of which reads "An act to amend an act for imposing more specific duties on the importation of certain articles, and also for levying and collecting light money on *foreign ships* or *vessels*, and for other purposes."

The act to which this was an amendment was passed in the previous year, 1804, the sixth section of which imposed "a duty of fifty cents per ton on all ships or vessels *not of the United States*, which after the aforesaid 30th day of June next may enter the ports of the United States." (Rev. Stat., § 4225.)

The act of 1805 was intended to relieve vessels owned by Americans from the provisions of this act, and place them on the same footing as vessels of American origin as well as of American ownership, and also to provide the documentary evidence of such American ownership to obtain the benefit of exemption.

The act of 1805 did not create American nationality for such foreign-built vessels. When the act of 1804 was passed, the words *vessels of the United States* had received a recognized meaning which designated vessels built in the United States and belonging wholly to citizens thereof (Rev. Stat., §§ 4131, 4132), which, as used in the act of 1804, imposed upon all other vessels, whether foreign or American, higher duties than on vessels of the United States. This act placed these vessels as to light dues in the same position as registered vessels.

The American character of such vessels is also recognized in § 4308, Rev. Stat., in the words of the act of March 2, 1803, "Every unregistered vessel *owned* by a citizen of the United States and sailing with a sea-letter, going to any foreign country, shall, before she departs from the United States, at the request of the master, be furnished by the collector of the district where such vessel may be with a passport, for

which the master shall be subject to the rules and conditions prescribed for vessels of the United States.

The title of the act of March 2, 1803, explains itself; it is a supplement to an act passed in 1796 requiring passports to be furnished by the collector to vessels bound on a foreign voyage which restricted the granting of such passports to such American vessels as were registered or enrolled. Registry and enrollment was, by the act of 1792, confined to vessels built as well as owned in the United States, and such vessels obtained peculiar privileges not given to vessels of foreign nations nor to American vessels of foreign origin. (Act of December 31, 1792, Rev. Stat., §§ 4131, 4132.)

The distinction between "vessels of the United States" and vessels "owned by citizens of the United States" had not been observed in the wording of an act passed on 28th February, a few days previously to the passage of this supplement of March 2, 1803 (R. S., § 4309). It required "every master of a vessel belonging *to a citizen of the United States* who shall sail from any port of the United States, shall, on his arrival at a foreign port, deposit his register, sea-letter, and Mediterranean passport with the consul," whose duty it is, on the master producing a clearance from the proper officer of the port where he may be, to deliver to the master all of his papers, if such master has complied with the provisions of law relating to the discharge of seamen in a foreign country, and to the payment of the fees of consular officers. The same act imposed a penalty on the master for not doing so. But as the sea-letter and Mediterranean passport referred to in this act under the statute of 1796 could be obtained only by "vessels of the United States," and as the act of 28th February, 1803, recognized the right of vessels other than the vessels of the United States to obtain documents certifying to the nationality of their owners, so as to identify such vessels as American property, the act of March 2, 1803, was immediately passed requiring the collectors of the ports, on the request of the masters of "*unregistered vessels owned by a citizen of the United States and sailing with a sea-letter*," to furnish such vessel with a passport, "for which the master shall be subject to the rules and conditions prescribed for vessels of the United States."

Although the act speaks of a sea-letter and a passport, it is difficult to ascertain the difference between the two documents. In various treaties the words passport and sea-letter are used as synonyms. (See extracts from treaties collected in Wharton's Dig. Int. Law, Vol. 3, pp. 692–703.)

The word *passport* appears to have been adopted with reference to the requirement of such a document for vessels bound to the Mediterranean, under the treaties with the Barbary Powers, certifying to the nationality of vessels owned by Americans. The Department of State, before the passage of this act, had adopted a certification of the American ownership of all American vessels, other than registered vessels, for the security of such vessels in the wars then pending in Europe, by reason of which the Americans, as neutrals, were enjoying a large part of the carrying trade.

On May 13, 1793, Mr. Hamilton enclosed to the collector of the port of New York forms of *sea-letters* to be furnished for the identification and security of all ships and vessels belonging to citizens of the United States, and Mr. Jefferson, the Secretary of State, in a letter to Mr. Morris, our minister in France, under date of June 13 in the same year, enclosed copies, which he terms *forms of passport*, in which he says: "It is determined that they shall be given in our own ports only, and to serve but for one voyage. It has also been determined that they shall be given to all vessels bona fide owned by American citizens wholly, whether built here or not." (3 Wharton's Dig. Int. Law, p. 664, 665.)

The vessels not registered furnished with such documents appear to have been called "sea-letter vessels," as distinguished from registered vessels of the United States. The ambiguity as to the meaning of the word passport arises from the statute of 1803 requiring passports to be issued to all vessels owned by American citizens sailing with a sea-letter, and is not satisfactorily explained in the opinion in Sleght *v.* Hartshorne (2 Johns R., 531–543). Chief-Justice Tilghman, of Pennsylvania, however, in

his opinion delivered in Griffith *v.* The Ins. Co. (5 Binn., 464), says that the *sea-letter* issued under the authority of the President in 1793 was a *passport* within the meaning of our treaties with France, Spain, Holland, &c., and that the passport mentioned in the acts of 1796 and of 1803 was a document required by our treaty with the Dey of Algiers of the 5th of September, 1795, by the fourth article of which eighteen months were allowed for furnishing the ships of the United States with passports. The sea-letters, which operated as passports among the European nations, he says, were printed in English, French, Spanish, and Dutch, while the Mediterranean passport was in the English language only, with an engraving, and indented at the top, so as to be easily distinguished by the eye by an examination of the indented part, of which a counterpart was furnished the Algerine cruisers. The chief-justice accepted the view (as to the nature of these documents) of the Hon. A. J. Dallas, one of the counsel in the cause, who afterwards, as the Secretary of the Treasury, adopted this distinction between the sea-letter and the passport, in a circular to the collectors of the ports of the United States in 1815 (3 Wharton's Dig. Int. Law., 712). The view that the word *passport* is to be confined to a Mediterranean pass under the treaties with the Barbary Powers is confirmed by Reeve's History of the Law of Shipping, 424, and the American document called a passport, of which the commencement is given in Baring *v.* Claggett (3 B. & P., 202), corresponds with that of the sea-letter prepared during the administration of President Garfield. (3 Wharton's Int. Dig., 716.) The sea-letter would appear to be a certificate of nationality and distinct from the formal document called for by a treaty with that particular naval power.

Congress also, in 1803 (Rev. Stat., § 4191), passed an act imposing a penalty on any person who should make, utter, or publish any false sea-letter, Mediterranean passport, or certificate of registry, or who should avail himself of the same.

This act recognizes the sea-letter and Mediterranean passport as a certificate of national character similarly with the registry required by vessels of the United States, and later on, in 1825, an act was passed (Rev. Stat., § 5423) making it criminal to forge or alter as well such pass or passport and sea-letter as a certificate of enrollment or registry.

These acts sufficiently indicate that Congress has recognized the national character of undocumented vessels owned by American citizens, and has provided for their identification as vessels of the nationality of the owners.

To what vessels sea-letters should be issued, and the character of the document, was also defined by the subsequent act of 26th March, 1810. (Rev. Stat., § 4190.)

It provides, "No sea-letter or other document certifying or proving any vessel to be the property of a citizen of the United States shall be issued except to vessels duly registered or enrolled and licensed as vessels of the United States or to vessels which shall be wholly owned by citizens of the United States, and furnished with or entitled to sea-letters or other custom-house documents."

It therefore is certain that the Government has from an early period recognized that American property afloat in form of a ship was entitled, as well as cargo, to protection without reference to the municipal law of the country which had put certain disabilities, in the foreign and coast-wise trade, on this class of vessels, but which it is a mistake to suppose is wholly excluded from either the foreign or coast-wise trade of the United States.

The views of Mr. Jefferson, Mr. Hamilton, Mr. Madison, and Mr. Dallas as to the national character of such vessels will be found in the third volumne of the Digest of the International Law of the United States (§ 410, pp. 663-665, 712).

On the outbreak of the war between Russia and France and England, Mr. Cushing, then being the Attorney-General of the United States, at the request of the British minister, put in writing the view his Government had adopted (6 Op., 638).

He took the ground which has since been followed by succeeding Attorneys-General, that citizens of the United States could lawfully purchase ships, the property of subjects of either of the belligerent powers; could lawfully employ and sail them under

the flag of the United States; and that such vessels which had become in good faith the property of citizens of the United States would lose their character as enemies' property and become neutral as regards either of the belligerents, and that the question as to the disabilities which the municipal rules of the Government of the owners might impose on such vessels did not concern other nations nor affect their nationality.

He only expressed views previously adopted by his Government. He sustained them, however, with his usual consummate ability; they have never been departed from. His position has been reiterated by succeeding Secretaries of State, and similar opinions have been given by other Attorneys-General.

The transfer of the Chinese merchant fleet to American citizens, who placed the vessels under the flag of the United States during the late hostilities between China and France, was not questioned by the Government of France, nor do the vessels appear to have been molested, although the position taken by the United States was contested by France during the Russian war on the ground that enemy-built vessels cannot be made neutral after hostilities break out. (3 Wharton's Dig. Int. Law, 522.)

So far as the international side of the question is concerned the position of such vessels is fixed.

Although the right of such vessels to carry the flag of the United States has been discussed in two late papers, there could hardly be occasion for such a question. A vessel's flag is only its signal to other vessels at sea.

The national bunting displayed is a communication to other vessels of the nationality of her owner, as her other signals are used to convey the name of the private owner, or of the line to which the vessel belongs.

There is no statute which authorizes "vessels of the United States" to carry a flag. The absence of a statute is unmeaning. There is no statute requiring any vessel to do so. Yet the right to carry a flag is recognized in the laws of war, and the abuse of the flag may procure the condemnation of a vessel.

The Treasury regulations, article 93, which declares such vessels entitled to the protection of the authorities and flag of the United States, recognizes the rights of these vessels to carry it.

The word "flag," when used either in public or private international law, in maritime subjects, designates the nationality of the vessel, arising from ownership, and the "law of the flag" is that which ascertains when a transaction is governed by the law of the country where the owner of the vessel resides, under which the master holds his authority to bind the vessel or its owner, or which governs the internal discipline of a ship or its liability to others. Expressions also have been used at times, with some looseness, in the maritime law, in which a vessel is spoken of as having a personality of its own, in reference to its liability *in rem*, independently of that of its owners. Such expressions are used by way of illustration, not of definition, and in this respect a vessel does not differ from other kinds of property; even real estate may in the same manner be considered as offending or guilty as well as indebted.

These expressions are used, however, with regard to an entirely different subject. A vessel as a subject of nationality is not considered a personality any more than any other chattel, and cannot have any other nationality impressed on it except that arising from ownership. The place in which a vessel is built does not give it nationality any more than the place of origin affects that of its cargo. It is the residence of the owner which stamps alike the vessel and its cargo with its national character.

President Woolsey writes as follows:

"It is unsafe, then, to argue on the assumption that ships are altogether territory, as will appear, perhaps, when we come to consider the laws of maritime warfare. On the other hand, private ships have certain qualities resembling those of territory: (1) As against their crews on the high seas; for the territorial or municipal law accompanies them as long as they are beyond the reach of other law, or until they come within the bounds of some other jurisdiction. (2) As against foreigners who are ex-

cluded on the high seas from any act of sovereignty over them, just as if they were a part of the soil of their country. Public vessels stand on higher ground; they are not only public property, built or bought by the Government, but they are, as it were, floating barracks, a part of the public organism, and represent the national dignity, and on these accounts, even in foreign ports, are exempt from the local jurisdiction.

"In both cases, however, it is on account of the crew rather than of the ship itself that they have any territorial qualities. Take the crew away, let the abandoned hulk be met at sea; it now becomes property and nothing more." (Woolsey Int. Law, § 54.)

While these views of the distinguished author are not exact in making the national character of the vessel depend on that of its crew or inhabitants, it correctly illustrates the position that the nationality of the vessel is derived from the personal relation of the individuals who own it; because a member of the crew in this way becomes nationalized temporarily by inhabiting the vessel, in the same manner as a foreigner obtains or loses a qualified nationality by domicile or residence in the enemy's country. For this reason the right to registry is suspended by the residence abroad of the American owner of a vessel of the United States. (Rev. Stat., 4133.) Mr. Wirt, the Attorney-General, decided that the right to nationality of such vessels was not lost but only suspended and that the vessel could be registered anew on the return of its owner to the United States, although the vessel had been placed, while the owner resided abroad, under the French flag.. (1 Op., 393.)

The class of vessels owned by citizens of the United States which are called undocumented vessels is recognized in the regulations of the Treasury Department as a part of the mercantile marine of the United States, although not coming within the statutory definition of "vessels of the United States."

The provisions of these regulations are contained in articles 93, 94, 95, 96, 97 of the general regulations under the customs and navigation laws of the United States.

These articles recognize the right of such vessel to use the flag of the United States; authorize the collectors to record the bill of sale of such a vessel, to authenticate its validity, to certify to its authenticity and to the citizenship of the owners, and make such authentication *prima facie* proof of good faith.

A form of certificate is prepared authenticating the sale, and before granting such certificate the tonnage of the vessel is to be ascertained and inserted in the description of the vessel in the certificate.

A separate record is kept of these vessels, and in the tonnage returns are reported in a separate column under the head, "Foreign-built vessels owned in the United States."

This review of the legislation in regard to undocumented vessels, and the action of the Departments in the construction of the navigation laws, is believed to be sufficient to establish not only the nationality of the vessels, but their recognition as a part of the mercantile marine of the United States. The construction of the laws by the proper Department, when long established and uniform, is binding upon the courts except in cases of very clear mistake. The same view of the national character of such vessels has been taken by the Department of State, the Treasury Department, and successive Attorneys-General.

These vessels are therefore a part of the mercantile marine of the United States under certain disabilities in regard to the trade of the United States. What these disabilities are and what law governs these vessels on the high seas has not been fully settled.

In construing the navigation laws of the United States in reference to a vessel's disabilities by reason of not being a "vessel of the United States," that is to say a vessel built in the United States, it is to be kept in mind that these laws in their inception were not a part of a protective system; they were intended to place foreign vessels, especially those of England, under the same disabilities as the laws of England placed our own.

As the Americans could build ships cheaper than the English, the American ship-builders did not require the protection given to the British ship-builder. (Reeves' Law of Shipping, 428, 429.)

The English, to preserve the carrying trade of the world to their own vessels, limited the trade to England by foreign vessels, to the importation of wares the product or growth of the country of the vessel, the master and three-fourths of the crew being of the same country or place. It excluded such foreign vessels from carrying between England and her colonies, and to encourage ship-building against American competition it confined the trade carried on by British vessels, by its registry laws, to vessels of British origin. (Reeves' Law of Shipping, 244. See also Lecky's England in the 18th Century, vol. 2, p. 9.)

The navigation laws passed in 1792 were based upon the English laws then existing. The measures were retaliatory. We confined the benefits of registry for the foreign trade and enrollment for the coast-wise trade of the United States to vessels of American origin, designating them by law as vessels of the United States.

In addition to this, in the early acts regulating importations into the United States, in imitation of the English act, discriminating duties were imposed in favor of importations in American vessels, and subsequently, in 1817, the right to *import* into the United States was confined to "vessels of the United States" and such foreign vessels as truly and wholly belong to the citizens or subjects of that country of which the goods are the growth, production, or manufacture. (Rev. Stat.. 2497.) The same act, as well as the previous acts discriminating in favor of vessels of the United States, provided that this restriction as to importation in foreign vessels should cease as to vessels of any nation which did not maintain a similar regulation against vessels of the United States.

This restrictive legislation as to importation in foreign vessels has been abrogated by treaties with the principal European nations.

But with the reason of the thing ceasing, the restriction still remains as to vessels owned by American citizens but not registered, including not only vessels of foreign origin but also vessels of American origin of construction which have become denationalized by a sale to a foreigner, and whose ownership has by a repurchase become again American. These last vessels still retain all the disabilities imposed by the original legislation and cannot be again registered. (6 Op., 383). These vessels are in the anomalous position that while when owned by foreigners they can import the merchandise and products of all countries into the United States, the same vessels if owned by Americans, and placed under the American flag, are excluded from the same trade they could enter into if owned by foreigners.

The denationalized vessel of American origin when owned by foreigners paid tonnage dues of 30 cents per ton, while the same vessel if owned by an American citizen paid 50 cents. (Rev. Stat., 4219.) On the other hand, this latter class of vessels had the advantage over foreign vessels of being exempted from the payment of light dues. (Rev. Stat., 4226.) Tonnage dues, however, are now payable at a uniform rate on all vessels entered from foreign ports, not to exceed 30 cents per annum. (23 Stat. L., 57.)

In reference to the foreign trade, the disability extends only to importation in such vessels. There is no statute which will prevent such vessels from coming in ballast to the United States, or with passengers, and it can obtain a clearance with cargo.

The statutes already quoted, especially the act of March 2, 1803, recognizes the right to clear for foreign countries with cargoes.

They are admitted also into the coasting trade of the United States from which foreign vessels are excluded (R. S., 4347) upon the payment of tonnage dues from which enrolled vessels are exempt. (Opinion of Nelson, Atty. Gen., 4 Op., 189.) By this opinion its privileges are confined to the trade in domestic merchandise and products other than distilled spirits, and it pays on each entry the same tonnage duties chargeable on foreign vessels. If found with foreign goods or distilled spirits on board the vessel is subject to forfeiture. (R. S., 4371.)

The construction of the Treasury Department as to the position of such vessels in relation to the foreign and coasting trade of the United States is found in a letter of the Treasury Department to the collector of Machias, Maine, dated May 2, 1872:

"I reply that if the Certificate Form No. 27, art. 96, part i, Rev. Reg., has been indorsed on the bill of sale of the vessel, you can clear her for St. John's, N. B., as desired. But she cannot legally import goods, wares, or merchandise from foreign ports, and she would be subjected in the coasting trade to disabilities and exactions from which documented vessels of the United States are exempted."

The law govering vessels, the character of which we are now discussing in their relation to the laws of the United States, has been the subject of an opinion addressed by the examiner of claims to Mr. Fish, the Secretary of State (3 Wharton's Digest Int. Law, § 410, p. 679), which was approved by the Attorney-General, Mr. Akerman. Possibly the attention of the latter was not attracted to the full extent to which that opinion went.

The question asked was as to the duties of American consuls in relation to this class of vessels, under the various acts of Congress relating to the deposit of papers with the consuls, and the shipment and discharge of seamen, and whether certain acts referred to applied to such vessels.

The result of the opinion was that none of the acts of Congress referred to by the Secretary of State applied to these undocumented vessels—in the following words:

"I then arrive at the conclusion that any vessel wholly owned by citizens of the United States is entitled to the protection of the United States, and can carry the flag of the United States, but that none of the acts, or parts of acts, referred to by Mr. Fish are applicable to any vessel that does not have a United States register.

"If this conclusion is right, a vessel owned by citizens of the United States, but not built in the United States, though entitled to its protection, would yet be under no relation thereto, or to its consuls, from which that vessel in a certain way, would be compelled to bear part of the cost of that protection by the payment of the fees due under existing statutes from registered vessels to the collectors, the consuls, and divers other officers of the United States, but she would sail the ocean flying the flag of the United States, entitled to demand protection from the Navy and the consuls of the United States, but yet without any official papers on board from officers of the United States which would present *prima facie* and official evidence that she was entitled to carry that flag and to receive that protection."

It is to be regretted that such conclusions were approved by the law department of the Government, for if the same reasoning were followed in the construction of other statutes as is applied to those referred to for consideration, there would be no law governing the relation of crews nor means of enforcing the internal discipline of such ships; no power to punish desertion, or to protect the seamen from cruel treatment, or to release them on the fulfillment of their engagement. It is only in exceptional cases that courts will take cognizance of questions in relation to seamen and the internal disipline of foreign vessels. Of crimes committed on the high seas other than piracy there is no jurisdiction except in the tribunals of the country to which the vessel belongs, and a serious question would arise by what tribunals crimes could be punished on board of such ships, which happily, however, has been otherwise disposed of by adjudication.

As every ship carries with it the territorial law of the country of its ownership, no other nation can or will interfere with its internal affairs at sea, or even in port, unless the peace of the port is disturbed. It is generally only at the request of a con-

NOTE.—The expressions used by Justice Nelson in delivering the opinion in White's Bank *v.* Smith, 7 Wallace, 655, 656, that vessels not brought within the registry and enrollment acts "are of no more value as American vessels than the wood and iron out of which they are constructed," and of Mr. Justice Miller in Badger *v.* Gutierez, 111 U. S., 736, 737, that a vessel of the United States without having the proper documents on board "in a foreign jurisdiction, or on the high seas, can claim no rights as an American vessel," were not involved or necessary to the decision of either case.

sul of the vessel's nation that the authorities of another nation will take jurisdiction of disputes between the mariners. They are reluctant to do so. Seamen of any nationality are considered in the law as seamen of the nation to which the vessel belongs in the same way as a foreigner subjects himself to the law of his domicile without regard to his actual citizenship.

It would seem to be indisputable that if the laws of the United States do not follow these vessels as a part of its territory the laws of no other nation can attach, and an anomaly is presented of property recognized as American without any law governing it except a guarantee of neutrality against belligerents.

Such a position is not supported by adjudications which will be referred to, nor by the opinion of Mr. Berrien, the Attorney-General, cited by the examiner of claims in his report to the Secretary of State, as to the construction of the provisions of the act of 28th February, 1803 (1 Op., 83), which were held to be inapplicable "to the mercantile marine of a *foreign nation or people*, although American seamen may be employed on board their vessels and American citizens may be interested in them as owners. It belongs to such foreign nation or people to govern its own marine by regulations, which the master and mariners who sail under the flag of such nation or people are bound to observe, and *to which they must look for protection.*"

The clause cited is inconsistent with the inference drawn by the examiner of the State Department, that protection was to be denied to American seamen sailing in a vessel carrying their own flag, as they could have none from any nation whose flag the vessel was not entitled to carry.

The comments of Mr. Berrien, Attorney-General, on the first three sections of the act under his consideration are not suggestive that he had in view their effect on any other class of vessels than foreign vessels.

The question to be answered was whether the first section of the act of 1803 "requiring a crew-list to be furnished by the master to the collector before clearance for a foreign port" could be construed to apply to foreign vessels as well as American vessels.

He refers to the other sections of the same act only to show that they could have no application to foreign vessels. They are as follows:

The second section of the act of 1803 which made it the duty of every master or commander of a ship or vessel belonging to citizens of the United States to deposit his register, sea-letter, and Mediterranean passport with the consul—in terms this section covers such undocumented vessels.

The third section of the same act under consideration relating to the consular protection of seamen on board of vessels sold abroad or discharged without their consent, refers in its words to those of "a ship or vessel belonging to a citizen of the United States."

The fourth section provides for the mariners or seamen of the United States who may be found destitute "within the consular districts," and requires all masters of vessels belonging to citizens of the United States and bound to some port of the same "to receive such mariners on board their vessels at the request of the consul."

There is nothing in these two last sections to suggest that the undocumented vessels and their crews are outside of consular supervision and protection, and none of them, except the first section, can have any bearing upon foreign vessels; or to intimate that Mr. Berrien, when using language which distinctly says that the sections of the act of 1803 were confined to vessels wholly owned by citizens of the United States and constituting a part of her mercantile marine by sailing under her flag, was not aware that foreign-built vessels had been allowed to sail under the flag of the United States, as a competent knowledge of the position of his Government in relation to such vessels and the legislation before referred to should be attributed to the highest law officer of the Government.

The conclusions that such undocumented vessels have the national character of American vessels, and yet are not regulated by the system of laws enacted to enforce

discipline and to protect seamen on board of such vessels is not supported by his opinion and cannot be accepted unless the legislation of the United States in positive terms excludes such vessels and their inhabitants from the operation of the laws governing other vessels of this nature. If these conclusions are correct these vessels are beyond the reach of all criminal process for offenses committed on the high seas. The judicial department however has not adopted this view. Judge Betts decided that an indictment for a revolt "by one or more of the crew of any American ship or vessel" under the second section of the act of March 3, 1835, Rev. Stat., § 5359, could be sustained by proof of American ownership, and that it was not in any way at issue whether the vessel was entitled to the privileges of an American bottom under our revenue laws. (U. S. *v.* Seagrist, 4 Blatch., 420.) Judge Woodbury held the same way in U. S. *v.* Peterson, 1 Wood & M., 305.

Judge Story's decision in U. S. *v.* Rogers, 3 Sumner, 342, "that the offense of revolt by one of the crew of an American vessel, on the high seas was not punishable under the act of 1835 when committed on board of a registered vessel of the United States engaged in the whale fisheries, because the vessel had not been licensed and enrolled for that trade, and the voyage was unlawful," was followed by Thompson, Ch. J., in U. S. *v.* Jenkins, 1 N. Y. Leg. Obs., 344, without any approval, and for the sake of uniformity until reversed. It does not militate with the decision of Judge Betts or of Judge Woodbury, which applied to revolts on American vessels engaged in a lawful trade.

The system of laws called the navigation laws, like the criminal laws, must be interpreted as effective on all classes of vessels which come within the reason for enacting any laws at all on such subject. The use of particular words does not necessarily affect the construction of such statutes. Take the case of The Mohawk, reported in 3 Wallace, 556, where the provisions of the act of 1792, forfeiting a vessel "if any certificate of *registry* or record shall be fraudulently or knowingly used for any ship or vessel not then actually entitled to the benefit hereof," were held to apply to a vessel enrolled and not registered navigating the lakes, although vessels enrolled in the coasting trade are not subject to forfeiture for such a cause, for the reason that an enrollment in the lake trade, in which the voyages are partly foreign and partly coastwise, is equivalent to a registry for the foreign trade to which the forfeiture applied.

It will be found that in some of the statutes referred to in the opinion given to the Department of State words are used which include these vessels as well as "registered vessels."

Thus in the act referred to, of 5th August, 1861 (12 Stat. L., 315), providing that "American vessels running regularly, &c., to or between foreign ports shall not be required to pay fees to consuls for more than four trips in a year," includes such vessels.

This statute naturally applies to this class of vessels whose trade is most generally between foreign ports in which trade they are under no disabilities, and it also must be read in connection with the statute of 1803 before referred to, requiring these vessels to deposit their passports with the American consuls and in terms to comply with the laws regulating the discharge of seamen and consular fees.

The words "American vessel" as a warranty of national character has been decided to be fulfilled by Kent, Ch. J., in Barker *v.* The Phœnix Ins. Co., 8 Johns R. 307, by a vessel wholly owned by American citizens, although not registered as a vessel of the United States, and the same decision was arrived at by Tilghman, Ch. J., in Griffith *v.* The Ins. Co., 5 Bin., 464; and the term American vessel, as used in the statute of March 3, 1835, applies to an offense committed on board of an American-owned vessel although not registered as a vessel of the United States.

So also the second section of the act of February 19, 1862, referred to, entitled "An act to prohibit the coolie trade by American citizens in American vessels," 12 Stat. L., 340, embraces such undocumented vessels under the terms "any ship or vessel, steamship or steam vessel belonging in whole or in part to citizens of the United States, or

registered, enrolled, or licensed within the same or any port thereof"—the word *or* must be used in the disjunctive, because a vessel owned only in part by a citizen of the United States cannot be registered or enrolled as a vessel of the United States.

For the same reason, in the fifth section of the same act extending the provisions of the passenger acts "to all vessels owned in whole or in part by citizens of the United States and registered, enrolled, or licensed within the same," the word "*and*" must also be read in the disjunctive.

In the laws referred to in the opinion, except the two last, it can be found according to the canons of construction that these vessels come within some of the provisions of the statutes.

One of the strongest arguments that can be urged against including these vessels in the mercantile marine of the United States is in the fact that the law does not require the officers of such vessels to be American citizens, as in the case of registered vessels. (Rev. Stat., § 4131). Whether this has been from inadvertence, or because the exclusion of such vessels from some of the privileges of vessels of the United States was a reason sufficient for relaxing the policy of confining the command of such vessel to our own citizens, will not override the plain intent of legislation, if it can be discovered. Whether a master is a citizen or a foreigner, his nationality while his employment is in an American vessel necessarily subjects him, like a merchant domiciled in the United States, to the law of his vessel's flag. The reasons for excluding foreigners from the command of vessels of the United States is one of municipal policy, to encourage American citizens to enter into the merchant service, by retaining for them the command of vessels of the United States and exclude competition by foreigners in this calling, and are not founded on sentiment or national exclusiveness. Foreigners have served with distinction in high commands in the military service of the United States, and could equally well be trusted with that of merchant vessels but for the policy of reserving such position for American citizens.

In examining the various enactments relating to merchant seamen collected in the Revised Statutes it will be found that some of the sections apply only to "vessels of the United States," while in others they may be interpreted to apply equally to undocumented vessels, and in the latest legislation, section 4582 of the Revised Statutes, reading: "Whenever a vessel belonging to a citizen of the United States is sold in a foreign country, and her company discharged, or when a seaman or citizen of the United States is with his own consent discharged in a foreign country," has been amended by the act of June 26, 1884, section 5, so as to apply only to "a vessel of the United States sold in a foreign country and her company discharged." (23 Stat. L., 54.)

There seems to be a reason for amending this section in this manner, because the original section required payment of three months' extra wages to a seaman discharged with his own consent in a foreign port from such an undocumented vessel, the nature of whose employment requires generally the shipment and discharge of its seamen to be made in a foreign port. The extra wages to be paid on the sale of a vessel, and the discharge of her crew, is now only payable to the seamen of that class of vessels whose crews were originally shipped in the United States, and whose voyages habitually ended there.

By section 7 of the same act (23 Stat. L., 55), section 4578, Rev. Stats., which required masters of vessels belonging to citizens of the United States and bound to some port of the same, to take on board destitute seamen, is amended in certain particulars, and its provisions are confined to "masters of vessels of the United States bound to ports of the same." No reason can be assigned for this change unless, perhaps, as the voyages of such vessels seldom extend to ports of the United States it may not have been thought expedient to include them in its provisions. However this may be, this change in the description of vessels included in both these sections is noticeable in an act which, in the second, third, and fourth sections, relating to the discharge of seamen before consuls in foreign ports; in the sixth section, relating to the duty of consular officers; in the fourth section, relating to the slop chest; and in

the twelfth section, abolishing consular fees, the same definition is not used, and the wording used applies equally to undocumented and registered vessels.

These views were prepared with regard to circumstances which might have occasioned a large number of foreign vessels to seek American ownership. If the views herein expressed are not correct, the evils attending belligerent character might be less than that of neutrality attached to the ownership of a class of vessels placed outside the regulation of the laws thought necessary for the protection of the crews and owners of all other vessels of the same nationality on the high seas and in foreign ports.

Such vessels might become free lances in case of war, being protected by the United States and under no subordination to its laws. If the opinion referred to is adopted as that of the Department of State it would give other nations, who must regard it as the official declaration of that Department of the Government, occasion for argument that protection as neutral property cannot be claimed for such vessels, as the United States refuses to consider a part of its territorial jurisdiction for the operation of its laws, as was mistakenly supposed to be the case by the English court in the case of Baring *v.* Claggett (33 B. & P., 201). A claim that such vessels are national for the purposes of neutrality, while in no respect a part of the commercial marine or controlled as to the acts of its owners and crew by the laws of the nation whose flag it carries, would be one very difficult to maintain as a part of the public law of the world.

The following is an extract from Mr. Henry Flanders' letter to Mr. Bayard, dated April 30, 1887, transmitting the text of the revised Consular Regulations, which were edited by Mr. Flanders:

"One of the first subjects that attracts attention in these regulations is the position assigned to foreign-built, but American-owned, vessels. Until the act of December 31, 1792 (Rev. Stat., § 4131), which defined what should be deemed vessels of the United States, all vessels carrying the flag and entitled to the protection of the United States were vessels of the United States. That act restricted the definition, and confined it to vessels only which should be registered pursuant to law, etc. Consequently, after the act of 1792, a class of vessels carrying the flag, and entitled to the protection of the United States, could no longer be deemed vessels of the United States, nor enjoy the benefits and privileges conferred on this latter class of vessels. Nevertheless, they were American-owned vessels, subject to many disabilities, and the objects, likewise, by subsequent legislation, of certain privileges.

"This was, and is, the *status* of foreign-built, but American-owned, vessels. The question is whether, when an act of Congress speaks of American vessels it means to include all vessels entitled to carry the flag and to receive the protection of the United States; or does it mean to exclude all but regularly documented vessels? The latter is the generally received construction of all such acts, and the construction adopted in the old edition of the Consular Regulations. But such construction at once encounters a serious practical difficulty. How can consuls exercise any jurisdiction over such vessels? How can the crimes act apply to the seamen on board of them? Obviously this difficulty has been overcome by the assumption that protection and amenability are correlative terms. And that when the protection is accorded, and the right to carry the flag is conceded, amenability to the law of the flag follows."

Offenses committed on British owned, but unregistered, vessels on the high seas, are cognizable by the British courts, although such vessels are not entitled to clearance from British ports as British ships, or to any benefits, privileges, advantages, or protection usually enjoyed by British ships, or to use the British flag, or assume the British national character. *Merchant Shipping Act*, 17 & 18 Vict., c. 104, secs. 19, 106; *R. v. Seberg*, 11 Cox's C. C., 520.