Numb. 23900.

SUPPLEMENT

TO

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TUESDAY, SEPTEMBER 24, 1872.

Foreign Office, September 20, 1872.

THE following despatches, with their inclosures, have been received from Lord Tenterden:—

No. 1.

Lord Tenterden to Earl Granville.

My Lord, *Geneva, September* 14, 1872.

I HAVE the honour to transmit to your Lordship herewith a copy of the Protocol of the proceedings of the Tribunal of Arbitration this day, to which is annexed a copy of the Decision and Award of the Arbitrators.

A copy of this Decision and Award, signed by the Arbitrators assenting to it, has also been delivered to me in accordance with the provisions of the VIIth Article of the Treaty of Washington, and is forwarded to your Lordship with this despatch.

After the Decision and Award of the majority of the Arbitrators had been read and signed, the Chief Justice presented to the Tribunal a statement of his reasons for dissenting from it.

A copy of this statement is also annexed to the Protocol.

I have, &c.

(Signed) TENTERDEN.

Inclosure in No. 1.

Protocol No. XXXII.

Record of the Proceedings of the Tribunal of Arbitration at the Thirty-second Conference, held at Geneva, in Switzerland, on the 14th of September, 1872.

THE Conference was held with open doors, pursuant to adjournment. All the Arbitrators and the Agents of the two Governments were present.

The Protocol of the last Conference was read and approved, and was signed by the President and Secretary of the Tribunal.

The President then presented the Decision of the Tribunal on the question of the Alabama Claims, and directed the Secretary to read it; which was done, and the Decision was signed by Mr. Charles Francis Adams, Count Frederic Sclopis, M. Jacques Staempfli, and Viscount d'Itajubá, Arbitrators, in the presence of the Agents of the two Governments.

A copy of the Decision thus signed, was delivered to each of the Agents of the two Governments respectively, and the Tribunal decided to have a third copy placed upon record; they further decided that the decision should be printed and annexed to the present Protocol.

Sir Alexander Cockburn, as one of the Arbitrators, having declined to assent to the Decision, state the grounds of his own decision, which the Tribunal ordered to be recorded as an Annex to the present Protocol.

The Tribunal resolved to request the Council of State at Geneva to receive the archives of the Tribunal and to place them among its own archives.

The President, Count Sclopis, then directed the Secretary to make up the record of the proceedings of the Tribunal at this XXXIInd and last Conference, as far as completed; which was done, and the record having been read and approved, was signed by the President and Secretary of the Tribunal and the Agents of the two Governments.

Thereupon the President declared the labours of the Arbitrators to be finished and the Tribunal to be dissolved.

(Signed) FREDERIC SCLOPIS.
TENTERDEN.
J. C. BANCROFT DAVIS.
ALEX. FAVROT, *Secretary.*

Annex 1.

Decision and Award

Made by the Tribunal of Arbitration constituted by virtue of the Ist Article of the Treaty concluded at Washington the 8th of May, 1871, between Her Majesty the Queen of the United Kingdom of Great Britain and Ireland and the United States of America.

HER Britannic Majesty and the United States of America 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 Her Britannic Majesty,
One by the President of the United States,
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

Her Britannic Majesty, the President of the United States, 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:

Her Britannic Majesty, Sir Alexander James Edmund Cockburn, Baronet, a Member of Her Majesty's Privy Council, Lord Chief Justice of England;

The President of the United States, Charles Francis Adams, Esquire;

His Majesty the King of Italy, His Excellency Count Frederic 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. Jacques Staempfli;

His Majesty the Emperor of Brazil, his Excellency Marcos Antonio d'Araujo, Viscount d'Itajubá, a Grandee of the Empire of Brazil, Member of the Council of His Majesty 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 IInd 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 Her Britannic Majesty, Charles Stuart Aubrey, Lord Tenterden, a Peer of the United Kingdom, Companion of the Most Honourable Order of the Bath, Assistant Under-Secretary of State for Foreign Affairs;

And for the United States of America, John C. Bancroft Davis, Esquire;

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 IIIrd 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 December, 1871, reassembled 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 IV 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 VIth and VIIth Articles of the said Treaty, the Arbitrators are bound under the terms of the said VIth Article, "in deciding the matters submitted to them, to be governed by the three Rules therein specified and by such principles of International Law, not inconsistent therewith, as the Arbitrators shall determine to have been applicable to the case;"

And whereas the "due diligence" referred to in the first and third of the said Rules ought to be exercised by neutral Governments in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfil the obligations of neutrality on their part;

And whereas the circumstances out of which the facts constituting the subject-matter of the present controversy arose, were of a nature to call for the exercise on the part of Her Britannic Majesty's Government of all possible solicitude for the observance of the rights and 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 offence 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 exterritoriality accorded to vessels of war has been admitted into the law of nations, not as an absolute right, but solely as a proceeding founded on the principle of courtesy and mutual deference between different nations, and therefore can never be appealed to for the protection of acts done in violation of neutrality;

And whereas the absence of a previous notice 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, dispatched 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 cruizer 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 the 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 fulfil the duties prescribed in the first and the third of the Rules established by the VIth Article of the Treaty of Washington.

And whereas, with respect to the vessel called the Florida, it results from all the facts relative to the construction of the Oreto in the port of Liverpool, and to its issue therefrom, which facts failed to induce the Authorities in Great Britain to resort to measures adequate to prevent the violation of the neutrality of that nation, notwithstanding the warnings and repeated representations of the Agents of the United States, that Her Majesty's Government has failed to use due diligence to fulfil the duties of neutrality;

And whereas it likewise results from all the facts relative to the stay of the Oreto at Nassau, to her issue from that port, to her enlistment of men, to her supplies, and to her armament, with the co-operation of the British vessel Prince Alfred, at Green Cay, that there was negligence on the part of the British Colonial Authorities;

And whereas, notwithstanding the violation of the neutrality of Great Britain committed by the Oreto, this same vessel, later known as the Confederate cruizer 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 fulfil the duties prescribed in the first, in the second, and in the third of the Rules established by Article VI of the Treaty of Washington.

And whereas, with respect to the vessel called the Shenandoah, it results from all the facts relative to the departure from London of the merchant-vessel the Sea King, and to the transformation of that ship into a Confederate cruizer 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 fulfil the duties of neutrality;

But whereas it results from all the facts connected with the stay of the Shenandoah at Melbourne, and especially with the augmentation 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 fulfil any of the duties prescribed by the three Rules of Article VI in the Treaty of Washington, or by the principles of international law not inconsistent therewith, in respect to the vessel called the Shenandoah, during the period of time anterior to her entry into the port of Melbourne;

And, by a majority of three to two voices, the Tribunal decides that Great Britain has failed, by omission, to fulfil the duties prescribed by the second and third of the Rules aforesaid, in the case of this same vessel, from and after her entry into Hobson's Bay, and is therefore responsible for all acts committed by that vessel after her departure from Melbourne, on the 18th day of February, 1865.

And so far as relates to the vessels called—

The Tuscaloosa
(Tender to the Alabama),
The Clarence,
The Tacony, and
The Archer
(Tenders to the Florida),

The Tribunal is unanimously of opinion—

That such tenders or auxiliary vessels being properly regarded as accessories must necessarily follow the lot of their principals, and be submitted to the same decision which applies to them respectively.

And so far as relates to the vessel called Retribution,

The Tribunal, by a majority of three to two voices, is of opinion—

That Great Britain has not failed by any act or omission to fulfil any of the duties prescribed by the three Rules of Article VI in the Treaty of Washington, or by the principles of international law not inconsistent therewith.

And so far as relates to the vessels called—

The Georgia,
The Sumter,
The Nashville,
The Tallahassee, and
The Chickamauga, respectively,

The Tribunal is unanimously of opinion—

That Great Britain has not failed, by any act or omission, to fulfil any of the duties prescribed by the three Rules of Article VI in the Treaty of Washington, or by the principles of international law not inconsistent therewith.

And so far as relates to the vessels called—

The Sallie,
The Jefferson Davis,
The Music,
The Boston, and
The V. H. Joy, respectively,

The Tribunal is unanimously of opinion—
That they ought to be excluded from consideration for want of evidence.

And whereas, so far as relates to the particulars of the indemnity claimed by the United States, the costs of pursuit of the Confederate cruizers 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 "nett 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 dollars 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 1872.

(Signed) C. F. ADAMS.
FREDERIC SCLOPIS.
STAEMPFLI.
VICOMTE D'ITAJUBA.

Annex 2.

Reasons of Sir Alexander Cockburn for dissenting from the Award of the Tribunal of Arbitration.

THE indirect claims at first insisted on by the Government of the United States being now out of the question, we have to deal with the claims for damages, "growing out of the acts" of certain specified vessels, as to which it is alleged that, by reason of some default on the part of the Government of Her Majesty the Queen of England, these vessels were enabled to take and destroy ships and cargoes belonging to citizens of the United States.

Causes of complaint brought forward by the United States.

The causes of complaint put forward by the United States' Government may be classed under the following heads:—

1. That by reason of want of due diligence on the part of the British Government, vessels were allowed to be fitted out and equipped, in ports of the United Kingdom, in order to their being employed in making war against the United States, and having been so equipped, were allowed to quit such ports for that purpose.

2. That vessels, fitted out and equipped for the before-mentioned purpose, in contravention of the Foreign Enlistment Act, and being therefore liable to seizure under that Act, having gone forth from British ports, but having afterwards returned to them, were not seized as they ought to have been, but having been allowed hospitality in such ports, were suffered to go forth again to resume their warfare against the commerce of the United States.

3. That undue favour was shown in British ports to ships of war of the Confederate States, in respect of the time these ships were permitted to remain in such ports, or of the amount of coal with which they were permitted to be supplied.

4. That vessels of the Confederate States were allowed to make British ports the base of naval operations against the ships and commerce of the United States.

Owing to all, or some one or other of these causes, vessels of the Confederate States were enabled, it is alleged, to do damage to the commerce of the United States; and compensation is claimed in respect of the damage so done.

Rules of the Treaty of Washington.

The Treaty of Washington, from which our authority is derived, lays down, for our guidance in dealing with and deciding on these claims, certain rules as to the obligations of Great Britain as a neutral State, which for the purpose of this arbitration are to be taken to have been binding on it.

Not, indeed, that the British Government admits that these rules form part of the law before existing between nations. On the contrary, it is expressly stated that "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 those claims, the Arbitrators should assume that Her Majesty's Government had undertaken to act upon the principles set forth in these Rules. And the High Contracting Parties agree to observe these Rules as between themselves in future, and to bring them to the knowledge of other maritime Powers, and to invite them to accede to them."*

The Rules in question are as follows:—

"A neutral Government is bound—

"First. To use due diligence to prevent the fitting out, arming, or equipping

* Treaty of Washington, Article VI.

within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruize 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 cruize 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."*

With these Rules before it, the Tribunal is directed to determine, as to each vessel, "whether Great Britain has, by any act or omission, failed to fulfil any of the duties set forth in such Rules, or recognized by the principles of international law not inconsistent with such Rules."

Difficulty arising from the Treaty.

The effect of this part of the Treaty is to place this Tribunal in a position of some difficulty. Every obligation, for the non-fulfilment of which redress can be claimed, presupposes a prior existing law, by which a right has been created on the one side and a corresponding obligation on the other. But here we have to deal with obligations assumed to have existed prior to the Treaty, yet arising out of a supposed law created for the first time by the Treaty. For, we have the one party denying the prior existence of the rules to which it now consents to submit as the measure of its past obligations, while the other virtually admits the same thing, for it "agrees to observe the Rules as between itself and Great Britain in future, and to bring them to the knowledge of other maritime Powers, and invite them to accede to them"—all of which would plainly be superfluous and vain if these Rules already formed part of the existing law recognized as obtaining among nations.

It is, I cannot but think, to be regretted that the whole subject-matter of this great contest, in respect of law as well as of fact, was not left open to us, to be decided according to the true principles and rules of international law in force and binding among nations, and the duties and obligations arising out of them, at the time when these alleged causes of complaint are said to have arisen.

From the history of the Treaty of Washington, we know that it was proposed by the British Commissioners to submit the entire question, both as to law and fact, to arbitration; but the Commissioners of the United States refused to "consent to submit the question of the liability of Great Britain to arbitration unless the principles which should govern the Arbitrator in the consideration of the facts could be first agreed upon." In vain the British Commissioners replied that they "should be willing to consider what principles should be adopted for observance in future, but that they were of opinion that the best mode of conducting an arbitration was to submit the facts to the Arbitrator, and leave him free to decide upon them after hearing such arguments as might be necessary." The American Commissioners replied that they should be willing to consider what principles should be laid down for observance in similar cases in future, but only with the understanding that "any principles which should be agreed upon should be held to be applicable to the facts in respect to the Alabama claims." The British Commissioners and Government gave way, possibly without fully appreciating the extent to which the principles, of which they were thus admitting the application, would be attempted to be carried in fixing them with liability.

How this apparent anomaly arose is plain. Her Majesty's Government, animated by a high sense of justice and by an earnest desire of conciliation, were anxious to remove every possible cause of complaint or sense of wrong which the Government and people of the United States had, or believed themselves to have, against Great Britain as to matters arising out of the civil war: they were willing that if, through any errors or shortcomings on the part of British Authorities, injury had been caused to American subjects, full redress should be afforded; they were willing that the question should be determined by an independent and impartial Tribunal; and though they would naturally have preferred that the matters in dispute between the two countries should be decided by what they believed to be the rules of International

* Treaty of Washington, Article VI.

Law governing the case—rather than that, if the decision should be in favour of Great Britain, the American people should feel that the contest had not been determined according to what in their view were the principles applicable to it, Her Majesty's Government gave way to the desire of that of the United States, and consented that the rules, by which it was agreed that the duties and obligations of the two nations should be governed in any future case, should be taken to be the measure of the past obligations and duties of Great Britain with reference to the subject-matters of the dispute.

It was a great and generous concession, and though the effect of it might be a pecuniary sacrifice on the part of Great Britain, it was one which was cheerfully made on the one side, and I trust will not fail to be appreciated in the same generous spirit on the other.

If, however, the differences which have unhappily arisen between the United States and Great Britain were to be determined, not according to the rules of International Law which the Arbitrators to be agreed on should determine to be applicable to the case, but according to rules to be settled by the Contending Parties themselves, then I cannot but wish that the framers of this Treaty had been able to accomplish the difficult task, now left to us, of defining more precisely what is meant by the vague and uncertain term "due diligence," and had also set forth the further "principles of international law, not inconsistent with the rules laid down," to which reference is made as possibly affecting the liability of Great Britain.

To some of the heads of complaint hereinbefore referred to, this observation does not indeed apply. Whether vessels, which might originally have been seized, should have been so dealt with when they re-entered British ports, or whether they were protected by the commissions they had in the meanwhile received from the Confederate Government; whether Confederate ships of war were permitted to make British ports the base of naval operations against the United States; whether the accommodation afforded to them in British ports constituted a violation of neutrality, for which Great Britain can be held liable, are questions which are left to be decided and must be decided according to the rules of international law alone.

But when we have to deal with the far more important question of the liability of Great Britain by reason of the omission to use "due diligence" to prevent the equipment of vessels of war in her ports, as required by the Treaty, we find nothing in the Treaty to direct us as to the meaning of that term, especially as regards the degree of diligence which is to be understood to be required by it.

Left in this difficulty, we must endeavour to determine for ourselves the extent and meaning of the "due diligence" by which we are to test the alleged shortcomings of the Government of Great Britain. For, it is plain that the standard of "due diligence" ought not to be left to the unguided discretion of each individual Arbitrator. The municipal law of every country, wherever diligence is required by the law, whether in respect of obligations arising out of contract, or in regard to the due care which every one is bound to exercise to avoid doing harm to the persons or property of others,—*ne alienum lædat*,—prescribes some standard by which the necessary degree of diligence may be tested.

Dealing here with a matter appertaining to law, it is to juridical science that we must look for a solution of the difficulty. And since we have to deal with a question of international law, although, it is true, of an exceptional character, it seems to me that it will be highly useful to endeavour to form a clear view of the reciprocal rights and duties between belligerents and neutrals, created by international law generally, and of the diligence necessary to satisfy the obligations which that law imposes. I cannot concur with M. Staempfli, that, because the practice of nations has at times undergone great changes, and the views of jurists on points of international law have often been and still are conflicting, therefore there is no such thing as international law, and that, consequently, we are to proceed independently of any such law—for such is the effect of his reasoning, if I understand it rightly—according to some intuitive perception of right and wrong, or speculative notions of what the rules as to the duties of neutrals ought to be. It seems to me that when we shall have ascertained the extent to which a neutral State is responsible, according to the general law of nations, for breaches of neutrality committed by its subjects, and the degree of diligence it would be called upon to exercise under that law, in order to avoid liability, we shall be better able to solve the question of what constitutes *due diligence* in the terms of the Treaty of Washington. That Treaty may have admitted a liability in respect of the equipment of ships, where none existed by international law before, as I

certainly think it has; but the degree of diligence required of a neutral Governmen to prevent breaches of neutrality by its subjects must be determined by the same principles, whatever may be the nature of the particular obligation.

Besides the necessity of thus considering the relation of belligerents and neutrals with reference to the subject of "due diligence," we have further, in order to satisfy the exigency of the Articles of the Treaty, to consider whether, besides in the omission of "due diligence," Great Britain has failed to fulfil any duty imposed by any principle of international law not inconsistent with the rules laid down. It is clear also that, with reference to the other heads of complaint, our decision must necessarily depend entirely on the rules of international law applicable thereto. It seems to me, therefore, desirable, in the first place, to endeavour to take an accurate survey of the law by which the relative rights of belligerents and neutrals are fixed and determined, as essential to the solution of the questions we are called on to decide.

I proceed, therefore, to consider the subject of neutral obligations in time of war.

lements of utrality.

Neutrality may be said to be the status of a country relatively to two others which are at war with one another, while it remains at peace with both, and gives assistance to neither.

The last mentioned condition is plainly an essential element of that which goes before it; for, to give assistance to either of the belligerents would be indirectly to take a part in the war, and would afford a sufficient reason to the one whose enemy was thus assisted, for having recourse to force to prevent such assistance from being given.

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It is obviously immaterial in what form the assistance is rendered, so long as its purpose and effect is to add to the means of the belligerent for the purpose either of offence or defence. Troops, men, horses, ships, arms, munitions of war of every kind, money, supplies—in short, whatever can add to the strength of the belligerent for the purpose either of attack or defence, are things that cannot be supplied by a neutral State to either belligerent without forfeiting the character of neutrality and the rights incidental to it.

In like manner the neutral Sovereign cannot allow the use of his territory for the passage of troops of either belligerent, still less allow it to be used by either as a base of hostile operations. He cannot lend his ships for the transport of troops, arms, or munitions of war, or even for the transmission of despatches. Whatever restrictions, in the exercise of his territorial rights, he imposes on the one belligerent, he must impose on the other also; for restraints—however lawful and proper in themselves—enforced as against the one, dispensed with as regards the other, are indirectly assistance given to the one so favoured.

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Whatever obligations attach by the general principles of the law of nations to the State or Community, as a whole, are equally binding on its subjects or citizens. For the State or community is but the aggregate of its individual members, and whatever is forbidden to the entire body by that law, is equally forbidden to its component parts. In this sense, and in this sense only, can it be said that international law—in other words, the common law of nations—forms part of the common law of England; for the greater part of the rules of international law, by which nations now consent to be bound, are posterior in date by many centuries to the formation of the common law of England. Nevertheless, Great Britain forming part of the great fraternity of nations, the common law adopts the fundamental principles of international law, and the obligations and duties they impose, so that it becomes, by force of the municipal law, the duty of every man, so far as in him lies, to observe them; by reason of which any act done in contravention of such obligations becomes an offence against the law of his own country.

But the subject, who thus infringes the law of his own country by violating the neutrality which that law enjoins him to maintain, is amenable for his offence to the law of his own country alone, except when actually taking part in the war as a combatant, when of course he is liable to be dealt with according to the laws of war. The offended belligerent has otherwise no hold on him. International law knows of no relations between a State and the subjects of another State, but only of those which exist between State and State. But this being so, the belligerent, against whom a breach of neutrality has been committed by the subject of a neutral State, as distinguished from the State itself, may have a right to hold the State responsible and to look to it for redress. For the State, that is, the community as a whole, is bound to

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restrain its individual members from violating obligations which, as a whole, it is bound to fulfil.

Not, however, that the responsibility of the State for the acts of its subjects is absolute and unlimited. Reason has set bounds to a responsibility which would otherwise be intolerable. For it must be remembered that the consequence of a violation of neutrality is the right of the offended belligerent to treat the offending neutral as an enemy, and declare war against him. He is not bound to accept pecuniary amends as an alternative.

Now, reason points out that the Government of a country can only be held responsible for breaches of neutrality committed by its subjects, when it can reasonably be expected to prevent them.

There are things which a Government can prevent, and others which it cannot. It can prevent things that are done openly and in defiance of the law. The open levying of men, and expeditions departing from its territory by land or water, are things which a Government would properly be expected to prevent, and for which, if not prevented, it would be answerable.

But a Government could not be so held in respect of things it cannot prevent; such as the conduct of individual subjects in enlisting or serving in the land or sea force of a belligerent; or things done clandestinely or surreptitiously, so as to elude observation or detection notwithstanding the exercise of proper diligence to prevent the law from being broken. But then the exercise of such diligence is part of the duty of a Government, and the condition of its immunity. If this diligence has been wanting, a belligerent has just cause to hold the neutral State responsible for wrongful acts done by its subjects in violation of neutrality, and from which he, the belligerent, has suffered. We are thus brought face to face with the all-important question of what is this "diligence" which a Government is thus bound to exercise to prevent breaches of neutrality by its subjects. I shall endeavour presently to grapple with that question; but I prefer first to complete my survey of the relative rights and obligations of belligerents and neutrals.

And as the principal complaint against the British Government relates to vessels of war furnished by its subjects to the Confederate States, I shall, in the first place, apply myself to the question how far the subjects of a neutral State can, consistently with the obligations of neutrality, supply a belligerent with articles of warlike use in the way of trade and business.

Rights of neutral subjects in respect of trade.

For, thus far we have been dealing with assistance rendered to one belligerent against another, *animo adjuvandi*, for the direct purpose of enabling him to overcome or resist his opponent. Very different considerations present themselves when we have to deal with assistance furnished to a belligerent, not *animo adjuvandi*, with the object of enabling him to overcome his enemy, but *animo commercandi*—in the way of trade and commerce.

Difference between a State and its subjects in regard to trade.

Here a broad and important distinction between the State and its subjects presents itself. The former, generally speaking, cannot, consistently with neutrality, under any circumstances, supply to one of two belligerents articles which may be of use to him in carrying on war. For, as Governments do not engage in trade, save in exceptional cases of very rare occurrence—as, for instance, when a Government disposes of ships for which it has no use—nothing supplied by a Government to a belligerent can be supplied otherwise than *animo adjuvandi*, that is, for a purpose inconsistent with neutrality. But its Subjects stand, in this respect, on a very different footing. The Subject, indifferent to both the belligerent parties, may be willing to sell to either articles of warlike use in which he is in the habit of dealing. Assistance, and sometimes very material assistance, is thus afforded to a belligerent, who, by this means, is enabled to carry on war. Is assistance thus afforded, not *animo adjuvandi*, but *animo commercandi*, a breach of neutrality, or is it to be considered as within the right of the neutral subject?

Now, the subjects of a neutral State having in time of peace the right of carrying on trade with the belligerent, on what ground of reason or justice, it may be asked, should their right of peaceful trade be taken away, and their interests thus be damaged by reason of a war which they have had no share in bringing about, and in which they have no concern? The condition of neutrality, in not supplying anything to either belligerent with the object of assisting him against the other, or which would not be as readily supplied to the other, being observed, what reason can be suggested why the

rights of the neutral in his relations with either belligerent, as they existed before war broke out, should be disturbed or altered?

An Italian jurist thus writes:—

"Il fatto della vendita degli oggetti di contrabbando avvenuta in territorio neutrale è opera dello Stato stesso nella sua qualità di persona pubblica, o invece è l'operato di suoi privati cittadini, che fanno di ciò la loro abituale professione. Nel primo caso è fuor di dubbio che vi sarebbe motivo di lagnanza per parte di uno dei belligeranti, poichè non entra negli officii dello Stato l'attendere a privati mercimonii, ed ogni suo atto ha un valore internazionale o in senso di un diritto o in senso di una obbligazione, che non si può mai dissimulare. Ma lo stesso non si può dire ove la vendita degli oggetti, e quando sia il caso la fabbrica degli stessi, fosse il fatto particolare di privati cittadini di quello stesso Stato. In esso non potrebbe ravisarsi un fine politico come nell'azione pubblica del governo, non essendo lo scopo di tali cittadini che commerciale od industriale, epperò non lesivo in modo alcuno degli altrui diritti.

"Se gli autori che hanno discusso la presente questione avessero ritenuta la capitale differenza che passa tra gli atti pubblici del governo e quelli dei privati cittadini, non avrebbero al certo classificato come atti contrari alla condizione neutrale la vendita fatta in territorio neutro da privati cittadini di armi e munizioni da guerra."*

Effect of war on neutral trade.

Nevertheless, it is certain that the rights of a nation, as regards trade with another nation, do undergo very considerable modifications, when such second nation engages in war with a third; and when it is said by some writers that neutrality is only the prolongation of the state of peace between the neutral and the belligerent, this language must be taken with considerable allowance. For, it is certain that, as regards trade and commerce, the rights of the peaceful neutral undergo very serious diminution. By the admitted rules of international law, a belligerent may seize articles contraband of war in transit by sea from the neutral to his enemy. By blockading his enemy's port he may shut out the commerce of the neutral even in articles not capable of being applied to warlike use. True, say those writers who advocate the rights of neutrals against belligerents—but if the rights of the neutral subject in respect of trade had been regulated according to natural law, or, to speak more philosophically, according to the law which reason points out as for the common benefit of all, those rights would have remained undisturbed and unaffected by the wars of others with whom his own country remained at peace. But between distant nations trade can be carried on only by sea. The nations most powerful at sea have generally been those who have waged war on the ocean. In such wars they have sought to weaken their adversaries by crippling their commerce, and to effect that object have imposed restraints on peaceful States less powerful than themselves. Some countries have even gone so far, in early times, as to interdict all commerce whatever with nations with which they were at war. The sense of mankind, it is true, revolted against pretensions so extravagant, and after a time the restraints which belligerents were entitled to impose on neutral commerce were rendered less oppressive. But they still bear the impress of their origin, as having been imposed by the strong upon the weak. They are manifestly in derogation of the common right of peaceful trade which all maritime nations enjoy in time of peace, but which is thus made to submit to restraint in order to serve the purposes of those by whom the peace of the world is disturbed.

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 to 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

* Avio, "Nuova Teoria dei Rapporti Giuridici Internazionali," cited in Gola, "Corso di Diritto Internazionale," vol. ii, p. 30.

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.

Blockade and contraband of war.

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.

Blockade.

The right of blockading a port, and thereby excluding from it neutral commerce of every sort, has been justified by assimilating it to that exercised by the besieger of a city or fortress, in investing it and debarring all access to it. But the analogy is not complete; for the immediate purpose of the besieger is to take the city or fortress, while that of the blockade is, not to capture the blockaded port, but to enfeeble the enemy and diminish his means by the gradual destruction of his commerce, which of course necessarily involves a corresponding loss inflicted on the commerce of the neutral. And though it may be said that, just as the besieger of a city or fortress is in occupation of the territory which surrounds it, and is, therefore, by the law of war, master of such territory and entitled to give laws to all within its ambit, and has thus full right as well as power to forbid access to it, so the blockading force has occupation of the territorial waters and can exercise a similar right in respect of them; yet for the most part such occupation is constructive only, and the blockading force is generally in the habit of sending cruizers far beyond the limits of the territorial waters, to intercept vessels intending to enter the blockaded port.

On whatever ground the right of blockade thus conceded to belligerents may be placed, it is obvious that it is a very serious encroachment on the freedom of the neutral in the peaceful pursuit of commerce.

In M. Calvo's work, "Le Droit International," blockade is spoken of as "la plus grave atteinte qui puisse être portée par la guerre au droit des neutres.*

Fiore says:—"Le blocus est odieux et contraire à l'indépendance des peuples neutres; parcequ'il n'empêche pas seulement le commerce de certaines matières déterminées, comme la contrebande de guerre; mais il détruit toute espèce de commerce de quelque nature que ce soit avec les lieux assiégés et bloqués."†

Nor must it be forgotten, with respect to trade carried on in defiance of a blockade, that the neutral owes nothing to the blockading belligerent, who, for his own purposes thus seeks to shut out the innocuous commerce of the neutral with his enemy, regardless of the loss and injury he is thereby inflicting on him.

Contraband of war.

The right to intercept articles of warlike use has been for the most part treated by earlier writers on international law as an admitted encroachment on the neutral in respect of freedom of trade. It has been justified on the score of the necessity in which the belligerent captor is placed, of preventing that which will be used to his own hurt from reaching his adversary; or as arising from the law of self-defence which

* Vol. ii, p. 521.

† Vol. ii, p. 446.

gives to the belligerent the right of stopping things, which may be used against him, while on their way to his enemy, and, furthermore, of confiscating them to his own use as a penalty on the neutral for having intended to convey them to the enemy.

Looked at from this point of view, it is said that the right of the belligerent to intercept this species of commerce, and the liability of the neutral to have his property captured and confiscated under such circumstances, do not arise out of obligations inherent in the nature of neutrality. They are purely conventional, and, as it were, a compromise between the power of belligerents and the rights of neutrals; and, if this species of trade can be said to be unlawful, it is only so *sub modo*, it being left free to the neutral to pursue it, subject always to the right of the belligerent to seize it during its transit to his enemy if he can. "The right of the neutral to transport," says that great jurist, Chancellor Kent, "and of the hostile Power to seize, are conflicting rights, and neither party can charge the other with a criminal act."*

Different view.

A different view respecting the trade of the neutral in articles of contraband of war has, however, been maintained in our day. M. Hautefeuille, and the writers of his school, look upon the supplying of articles of contraband of war by the neutral in the way of trade as inconsistent with the duty of neutrality, which prohibits the rendering of assistance to a belligerent for the purpose of a war in which he is engaged—extending the rule to articles of warlike use supplied in the way of trade as much as to those furnished gratuitously.

I. Hautefeuille.

According to this view, the neutral thus guilty of a breach of the first principle of neutrality justly incurs the penalty of his transgression in the confiscation and loss of his property.

This doctrine is open, however, to the objection that it is inconsistent with the practice of nations, according to which this species of trade has never been treated as a breach of neutrality in the full sense of the term. It wholly fails to account for or justify the right of blockade.

But the importance of this difference in the views of publicists will be more sensibly felt when we proceed to deal with the subject of the trade of the neutral with the belligerent in the country of the neutral.

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One thing is quite clear, and must not be lost sight of. Neither the trade in contraband of war, nor that carried on in defiance of a blockade, constitute, practically, any violation of neutrality, so far as the Government of the neutral trader is concerned. Scarce any neutral Government has ever attempted to prevent its subjects from carrying on such trade: no neutral Government was ever held responsible, as for a breach of neutrality, for such trade carried on by its subjects. This is a point as to which there has been no difference of action among Governments, or difference of opinion as to the duty of Governments among writers on public law. It is one of those things which, on the part of its subjects, a Government, according to the existing practice of nations, is not called upon to prevent. It is one of those things which the belligerent, who, in furthering his own purposes is indifferent to the loss he inflicts on the neutral, must submit to if he is unable to prevent it, and for which he is not entitled to hold the neutral State responsible.

l. Ortolan.

Speaking of the transport of articles contraband of war, M. Ortolan states the law most correctly:—

"Si c'est l'Etat neutre lui-même qui fait opérer ce transport, soit qu'il le fasse gratuitement, soit qu'il en reçoive le prix, il devient auxiliaire de la lutte, et par conséquent il rompt la neutralité. La chose change si ce sont les sujets de cet Etat qui, sans appui de leur Gouvernement, font de ce même transport un objet de leurs opérations commerciales. Une Puissance qui reste neutre n'est pas obligée de défendre ce commerce à ses sujets, encore moins de les punir pour l'avoir fait; seulement elle ne peut le couvrir de sa protection. En d'autres termes, le pavillon ne couvre pas les marchandises de contrebande de guerre, non pas même dans le cas où ces marchandises appartiennent à des neutres."†

hips of war and oals.

Among the various articles coming under the denomination of contraband of war, according to the general principles of international law, two more particularly interest us on the present occasion,—ships of war and coals. Both are excluded from the category of contraband by M. Hautefeuille, who refuses to recognize as such anything

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* Kent's Commentaries, vol. i, p. 142.
† "Diplomatie de la Mer," vol. ii, cap. vi.

which is not in its actually existing state ready to be used for attack or defence. The following passages from his work "Des Droits et des Devoirs des Nations Neutres," explain the views of the author on the subject of ships, which, till armed, he refuses to consider contraband of war, and which, whatever the construction, when unarmed, he holds to be objects of lawful commerce :—

"Je ne puis comprendre qu'un bâtiment, quelles que soient sa grandeur, sa forme, sa destination, soit un objet de contrebande de guerre. Le navire n'est pas propre à la guerre, préparé pour servir exclusivement aux opérations militaires, apte à être employé à ces opérations, immédiatement et sans aucun changement, sans aucune addition. Lorsqu'il est dépourvu des canons, des munitions, des armes et des hommes qui doivent les employer, ce n'est pas une machine de guerre; c'est un véhicule plus ou moins grand, plus ou moins solide, mais ce n'est qu'un véhicule. Pour lui donner les qualités spéciales et exclusives qui déterminent le caractère de contrebande de guerre, il est nécessaire de transporter à bord des canons, des armes, des munitions, en un mot, tout l'attirail du combat. C'est alors seulement que le bâtiment devient, non une machine de guerre, mais une machine portant des instruments de guerre et susceptibles de nuire, par cette circonstance seulement, au belligérant. Mais la machine elle-même, mais le véhicule dénué de son armement, ne peut être réputé nuisible. Au reste, il faut convenir que ce commerce est peu fréquent, et la meilleure preuve que je puisse donner de l'innocuité de ce négoce est le silence du droit secondaire à son égard."* . . .

"Les bâtiments non armés, construits dans les ports neutres et vendus aux nations engagés dans les hostilités, quelles que soient leur force, la nature de leur construction, sont également objets d'un commerce licite. Ils doivent être régis par la règle générale, qui est la liberté entière du commerce, entre les nations neutres et les deux belligérants."†

As to coal, M. Hautefeuille expresses himself as follows :—

"La houille est sans doute un auxiliaire indispensable des machines, mais elle ne saurait être considérée comme un instrument direct et exclusif de guerre; bien loin de là, les usages pacifiques auxquels elle est employée sont beaucoup plus importants que ceux qui résultent de l'état de guerre; et la consommation faite pour ces usages pacifiques est beaucoup plus considérable que celle nécessitée par les hostilités. D'après les règles du droit primitif, la houille est donc une denrée dont le commerce doit toujours rester libre.

"Je ne saurais prévoir comment les Traités à intervenir entre les peuples navigateurs trancheront cette question; mais ce que je puis affirmer c'est que la houille, d'après le droit primitif, ne fait pas partie de la contrebande; c'est que la loi secondaire ne peut changer la nature des objets, ni leur donner un caractère qu'ils n'ont pas, d'après les principes qu'elle est appelée à appliquer, mais non à modifier."‡

But the views of this eloquent and learned, but theoretical, author, on this subject, are not shared by other writers. Galiani, Hübner (the champion of the rights of neutrals), Martens, Tetens, Piantanida, Rutherford, Lord Stowell, Chancellor Kent, Heffter, in his able work "Das Europäische Völkerrecht der Gegenwart," include ships among the things which are contraband of war. Among later writers, M. Ortolan and Sir Robert Phillimore place both ships and coal in the list of articles of contraband. I entirely concur in thinking that a ship adapted and intended for war is clearly an article of contraband. Such a ship is, in fact, a floating fortress, and, when armed and manned, becomes a formidable and efficient instrument of warfare. Coal, too, though in its nature *ancipitis usus*, yet when intended to contribute to the motive power of a vessel must, I think, as well as machinery, be placed in the same category as masts and sails, which have always been placed among articles of contraband, except by M. Hautefeuille, who, as has been stated, insists that nothing is to be considered as contraband except what is capable of being immediately applied to the purpose of destructive warfare.

Passive commerce of the neutral.

It is perfectly clear, though I fear it has not always been kept in view in the course of these discussions, that, with the liability to the seizure and loss of the cargo, —in some instances, it is said, of the ship—if he transmits contraband of war to the enemy of the belligerent captor—and to the loss both of ship and cargo if he attempts to force a blockade—ends, according to the existing practice of nations, all restraint on the trade and commerce of the neutral. In his own country, in his own markets, in his own factories, the neutral may, according to the practice of nations, sell articles to the belligerent, which, if sent by sea, would be contraband of war. Theoretical writers are not, indeed, of one mind on this subject. While the great majority of authors are agreed as to the right of the neutral to sell, in the way of trade, to the belligerent resorting to his market, whatsoever the latter desires to buy, if the neutral has it to sell, whether the article be of an innocent character or contraband of war in its most destructive form, a few authors have recently written in a different spirit.

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* Hautefeuille, "Droits et Devoirs des Nations Neutres," vol. ii, p. 136.
† Ibid. ‡ Ibid., pp. 143, 144.

No writer on international law before Galiani had ventured to assert that the neutral was prohibited from selling, in his own country, to a belligerent, articles which, if sent out of his country by sea, would be liable to seizure as contraband of war. His doctrine to that effect was vigorously refuted by his two distinguished countrymen, Lampredi and Azuni, and was for a time abandoned as untenable; but it has been revived in our day. Let us review the leading authorities. The question is not only of interest to the jurist, but one which will be found to be important to some of the decisions of this Tribunal.

ampredi. Lampredi, in his work on neutral commerce, refutes the opinion of Galiani. On the general subject (I quote from Peuchet's French translation, not having the original before me), he writes as follows :—

"Lorsqu'une fois l'on a établi la seule loi que les peuples neutres doivent observer pendant la guerre, il devient inutile de demander quelles doivent être les limites du commerce qu'ils font en conséquence de leur neutralité, parcequ'on peut répondre qu'il n'en doit avoir aucune, et qu'ils peuvent le faire de la même manière qu'ils le faisaient en temps de paix, observant seulement une exacte impartialité pendant tout le temps de la guerre. *Il n'y aura donc aucune espèce de marchandises qu'ils ne puissent vendre et porter aux belligérants, et l'on ne pourra pas les empêcher de leur vendre ou louer des navires,* pourvu qu'ils ne refusent point à l'un ce qu'ils accordent à l'autre. Devant et pouvant suivre légitimement leur commerce comme en temps de paix, il ne doit y avoir aucune distinction de marchandises, d'argent, d'armes, et d'autres munitions de guerre: la vente et le transport de ces divers objets dans les places des belligérants doivent être permis, et ne point porter atteinte à la neutralité, pourvu qu'il n'y ait ni faveur, ni préférence, ni esprit de parti."*

In chapter v, page 57, he treats the question whether neutrals may sell every kind of merchandize within the neutral territory to a belligerent, as one which no jurist anterior to Galiani had ever thought of bringing into controversy, all their discussions being confined to the *carriage* of contraband to the enemy. It is not, he explains, till they have left the neutral territory that articles, though of warlike character, assume the character of contraband. In chapter vii, p. 72, he says :—

"Le caractère de contrebande ne vient donc pas, aux marchandises, de l'usage qu'on peut en faire dans la guerre, mais de tout autre source. Aussi longtemps qu'elles sont sur le territoire neutre, elles ne diffèrent pas des autres marchandises; elles s'y vendent et s'y achètent de la même manière et sans aucune différence. Deux circonstances font prendre à ces marchandises le caractère de contrebande: 1, qu'elles soient passées à la puissance de l'ennemi, ou à moins destinés à y passer; 2, qu'elles soient sorties du territoire neutre. Alors elles deviennent choses hostiles, *res hostiles;* elles prennent le caractère de marchandises de contrebande; et si elles sont trouvées hors de toute juridiction souveraine, comme, par exemple, si l'on les trouvait en pleine mer, elles peuvent être légitimement arrêtées et confisquées par l'ennemi, quel que soit le pavillon qui les couvre, non pas parce que ce soit des instruments ou provisions de guerre, mais parce que ce sont des choses appartenantes à l'ennemi, ou au moins parce qu'elles sont destinées à devenir sa propriété et à accroître ses forces. D'où il résulte que le souverain qui permet, sur son territoire, le commerce libre de *toutes sortes d'objets* ne passe pas les droits de souveraineté, et les puissances belligérantes ne peuvent s'en plaindre ni l'accuser de donner la main à la vente des marchandises de contrebande, qui, sur son territoire, ne peuvent jamais avoir ce caractère, et ne peuvent en porter le nom que lorsqu'elles sont devenues ou destinées à devenir la propriété de l'ennemi, et sorties du territoire où elles ont été achetées."

In another work Lampredi, speaking of neutrality, says :—

"Et quia neutrius partis esse debet, et a bello omnino abstinere, neutri etiam suppeditabit quæ directe ad bellum referuntur. Suppeditare hic loci transvehere ad alterutrum hostem significat; nam si qua gens instrumenta bellica, et cœtera supra memorata utrisque bellantibus æquo pretio veluti merces vendat, neutralitatem non violat. Ad hanc necessariam mercaturæ distinctionem animum non advertisse eos, qui de hac re tam prolixe scripserunt, manifeste patet; maxime enim inter se differre videntur exportatio mercium ad hostem meum ab amico vel neutro populo facta, et eorum venditio, quæ ad bellum necessaria esse possunt."†

zuni. Azuni, who wrote shortly after Lampredi, maintains the same doctrine. In his work "Système Universel de Principes de Droit Maritime" (ch. ii, art. 3), he says :—

"Le commerce général passif, ou la vente impartiale sur le propre territoire des neutres, de marchandises, denrées, *ou manufactures, de toute espèce,* sera toujours permis, pourvu que le souverain n'ait pas fait un Traité particulier avec un des belligérants dont les sujets viennent faire des achats et des provisions sur le territoire neutre, et qu'il ne se mêle pas des achats, des ventes, et des autres contrats qui transmettent la propriété, qu'il n'ordonne pas qu'on remplisse les magasins de provisions de guerre, et ne fasse pas mettre ses navires à la voile pour les transporter sur le territoire du belligérant. En protégeant également le commerce de son pays, en permettant à ses sujets de continuer leur

* "Commerce des Neutres," Part i, chap. 3, p. 32.
† "Theorem. Juris Publici Universi," p. 3, cap. 12, § 9, n. 4.

commerce de la même manière et avec la même liberté qu'avant la guerre, il ne fait qu'user de droits incontestables, qui ne peuvent être limités que par des conventions spéciales, expressément ou tacitement faites."

After combating the reasoning of Galiani, he adds :—

"Il est nécessaire que je répète ici le principe incontestable que j'ai précédemment rapporté, qu'en suivant le droit conventionnel de l'Europe, les neutres ne peuvent porter les choses qui sont spécialement propres à la guerre, et qui y sont directement employées, mais qu'ils peuvent sans inconvénient, selon le droit universel des gens, les vendre comme marchandise sur leur propre territoire à quiconque se présente pour les acheter, puisqu'ils le font sans partialité, et sans montrer de faveur plutôt pour une partie belligérante que pour l'autre."

Reddie, in his "Researches Historical and Critical in Maritime and International Law" cites these views with concurrence and approbation.

In Wheaton's "History of International Law" the author speaks of the refutation of Galiani by Lampredi as superfluous—as an "idle question."

Massé, in his work "Le Droit Commercial dans ses Rapports avec le Droit des Gens," after maintaining the right of the belligerent to intercept contraband, adds :— Massé.

"Mais la thèse change s'il s'agit d'un commerce passif. S'il est défendu au neutre de porter des armes et des munitions aux belligérants, parcequ'alors il devient l'auxiliaire de l'un et l'ennemi de l'autre, il ne lui est pas défendu de vendre impartialement sur son territoire des objets nécessaires à la guerre, parceque son territoire est ouvert à tous, que tous peuvent venir y chercher ce dont ont-ils besoin, et que le neutre qui se borne à vendre chez lui, à la différence de celui qui porte ses marchandises au belligérant, n'est pas tenu de rechercher qui les lui achète, pour qui elles sont achetées, et quelle est leur destination ultérieure. C'est alors qu'il est absolument vrai de dire que les neutres peuvent continuer pendant la guerre le commerce qu'ils faisaient pendant la paix, et que la nentralité est la continuation d'un état antérieur qui ne modifie pas la guerre à laquelle le neutre, qui ouvre son marché à toutes les nations, ne prend aucune part directe ou indirecte."*

Again :—

"Sur un territoire neutre, il n'y a pas de marchandises de contrebande ; toutes y sont libres. Elles ne deviennent contrebande qu'au moment où elles en sortent avec direction pour un lieu dont leur nature les exclut. C'est alors qu'elles tombent sous la juridiction des belligérants contre lesquels elles sont dirigées. Jusque-là et tant qu'elles restent en un lieu où elles ne peuvent leur nuire, ils n'ont pas le droit de s'occuper des transactions pacifiques dont elles peuvent être l'objet. Sans doute, la guerre donne une nouvelle impulsion au commerce passif des objets utiles à la guerre ; mais cette impulsion n'est pas du fait des neutres, elle est du fait des belligérants, qui, après avoir eux-mêmes produit des circonstances nouvelles, ne peuvent trouver mauvais que les neutres en profitent dans les limites de leurs droits et de leur territoire."†

M. Ortolan observes as follows :—

"C'est seulement lorsque de telles marchandises sont en cours de transport pour une destination hostile qu'elles deviennent *contrebande militaire*. Lorsqu'un Etat neutre laisse ses sujets se livrer au commerce passif de ces mêmes objets, c'est-à-dire, lorsqu'il permet à tous les belligérants indistinctement de venir les acheter sur son territoire pour les transporter ensuite où bon leur semble, à leurs frais et à leurs risques, sur leurs propres navires *marchands*, il ne fait pas autre chose que laisser s'accomplir un acte licite ; on ne peut pas dire qu'il prenne part à la guerre parce qu'il laisse ses ports libres, et parce qu'il conserve à toutes les nations le droit qu'elles avaient avant la guerre d'y entrer avec leurs bâtiments marchands pour s'y approvisionner, par la voie du commerce, des marchandises dont elles ont besoin ; les vendeurs eux-mêmes ne sont pas responsables de l'usage ultérieur qui sera fait de ces marchandises ; ils ne sont pas tenus de connaître ni pour qui elles sont achetées ni la direction qu'on leur réserve. M. Ortolan.

"Le droit conventionnel est d'accord avec ces principes ; il ne défend pas la vente impartiale faite sur un territoire neutre des marchandises propres à la guerre. Mais si ces secours effectifs en nature, que l'un des combattants vient prendre et exporte à ses propres risques, étaient fournis par l'Etat neutre lui-même ; si, par exemple, des armes, des projectiles, de la poudre étaient tirés de ses arsenaux ou de ses manufactures publiques, ce ne serait plus là un commerce privé, et par conséquent il y aurait atteinte grave à la neutralité."‡

Heffter, in his "Volkerrecht der Gegenwart" (I cite from Bergson's translation), p. 315, says :— Heffter.

"En ce qui concerne les objets de contrebande, la vente faite aux belligérants en territoire neutre ne saurait être considérée comme un acte illicite et contraire aux devoirs de la neutralité ; ce n'est que leur transport qui en rend responsable."

Professor Sandona, of Siena, "Trattato di Diritto Internazionale Moderno," comparing passive with the active commerce of neutrals, says :—

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* Vol. i, p. 203. † Ibid., p. 205.

‡ "Diplomatie de la Mer," vol. ii, p. 180.

"Dico adunque, che si crede a torto che faccia opera ad un di presso eguale, chi vende semplicemente nel proprio paese quanto immediatemente si riferisce ai mezzi di fare la guerra, e chi trasporta questi mezzi sui mercati o nelle piazze dei belligeranti. Il primo vende le sue merci nel proprio paese, ove non vi è, stando al puro diritto razionale, alcuna legge che gliene vieti il traffico. E appunto perchè dimora in esso, e niente osta a questo commercio, egli non fa uso che della sua libertà, che d'altra parte finchè rimane nel paese nativo, nessun principe straniero può limitare. . . . . La sola cosa che si può dimandare da lui è questa, che sia disposto a vendere egualmente a chiunque si presenta le sue merci, onde evitare il pericolo di offendere l'imparzialità, a cui i neutrali sono tenuti."

To these authors Professor Bluntschli has added the weight of his authority.

Professor Bluntschli.

In his work entitled "Das Moderne Volkerrecht," or, as it is called in the French translation, "Le Droit International Codifié," he writes :—

"Le fait qu'un Etat neutre fournit ou laisse fournir à un des belligérants des armes ou du matériel de guerre constitue également une violation des devoirs des neutres.

"Par contre, si des particuliers, sans avoir l'intention de venir en aide à l'un des belligérants, lui fournissent à titre d'entreprise commerciale des armes ou du matériel de guerre, ils courent le risque que ces objets soient confisquées par l'adversaire comme contrebande de guerre; les Gouvernements neutres ne manquent pas à leur devoir en tolérant le commerce d'objets qui sont considérés comme contrebande de guerre. . . .

"Celui qui transporte de la contrebande de guerre à l'une des parties belligérantes s'expose à voir ces objets confisqués. Mais l'état neutre n'a pas de motifs de s'opposer à l'expédition de la contrebande de guerre. Dans les discussions de la loi Américaine sur la neutralité, le Président Jefferson déclara en 1793 que la guerre étrangère ne privait point les particuliers du droit de fabriquer, de vendre ou d'exporter des armes; seulement les citoyens Américains, ajoutait-il, exercent ce droit à leurs risques et perils."*

The opinion of Galiani has, however, been again revived by two or three writers in our own days.

Sir R. Phillimore.

Amongst these, Sir Robert Phillimore, in his work on International Law, vol. iii, § ccxxx, speaking "as to the permitting the sale of munitions of war to a belligerent within the territory of the neutral," writes :—

"If the fountains of international justice have been correctly pointed out in a former volume of this work, and it be the true character of a neutral to abstain from every act which may better or worsen the condition of a belligerent, the unlawfulness of any such sale is a necessary conclusion from these premises.

"What does it matter where the neutral supplies one belligerent with the means of attacking another? How does the question of locality, according to the principles of eternal justice and the reason of the thing, affect the advantage to one belligerent or the injury to the other accruing from this act of the alleged neutral? Is the cannon, or the sword, or the recruit who is to use them the less dangerous to the belligerent because they were purchased, or he was enlisted, within the limits of neutral territory? Surely not. Surely, the *locus in quo* is wholly beside the mark, except, indeed, that the actual conveyance of the weapon or the soldier may evidence a bitterer and more decided partiality —a more unquestionable and active participation in the war."

MM. Pistoye and Duverdy also, in their "Traité des Prises Maritimes," express, though with less energy than the learned author last mentioned, a like view.

M. Hautefeuille.

M. Hautefeuille, who, as we have seen, not only refuses to admit vessels equipped for war, if not armed, into the list of contraband of war, but also holds that they are legitimate articles of neutral commerce—nevertheless maintains that what is called the passive trade of the neutral in articles of warlike use is inconsistent with neutrality. His reasoning is as follows :—

"Cette question a été traitée avec beaucoup d'étendue par Lampredi et par Azuni; la doctrine de ces deux auteurs a été combattu par Galiani. Avant d'examiner l'opinion de ces publicistes, il me paraît indispensable de rappeler les bases de la discussion, de poser des principes qui, d'après la loi primitive, doivent la dominer. Ces principes ont déjà été établis. Ils peuvent se résumer en deux droits et en deux devoirs. Les droits sont: 1. Liberté et indépendance du peuple neutre dans son commerce, en temps de guerre, même avec les deux belligérants. 2. Liberté et indépendance absolues du neutre sur son propre territoire. Les deux devoirs sont corrélatifs aux deux droits, ils les limitent. Ce sont: 1. L'impartialité; 2. L'abstention de tous actes directs de guerre, et par conséquent de fournir aux belligérants les armes et les munitions de guerre. De ces droits il résulte, sans doute, que la nation pacifique a le pouvoir de commercer librement avec chacun des belligérants, non seulement sur son propre territoire, mais encore partout ailleurs, sans qu'aucun d'eux puisse s'y opposer: mais ce droit est borné par le devoir imposé au neutre de ne fournir, ni à l'un ni à l'autre, des instruments actuellement et uniquement destinés à la guerre.

"Cette limite mise par la loi primitive à la liberté des nations, s'étend-elle à tout le commerce, au commerce passif comme au commerce actif? Le devoir du neutre consiste-t-il uniquement à ne pas

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* Section 765, p. 385; with Notes 1 and 2.

transporter les objets de contrebande dans les ports des belligérants; ou au contraire ne prohibe-t-il pas le fait de vendre, de fournir ces objets à ceux qui doivent s'en servir pour frapper un ennemi? A mes yeux, la réponse à cette double question ne peut être douteuse. Le devoir imposé aux nations, qui désirent ne pas prendre part aux hostilités, et jouir de la paix au milieu des maux de la guerre, est de ne pas fournir des armes aux mains de ceux qui doivent s'en servir pour frapper. La loi naturelle, qui impose ce devoir, n'a pas fait de distinction entre le commerce actif et le commerce passif. Elle ne pouvait en faire, car l'un et l'autre ont le même résultat, celui de donner à l'un des belligérants le moyen de nuire à l'autre. Ce devoir est absolu; la restriction qu'il impose s'étend à toutes les manières de fournir à l'un des combattants l'arme dont il veut frapper son ennemi. C'est un devoir d'humanité; et il n'est pas moins inhumain de vendre des instruments homicides dans le port de Livourne que de les transporter dans celui de Londres ou de Marseille. La vente des denrées de contrebande aux belligérants est donc prohibée sur le territoire neutre, de la même manière et par le même motif que le transport de ces denrées dans les ports des peuples en guerre."

Professor Casanova, in his recent work, "Del Diritto Internazionale," adopts the views of M. Hautefeuille.

This difference of opinion arises from the different point of view from which each party considers the question. The one party assume that to supply a belligerent with articles of warlike use, though in the way of trade, is to take part in the war: assuming which, they say, with truth, that it is the same thing whether the objectionable articles are sold to the belligerent in the country of the neutral or in his own. The other party, starting from the principle that, according to natural justice, the rights of the neutral should be left free and untouched by the wars of others, look on the existing restraints on the freedom of his commerce as encroachments on his rights, and considering these restraints as arising entirely from convention, deny the illegality of any trade, which the actual practice of nations does not prevent. The great authority of Chancellor Kent, and of the majority of writers, is in favour of the latter view.

But, in truth, the question does not depend on the lucubrations of learned professors or speculative jurists. However authoritatively these authors may take upon themselves to write, and however deserving their speculations may be of attention, they cannot make the law. International law is that to which nations have given their common assent, and it is best known as settled by their common practice.

Practice in former wars.

Now, in all wars, neutrals have traded at home and abroad in articles contraband of war, subject always in the latter case to the chance of capture and confiscation. As I have already said, no Government has ever been sought to be made responsible on that account. Assuredly, no nation has ever asserted the freedom of commerce in this respect more broadly than the United States, or acted up to its principles with greater pertinacity.

On the breaking out of the war between France and England in 1793, after a proclamation of neutrality by General Washington, then President, Mr. Jefferson, then Secretary of State, thus writes to Mr. Hammond, Minister of Great Britain to the United States:—

American authorities.

"The purchase of arms and military accoutrements by an Agent of the French Government in this country, with an intent to export them to France, is the subject of another of the Memorials; of this fact we are equally uninformed as of the former. Our citizens have been always free to make, vend, and export arms. It is the constant occupation and livelihood of some of them. To suppress their callings, the only means perhaps of their subsistence, because a war exists in foreign and distant countries, in which we have no concern, would scarcely be expected. It would be hard in principle, and impossible in practice. The law of nations, therefore, respecting the rights of those at peace, does not require from them such an internal 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 any of the belligerent Powers on their way to the ports of their enemies. To this penalty our citizens are warned that they will be abandoned, and that even private contraventions may work no inequality between the parties at war, the benefit of them will be left equally free and open to all."*

The Collectors of the Customs at the different ports were instructed that—

"The purchasing and exporting from the United States, *by way of merchandize*, articles commonly called contraband, being generally warlike instruments and stores, is free to all parties at war, and is not to be interfered with. If our own citizens undertake to carry them to any of these parties, they will be abandoned to the penalties which the laws of war authorize."†

In 1842, Mr. Webster writes:—

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* British Appendix, vol. v, p. 242.

† Ibid., p. 269.

"It is not the practice of nations to undertake to prohibit their own subjects from trafficking in articles contraband of war. Such trade is carried on at the risk of those engaged in it under the liabilities and penalties prescribed by the law of nations or particular Treaties. If it be true, therefore, that citizens of the United States have been engaged in a commerce by which Texas, an enemy of Mexico, has been supplied with arms and munitions of war, the Government of the United States, nevertheless, was not bound to prevent it, and could not have prevented it without a manifest departure from the principles of neutrality, and is in no way answerable for the consequences. Such commerce is left to its ordinary fate, according to the law of nations."*

In his Message to the American Senate, in December 1854, President Pierce declares—

"The laws of the United States do not forbid their citizens to sell to either of the belligerent Powers articles contraband of war, or to 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 on 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 France in transporting troops, provisions, and munitions of war to the principal seat of military operations, and in bringing home the 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 compromise our neutral relations with Russia."†

Chancellor Kent, in his Commentaries, says:—

"It was contended by 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. 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 1862, on the occasion of the French invasion of Mexico, complaint was made by M. Romero, the Representative of the Mexican Government at Washington, of the French being allowed to purchase horses and mules in the United States for the purpose of the war. A long correspondence ensued between M. Romero and Mr. Seward, in which the latter vigorously maintains what he calls "the settled and traditional policy of the country." He says—

"It is not easy to see how that policy could be changed so as to conform to the views of M. Romero, without destroying all neutral commerce whatsoever. If Mexico shall prescribe to us what merchandize 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 merchandize 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."§

Purchase of contraband of war by the Government of the United States.

As regards the purchase of articles of war, the United States have not scrupled to purchase arms and munitions of war in other countries when need required it. At the commencement of the civil war, the Government being short of arms, agents were sent to England to procure them in large quantities. Other agents bought arms in different countries on the continent. Figures are given in the British Counter-Case which appear to bear out the statement that "the extra supplies of warlike stores, thus exported to the northern ports of the United States during the civil war, are estimated to represent a total value of not less than 2,000,000*l.*, of which 1,500,000*l.* was the value of muskets and rifles alone." Mr. Adams, in a conversation with Earl Russell, on the 22nd May, 1862, when the latter, in answer to his remonstrances as to supplies sent out from Great Britain to the Confederate States, referred to the large supplies of similar materials obtained on the part of the United States, naively answered that "at one time a quantity of arms and military stores had been bought, as a purely commercial transaction, for the use of the Federal army, but that the practice had been discontinued at his suggestion, because it prevented him from

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* Letter to Mr. Thompson, Webster's Works, vol. vi, p. 452; British Appendix, vol. v, p. 333.
† British Appendix, vol. v, p. 333. ‡ Kent's Commentaries, vol. i, p. 142.
§ British Appendix, vol. v, p. 336.

pressing his remonstrances against a very different class of operations carried on by friends and sympathizers with the rebels, and that the United States had, instead, bought largely from Austria;" "because," adds Mr. Adams, "that Government had never given any countenance to the insurgents."*

It thus appears that the continental Governments also did not consider the sale of arms by their subjects as any infringement of the law of nations.

Result of discussion.

It seems to me, therefore, that the law relating to contraband of war must be considered not as arising out of obligations of neutrality, but as altogether conventional; and that by the existing practice of nations, the sale of such things to a belligerent by the neutral subject is not in any way a violation of neutrality. Then how stands the matter as to ships of war? In principle, is there any difference between a ship of war and any other article of warlike use? I am unable to see any. Nor can I discover any difference in principle between a ship equipped to receive her armament, and a ship actually armed. A ship of war implies an armed ship; for a ship is not actually a ship of war till armed. Of the authors I have cited, and who hold ships of war to be contraband of war, no one of those who wrote before these disputes between the United States and Great Britain had arisen, with the exception of M. Hautefeuille, makes any distinction between ships equipped to receive their armaments, and ships actually armed M. Hautefeuille, who, as we have seen, refuses to a ship, equipped for armament, but not armed, the character of contraband, treats the equipping and arming as a violation of neutrality; but he gives no reason and cites no authority, and seems to me herein, I say it with the utmost respect, inconsistent with himself.

Sale of ships.

Professor Bluntschli.

Professor Bluntschli, in the work already cited, lays down, on the subject of ships furnished to a belligerent by the subjects of a neutral power, the following rules.

In Article 763 of his proposed Code, he says:—

"L'Etat neutre ne doit pas seulement s'abstenir de livrer des navires de guerre à l'une des puissances belligérantes; il est aussi tenu d'exercer une surveillance rigoureuse et d'empêcher que des particuliers n'arment des navires de guerre sur son territoire et ne les livrent à l'un des belligérants."

In a note he adds:—

"En temps de paix, un Etat peut évidemment vendre des navires de guerre à un autre, ou recourir à l'industrie privée des Etats étrangers. Mais pendant la guerre, la fourniture de navires de guerre constitue évidemment un appui et un renfort accordé aux belligérants. Si l'intention de le faire résulte des circonstances, on devra considérer ces actes comme contraires aux devoirs des neutres et l'Etat lésé pourra agir en conséquence."†

In Article 764, he says:—

"Il suffit que l'intention de venir en aide à l'un des belligérants soit manifeste, pour que l'Etat neutre soit tenu d'intervenir, alors même que l'armement du navire de guerre ou du corsaire ne serait que préparé ou commencé."

In a note he subjoins:—

"Il n'est pas nécessaire que le navire soit déjà armé. Lorsque les constructeurs, tout en prétendant frêter un navire de commerce, ont l'intention de l'armer en guerre, et lorsque cette intention peut être constatée ou du moins est vraisemblable, cet acte constitue une violation des lois sur la neutralité. Mais lorsque cette intention ne peut pas être démontrée, on ne saurait incriminer le fait de transformer en navire de guerre un navire de commerce construit sur un chantier neutre et acheté plus tard par un négociant d'un des pays belligérants. (Wheaton, Intern. Law, p. 562.) *Il en est autrement lorsqu'un navire de guerre est vendu à l'un des belligérants à titre d'entreprise purement commerciale ou industrielle; il y aura dans ce cas contrebande de guerre, mais cet acte ne constituera pas une violation des devoirs des neutres.*"‡

I must observe that these rules, which are of a very stringent character, are not supported by any reasoning of the author, or by any juridical authority. I might add that there is no ground for saying that they have been generally accepted as international law. Even so distinguished a man as Professor Bluntschli cannot give laws to the world from the professorial chair. Moreover, as I understand him, Professor Bluntschli draws a distinction between the sale of ships with the intention of assisting a belligerent and of ships sold in the course of a purely commercial transaction.

The first two-cited articles would, from the general terms in which they are

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* British Counter-Case, pp. 52–54. British Appendix, vol. vi, pp. 153–155, 158, 173. United States' Documents, vol. i, p. 536.

† Section 763 and Note 1, p. 383.

‡ Section 764, p. 384.

framed, appear to apply to ships of war by whomsoever they may be supplied to the belligerent; but from the note to section 764 and the reference to section 765, hereinbefore cited as to the sale of arms and munitions of war in the country of the neutral, I gather that the Professor means to draw a distinction between ships made over to a belligerent, whether by sale or otherwise, for the purpose of assisting his cause, and ships of war sold to a belligerent by neutral subjects in the way of trade.

Opinion of Dana.

This is the view taken by Mr. Dana in a note to his edition of "Wheaton's Elements of International Law," which has been reprinted in the documents appended to the American Case:—

"Our rules do not interfere with *bonâ fide* commercial dealings in contraband of war. An American merchant may build and fully arm a vessel, and provide her with stores, and offer her for sale in our own market. If he does any acts as an agent or servant of a belligerent, or in pursuance of an arrangement or understanding with a belligerent, that she shall be employed in hostilities when sold, he is guilty. He may, without violating our law, send out such a vessel, so equipped, under the flag and papers of his own country, with no more force of crew than is suitable for navigation, with no right to resist search or seizure, and to take the chances of capture as contraband merchandize, of blockade, and of a market in a belligerent port. In such case, the extent and character of the equipments is as immaterial as in the other class of cases. The intent is all. The act is open to great suspicions and abuse, and the line may often be scarcely traceable; yet the principle is clear enough. Is the intent one to prepare an article of contraband merchandize, 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."*

Professor Gola, of Parma, in a recent work, observes:—

"Lo stesso dicasi ove si trattasse di costruzioni di navi: l'atto lede la neutralità, ove l'impresa si eseguisca dal governo, è invece un'opera d'industria ove si compia da privati imprenditori nei loro cantieri."†

Opinion of M. Ortolan.

M. Ortolan, who had made no such distinction in the former edition of his work, "Sur la Diplomatie de la Mer," in the last edition of that work has, with reference to this subject, the following, I cannot help thinking somewhat extraordinary doctrine:—

"Si l'on suppose un navire construit sur le territoire neutre, non pas sur commande d'un belligérant ou par suite d'un traité ostensible ou dissimulé avec ce belligérant, mais en vue d'un dessein quelconque, soit de navigation commerciale, soit tout autre, et que ce navire, déjà par lui-même propre à la guerre ou de nature à être converti à cet usage, une fois sorti des ports de la nation neutre, soit vendu, dans le cours de sa navigation, occasionnellement, à l'un des belligérants, et se mette à naviguer en destination directe pour ce belligérant; un tel navire dans de telles circonstances tombe uniquement sous le coup des règles relatives à la contrebande de guerre. Il est sujet à être arrêté et confisqué par l'ennemi qui pourra s'en emparer, mais sans qu'aucun grief de violation des devoirs de la neutralité puisse sortir de ce fait contre l'Etat neutre pour n'avoir pas défendu à ses nationaux de telles ventes ou ne les avoir pas réprimées. C'est une opération de trafic qui a eu lieu, trafic de contrebande de guerre, dont aucune circonstance particulière n'est venue changer le caractère.

"Tel fut, en l'année 1800, le cas du navire Américain le Brutus, capturé par les Anglais et jugé de bonne prise par le Cour d'Amirauté d'Halifax.

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"Mais la situation change, la contrebande de guerre n'est plus la question principale, d'autres règles du droit des gens interviennent et modifient profondément la solution, si l'on suppose qu'il s'agisse de bâtiments de guerre construits, armés ou équipés sur un territoire neutre pour le compte d'un belligérant, par suite d'arrangement pris à l'avance avec lui, sous la forme d'un contrat commercial quelconque—vente, commission, louage d'industrie ou de travail; que les arrangements aient été pris ostensiblement, ou qu'ils le soient d'une manière secrète ou déguisée; car la loyauté est une condition essentielle dans la solution des difficultés internationales, et sous le couvert des fausses apparences il faut toujours aller au fond des choses. Il y a ici, incontestablement, une seconde hypothèse qu'il importe de distinguer soigneusement de la précédente.

"Nous nous rattacherons, pour résoudre en droit des gens les difficultés que présente cette nouvelle situation, à un principe universellement établi, qui se formule en ce peu des mots: 'Inviolabilité du territoire neutre.' Cette inviolabilité est un droit pour l'Etat neutre, dont le territoire ne doit pas être atteint par les faits de guerre, mais elle impose aussi à ce même Etat neutre une étroite obligation, celle de ne pas permettre, celle d'empêcher, activement au besoin, l'emploi de ce territoire par l'une des parties ou au profit de l'une des parties belligérantes, dans un but hostile à l'autre partie.

"Les publicistes en crédit ne font aucun doute pour ce qui concerne l'armement et l'équipement dans un port neutre de bâtiments de guerre destinés à accroître les forces des belligérants. Ils s'accordent pour reconnaître l'illégalité de ces armements ou équipements, comme une infraction de la part de l'Etat neutre qui les tolérerait aux devoirs de la neutralité.

"N'est-il pas évident qu'il en doit être de même *a fortiori* de la construction de pareils bâtiments, lorsque cette construction a lieu dans les conditions prévues en notre seconde hypothèse?"

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* United States' Documents, vol. vii, p. 36.

† "Corso di Diritto Internazionale," vol. ii, p. 30.

So that, according to M. Ortolan, if a ship happens to be ready made and armed, she may be lawfully sold to a foreign belligerent, though with a full knowledge on the part of the seller of the purpose to which she is to be applied; but, if she is made to order, the transaction assumes the opposite character, and is a breach of neutrality. With all respect for the authority of this distinguished writer, I must decline to adopt a doctrine which rests on so shadowy a distinction.

Opinion of Professor Bluntschli.

Professor Bluntschli, undertaking to pronounce a judgment on the subject matter of this dispute, as it were *ex cathedrâ*, in an article in the "Revue de Droit International" of 1870, lays down the following doctrine:—

"L'Etat neutre qui veut garantir sa neutralité doit s'abstenir d'aider aucune des parties belligérantes dans ses opérations de guerre. Il ne peut prêter son territoire pour permettre à l'une des parties d'organiser en lieu sûr des entreprises militaires. Il est obligé de veiller fidèlement à ce que des particuliers n'arment point sur son territoire des vaisseaux de guerre, destinés à être livrés à une des parties belligérantes. (Bluntschli, *Modernes Volkerrecht*, section 763.)

"Ce devoir est proclamé par la science, et il dérive tant de l'idée de neutralité que des égards auxquels tout Etat est nécessairement tenu envers les autres Etats avec lesquels il vit en paix et amitié.

"La neutralité est la *non-participation* à la guerre. Lorsque l'Etat neutre soutient un des belligérants, il prend part à la guerre en faveur de celui qu'il soutient, et dès lors *il cesse d'être neutre.* L'adversaire est autorisé à voir dans cette participation un acte d'hostilité. Et cela n'est pas seulement vrai quand l'état neutre livre lui-même des troupes ou des vaisseaux de guerre, mais aussi lorsqu'il prête à un des belligérants un appui *médiat* en permettant, *tandis qu'il pourrait l'empêcher*, que, de son territoire neutre, on envoie des troupes ou des navires de guerre.

"Partout où le droit de neutralité étend le cercle de son application, il restreint les limites de la guerre et de ses désastreuses conséquences, et il garantit les bienfaits de la paix. Les devoirs de l'Etat *neutre* envers les *belligérants* sont en substance *les mêmes* que ceux de l'Etat *ami, en temps de paix*, vis-à-vis des autres Etats. Aucun Etat ne peut non plus, en *temps de paix*, permettre que l'on organise sur son territoire des agressions contre un état ami. Tous sont obligés de veiller à ce que leur sol ne devienne pas le point de départ d'entreprises militaires, dirigées contre des Etats avec lesquels ils sont en paix."

I entirely agree in all that is thus said by this able jurist—that is, if I properly apprehend his language, and am right in understanding it to apply not to the sale of ships of war, *simpliciter*, but to the sending out of troops and armed ships for the purpose of what the learned Professor terms "military enterprises," and to the "organizing of aggressions against a friendly State."

Opinion of M. Rolin Jacquemyns.

Another eminent jurist, who has espoused the cause of the United States, in a very able review of the work of Professor Mountague Bernard, and whose opinion is referred to by the United States as an authority in their favour, M. Rolin Jacquemyns, does not, as far as I collect, deny the legality of the sale of ships of war, but rests his opinion on the general circumstances connected with the construction and escape of the Alabama. But the spirit in which this author writes will be seen from the following passage:—

"Il eût dans tous les cas été digne d'un jurisconsulte de la valeur de M. Bernard de ne pas se borner à examiner cette grave question des devoirs de la neutralité au point de vue du droit positif existant. C'est par l'opinion hautement émise de savants comme lui, que les idées générales en matière de droit sont appelées à se rectifier et à se compléter. Or, s'il y a une chose que chaque guerre nouvelle démontre, c'est le caractère non-seulement insuffisant, mais fallacieux de la vieille définition: *neutrarum partium.* Si au début de cette dernière et épouvantable guerre de 1870, l'Angleterre au lieu d'être obstinément *neutrarum partium*, avait clairement désapprouvé l'offensive inique de la France, est-ce que les intérêts de la justice et de la paix n'auraient pas été mieux servis? L'idéal du personnage *neutrarum partium*, c'est le juge qui, dans l'apologue de l'huitre et des plaideurs, avale le contenu du mollusque et adjuge les écailles aux deux belligérants. Il n'est d'aucun parti, mais il s'engraisse scrupuleusement aux dépens de tous deux. Une telle conduite de la part d'un grand peuple peut être aussi conforme aux précédents que celle du vénérable magistrat dont parle la fable. Mais quand elle se fonde sur une loi positive, sur une règle admise, c'est une preuve que cette loi ou cette règle est mauvaise, comme contraire à la science, à la dignité, et à la solidarité humaine."*

This reasoning may be very well deserving of attention for the future; but, for the present purpose, when the authority of M. Rolin Jacquemyns as to the culpability of Great Britain is cited, I must protest against the question being determined not according to "existing positive law," but to the opinion of "savants" as to what the law should have been, or should now be made. The Tribunal cannot, I apprehend, adopt such a principle in forming its judgment. Its functions are not to make the law, but to decide according to the rules of the Treaty, with the light

* "Revue de Droit International et de Législation comparée," 1871, p. 125.

which the acknowledged principles of international jurisprudence and the established usages of nations may afford for its assistance. The occasion may be a tempting one for giving effect to speculative opinions or individual theories. But a decision founded on such a principle would not ensure the approbation of wise and judicious minds, or command the respect of those who might suffer from a judgment which would be at variance with the first principles of equity and justice.

Opinion of the Judges of England.

Let us see what has been the practical view taken of the subject in England or America. As far back as the year 1721, ships of war having been built in England, and sold to the Czar of Russia, then at war with Sweden, and complaint having been made by the Swedish Minister, the Judges were summoned to the House of Lords, and their opinion was asked whether by law the King of England had the power to prohibit the building of ships of war, or of great force, for foreigners, in any of His Majesty's dominions. And the judges, with the exception of one, who had formed no opinion, answered that the King had no such power. It is plain that, if the sale of such vessels had been an offence against international law, the King would have had power to prevent it by the prosecution of the parties building and selling such ships, as offenders against the municipal law, as the offence would have been a misdemeanour at the common law.

It appears that Chief Justice Trevor, and Parker, afterwards Lord Chancellor, had given the like opinion seven years before.*

Case of the Santissima Trinidad.

The judgment of Judge Story, in the well-known case of the Santissima Trinidad,† shows that the sale of armed ships of war has never been held to be contrary to law in America. In that case a vessel, called the Independencia, equipped for war and armed with twelve guns, had been sent out from the American port of Baltimore, upon a pretended voyage to the North-West Coast, but in reality to Buenos Ayres, then at war with Spain, with instructions to the supercargo to sell her to the Buenos Ayres Government if he could obtain a certain price. She was sold to that Government accordingly, and, having been commissioned, was sent to sea and made prizes. She afterwards put into an American port, and having there received an augmentation of her force, again put to sea and captured a prize. The validity of this prize was questioned in the suit, on two grounds: 1st. That the sale of the vessel to a foreign Government by American citizens, for the purpose of being used in war against a belligerent with whom the United States were at peace, was a violation of neutrality and illegal; 2ndly. Because the capture had been made after an augmentation of the force of the vessel in a port of the United States. The capture was held invalid on the latter ground. Upon the first, the Judge delivered judgment as follows:—

Judgment of Mr. Justice Story.

"The question as to the original illegal armament and outfit of the Independencia may be dismissed in a few words. It is apparent, that though equipped as a vessel of war, she was sent to Buenos Ayres on a commercial adventure, contraband, indeed, but in no shape violating our laws or our national neutrality. If captured by a Spanish ship of war during the voyage, she would have been justly condemned as good prize for being engaged in a traffic prohibited by the law of nations. But there is nothing in our laws, or in the law of nations, that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the person engaged in it to the penalty of confiscation. Supposing, therefore, the voyage to have been for commercial purposes, and the sale at Buenos Ayres to have been a *bonâ fide* sale (and there is nothing in the evidence before us to contradict it), there is no pretence to say that the original outfit on the voyage was illegal, or that a capture made after the sale was, for that cause alone, invalid."

It is now sought to shake the authority of this judgment, by saying that it was unnecessary to the decision of the cause, as the prize was held to be invalid on the other ground; but it was, nevertheless, a solemn judgment upon a point properly arising in the cause, and, so far as I am aware, it has never been questioned.

Case of the Grand Para.

It is indeed alleged (but for the first time) in the American Case that the authority of this decision is to be looked upon as overruled or controlled by a judgment given by the same Court in the case of the Gran Para. Now, the latter judgment was a judgment of the same Court (of which, therefore, Mr. Justice Story was himself a member), and was pronounced on the very next day. We are told in the Case of the United States, that the cases were argued, the one on the 20th, the other on the 28th of February, 1822; that the judgment in the case of the Santissima Trinidad was pronounced on the 12th of March, that in the case of the Gran Para on the ensuing

* "Fortescue's Reports," p. 388.

† 7 Wheaton, p. 283.

day, the 13th. It is said, and truly, that "there can be no doubt they were considered together in the consultation room," and lawyers are gravely asked to believe that it was intended by the second judgment to overrule or qualify the doctrine involved in the first. No English or American lawyer could entertain the notion for a moment that, if the same Court had intended to overrule, or even to qualify, the judgment given immediately before, it would not have referred to it in terms and given its reasons for so sudden a change in its views of the law. But the truth is,—and I am at a loss to understand how the American Counsel can have failed to overlook this, or to call attention to it when citing the decision,—that, so far from overruling or affecting the judgment in the Santissima Trinidad, the case of the Gran Para had nothing in common with it beyond that of being a suit for the restitution of prize. It was not the case of the sale of a ship to a foreign Government at all. It was simply the case of an American privateer armed in defiance of American law, and cruizing under a fictitious commission, the property in her still remaining unchanged in the American citizen by whom she had been fitted out. The great importance of this distinction will be seen in another part of this case.

American Review.

In a learned and able article in the well-known publication the "American Law Review" of January 1871, the writer, after referring to the case of the Santissima Trinidad as "a famous and leading case," states the law as follows:—

"It may be declared as indubitable that the pure unalloyed bargain and sale of a ship, even a ship of war, to a belligerent is legal by the rules of international law; that such a ship is, however, contraband of war, and, if captured after sale on her way towards delivery, or before sale on her way toward a market where she is intended to be sold to a belligerent, she will be properly condemned. Neutrality Acts have not been intended to change this state of the law, but only to furnish sufficient means for preventing its abuse. Our original proposition that the doctrine of contraband of war does not operate as a restriction upon trade, upon dealings which are purely commercial, remains correct, even in this matter of war vessels."

Opinion of Mr. Adams.

In this view of the law I am glad to have the concurrence of our distinguished colleague Mr. Adams, who, writing to Earl Russell on the 6th of April, 1863, states, with reference to certain American authorities which Lord Russell had appealed to:—

"The sale and transfer, by a neutral, of arms, of munitions of war, *and even of vessels of war*, to a belligerent country, not subject to blockade at the time, as a purely commercial transaction, is decided by these authorities not to be unlawful. They go not a step further; and precisely to that extent I have myself taken no exception to the doctrine."*

Question as to prohibition of sale of articles contraband of war.

This being the present state of international law on this subject, if it is desirable to introduce new rules, it must be done by the common consent of nations, not by the speculative doctrines of theorists, however distinguished.

But is it desirable that it should be altered, and that obstacles to the industry and trade of neutral nations should be created?

Azuni observes:—

"Une grande partie du commerce de quelques nations Européennes, telles que les Suédois, Norvègiens, et les Russes, consiste en marchandises nécessaires pour la guerre maritime, pour la construction et pour l'équipement d'une flotte; elles vendent en temps de paix, à quiconque en a besoin, de fer, du cuivre, des mâts, des bois, du goudron, de la poix, et des canons, *enfin des navires de guerre entiers*. Quelles raisons pourrait-il y avoir de priver ces nations de leur commerce et de leur manière de subsister, à l'occasion d'une guerre à laquelle ils ne prennent aucune part? Il n'y a dans le code de la justice et de l'équité rien en faveur d'une telle protection. Il est donc nécessaire d'établir, comme maxime fondementale de tout droit, que les peuples neutres devant et pouvant licitement continuer le commerce qu'ils font en temps de paix, *on ne doit faire aucune distinction* de denrées, de marchandises, *et de manufactures, quoique propres à la guerre*, et que, par cette raison, la vente et le transport aux parties belligérantes en sont permis, si le commerce actif et passif était établi en temps de paix, sans qu'on puisse prendre, en aucune manière, que la neutralité soit violée, pourvu que cela se fasse sans animosité, sans préférence, et sans partialité."

I cannot but feel the force and justice of these observations. I ask in like manner, "Why—unless, indeed, on account of reasons of State affecting the interests of the neutral State itself, in which case private interests must give way to those of the public—are the armourers of Birmingham or Liege, or the shipbuilders of London or Liverpool, to have their business put a stop to because one of their customers happens to be engaged in war with another State?" It is not enough to say that, but for the war the demand for the articles in question would not have arisen. From whatever cause it may proceed,

* United States' Documents, vol. iii, p. 591.

increased demand is the legitimate advantage of the producer or the merchant, and it is by the advantage which periods of increased and more active demand bring with them that the loss arising from occasional periods of stagnation is balanced and made good.

The authors who desire to put further restraints on the free commerce of neutrals than international law has hitherto done, appear to me to think too much of the interests of belligerents, who are the disturbers of the world's peace, and to be too unmindful of the interests of neutral nations, who are simply seeking occupation for their industry and commerce indifferent by whom they are employed. They seem to think that the belligerent is granting an indulgence or conferring a favour on the neutral in allowing him to remain a stranger to the war, which the grateful neutral should be too glad to purchase by the sacrifice of all rights at all incompatible with the convenience of the belligerent.

M. Hautefeuille, indeed, invokes humanity, and would prohibit the sale of articles of warlike use in order to prevent and put an end to war. But if considerations of humanity are to be taken into account, it is obvious that the sale of such things should be prohibited in time of peace, as well as of war. They are not the less available in time of war because bought in time of peace.

The armourer or the shipbuilder, who is thus required to close his establishment to the belligerents when war arises, may continue to manufacture and sell, undisturbed, his instruments of destruction down to the very hour when war is proclaimed. Had Prussia, for instance, anticipated the attack of France as likely to occur so soon, and had desired to procure a fleet, she might have resorted to the shipwrights' yards of England till she possessed ships enough to cope with her formidable adversary on the seas. But, let war but be proclaimed, and according to these views, the work becomes at once criminal, the workman's hammer must be arrested, the shipwright's yard closed. There may be reasons of state in certain instances—as according to British and American views in the case of ships—for putting a restraint on the freedom of trade, but it seems idle to base it on the score of humanity. The effect would simply be that a Government meditating the invasion of another country would have to provide itself in time. The neighbour upon whom it thus brings war on the sudden, and who may be comparatively unprepared, is not to be at liberty to seek the materials of war elsewhere, but is to be left at the mercy of the invader. Peaceful nations would thus be at the mercy of others more ambitious and warlike and better prepared than themselves. The weak would be sacrificed to the strong. Let me suppose a people rising in a just and righteous cause. I will not offend the patriotic susceptibility of my honourable and esteemed colleague by suggesting, for a single instant, even hypothetically, the possibility that the cause of the Insurgents might have been such a one—I will take what he will readily admit to have been so, the separation of the United States from the mother country. Let me suppose that, while Great Britain had her fleets prepared, her troops armed, her arsenals well stored, America had neither ships nor arms, nor munitions of war, with which to resist the superior forces of her adversary. Would it have been in the interest of humanity that she should be shut out from the markets of the world? An appeal to considerations of humanity has no doubt something very captivating about it; but I question very much whether humanity would not lose more than it would gain by the proposed restraint on the commercial freedom of nations.

Ship of war sent out for immediate service.

The case, however, becomes essentially different when a ship thus equipped and armed is not sent out to be taken to the port of the belligerent purchaser, but is sent to sea with officers and a fighting crew for the purpose of immediate warfare. Under such circumstances the transaction ceases to be one of mere commerce, and assumes the form of a hostile expedition sent forth from the territory of the neutral. Such an expedition is plainly a violation of neutrality, according to international law, and one which the neutral Government is bound to do its best to prevent.

Armament and crew sent out in different ships.

But what if, in order the better to avoid observation and detection, the vessel is sent forth, without its armament, without its war crew, and these, sent to it by another or different vessels, are put on board of it in some place or water beyond the jurisdiction of the neutral? In my opinion, except so far as the question of diligence is concerned, as to which it may form a very material element, this makes no difference. The ship, the armament, the crew, though sent out separately, form each of them part of one and the same enterprise or undertaking. Taken together, they constitute a hostile expedition and must be treated as such. It is as though a hostile force were sent by sea to invade an enemy's territory, and each arm of the force so

sent, infantry, cavalry, artillery, were embarked in different ships. The whole would still form one expedition. So here, ships, guns, crew, are each a part of one entire whole to be employed and used in furtherance of one common design. This is happily expressed in the American Law Review, in the article already cited: "It was not," writes the author, "because the Messrs. Laird sold a war ship to the Confederates that we have a claim against England for a breach of international law; but it was because collateral arrangements for completing the equipment and armament of the ship so sold, by placing on board officers aud crew, guns and provisions, rendered the entire procedure, in fact, the inception of a hostile undertaking from the confines of a neutral country."

Of course the question may become one of degree. The interval of time which might elapse between the sending out of the ship and that of the crew, the distance between the neutral territory and the place at which the war crew are to join, the possible fact that it was originally intended to procure a crew in some other country than that of the neutral, the occurrence of intermediate circumstances, might fairly lead to the inference that there was no present intention to apply the vessel to the purpose of war, which in my mind is an essential element in ascribing a belligerent character to that which might otherwise have remained a purely commercial transaction.

Duty of neutral Government.

An expedition of this kind being an undoubted violation of neutrality, every one will agree that it is the duty of the neutral Government, if it knows that such expedition is about to leave its waters, to use due diligence to prevent it. Nor does the duty of the neutral Government end here. It is also its duty to use due diligence to make itself informed as to the true character and destination of a vessel, where there is reasonable ground to suspect that such character and destination are unlawful.

The duty of the neutral Government in this respect appears to me to involve three things: first, that the law of the neutral shall be sufficient to enable the Executive to prevent breaches of its duties as a neutral; secondly, that, where its application is called for, the law shall be put in force honestly and in good faith; thirdly, that all proper and legitimate means shall be used to detect an intended violation of the law, so as by the application of the law to prevent it.

American argument as to effect of Foreign Enlistment Act.

Having thus seen what is the present state of international law, according to the views of leading jurists and the practice of nations, more especially that of England and America, the parties to the present dispute, we are enabled to form an opinion as to how far the assertion in the Case of the United States that the English Foreign Enlistment Act, which, going far beyond the restraints which international law imposes on the neutral subject, prohibits even the fitting-out and equipping of vessels for the purpose of war, is only a recognition of duties imposed by international law. The proposition is altogether untenable.

It is, in the first place, altogether at variance with what we know historically to have been the origin both of the American Acts of 1794 and 1818, and of the British Act of 1819, to say that either of these Acts arose out of, or was passed to prevent, the building or equipping or arming of ships of war to be sold to a belligerent.

British and American Acts.

The American Act of 1794 was passed in consequence of the proceedings of the French Envoy and Consuls in the United States, on the breaking out of the war between Great Britain and France, in procuring privateers to be fitted out and manned by American citizens, and furnishing them with letters of marque as privateers. It was not a question of fitting out ships to be sold to the French Government, but of fitting out American vessels, the property of American owners, and manned by American crews, to prey, under commissions as privateers, upon the commerce of a friendly nation.

In like manner, the American Act of 1818 arose out of the precisely similar conduct of American citizens in fitting out American vessels, manned by American crews, against the commerce of Spain and Portugal, under commissions as privateers from the *de facto* Governments of the revolted colonies of the two countries.

The Spanish Minister had loudly complained that some thirty vessels, specifically named, the property of American citizens, and belonging to ports of the Union, were thus preying on Spanish commerce.

The Representative of Portugal made similar complaints..

This practice carried on, on so large a scale, created great scandal; and after the complaints had gone on for two years, the Act of 1818 was passed, to put a check on it,

if possible. This Act, in addition to the enactments of that of 1794, required that a bond in double the value of the ship should be given in the case of any armed vessel, owned in whole or in part by American citizens, going out of an American port, that the vessel should not be employed against a foreign Government; and gave power to the Collectors of Customs to detain any vessel, built for war, leaving an American port, under certain suspicious circumstances specified in the Act. It is plain that this Statute, like its predecessor, was directed against privateering carried on by American citizens against countries with which the United States were at peace. Building or fitting out ships of war for a belligerent had not come into question at that time at all.

In like manner the British Act of 1819 had in view, not the prevention of building or equipping ships for a belligerent, in the way of trade, but the prevention of military or naval expeditions on behalf of the revolted colonies or malcontent subjects of Spain. Its origin is briefly stated in the Report of Lord Tenterden to the Neutrality Laws Commission:—

"The British Foreign Enlistment Act may be said to have arisen from the provision of a Treaty; that with Spain of the 28th of August, 1814.

"This Treaty, or, as it is called, 'Additional Articles to the Treaty of July 5, 1814,' contains the following Article:—

"'Article III. His Britannic Majesty, being anxious that the troubles and disturbances which unfortunately prevail in the dominions of His Catholic Majesty in America should entirely cease, and the subjects of those provinces should return to their obedience to their lawful Sovereign, engages to take the most effectual measures for preventing his subjects from furnishing arms, ammunition, or any other article to the revolted in America.'

"In 1818 the reactionary policy of King Ferdinand, the prohibitory duties imposed by him on British commerce, and the ingratitude with which he treated British officers and others who had served his cause in Spain, had provoked a great deal of irritation in England; and there was a considerable party in the House of Commons, headed by Sir James Macintosh, who were prepared to support the claims of the Spanish American Colonies to independence.

Expeditions were said to be in preparation for rendering active assistance both to the malcontents in Spain and to the rebels in America, in spite of a Proclamation forbidding such expeditions, which had been published in 1817; and the Government consequently found that it was necessary, in order to keep good faith with Spain and to prevent infractions of British neutrality, to bring in an Act of Parliament to provide for the case which now for the first time arose in modern history, of Great Britain being neutral at the time of a great maritime war."*

That it was against armaments going out from the shores of Great Britain that the measure was directed is plain from some of the arguments used by Mr. Canning in the course of the debate on the Bill. Thus he says:—

"If a foreigner should chance to come into any of our ports, and see all this mighty armament equipping for foreign service, he would naturally ask, 'With what nation are you at war?' The answer would be, 'With none.'

"'For what purpose, then,' he would say, 'are these troops levied, and by whom?' The reply of course must be, 'They are not levied by Government; nor is it known for what service they are intended; but, be the service what it may, Government cannot interfere.' Would not all that give such a foreigner a high idea of the excellence of the English Constitution? Would it not suggest to him that for all the ordinary purposes of a State there was no Government in England? Did the honourable and learned gentlemen not think that the allowing of armaments to be fitted out in this country against a foreign Power, was a just cause of war?"†

Mr. Robert Grant, another member of the Government, said that—

"Every Government, in its foreign relations, was the representative of the nation to which it belonged, and it was of the highest importance to the peace of nations, that Governments should be so considered. Nations announced their intentions to each other through the medium of their rulers. Hence every State knew where to look for expressions of the will of foreign nations,—where to learn whether war or peace was intended,—where to demand redress for injuries, and where to visit injuries unredressed. But all this system was inverted and thrown into confusion, if the Government might act in one way, and the nation in another. All this system was at an end if, while we were professedly at peace with Spain, she was to be attacked by a large army of military adventurers from our own shores, —a sort of *extra-national* body—utterly irresponsible—utterly invulnerable, except in their own persons —for whose acts no redress could be demanded of the British Government—who might burn, pillage, and destroy, then find a safe asylum in their own country, and leave us to say, 'We have performed our engagements—we have honourably maintained our neutral character."‡

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* See Report of Commission, p. 37; British Appendix, vol. iii.

† Hansard's Parliamentary Debates, Vol. XL, page 1106. See also extracts given in the Argument of the United States, page 510.

‡ Hansard, Vol. XL, page 1244. Argument of United States, page 512.

But the language of these acts being large enough to embrace a case of the equipping a vessel for a foreign belligerent, the Foreign Enlistment Act has been made available for the purpose of preventing a traffic, which is calculated to cause embarrassment to a Government pressed by the remonstrances of belligerents. And this Act having been so often appealed to and discussed, a notion has sprung up that the equipment of vessels of war, though in the way of trade, is a violation of neutrality, while, in fact, it is only a violation of the municipal law.

Mr. Dana, in the passage before cited, puts the matter on the right ground.

As to effect of Act of 1870.

Again, it is idle to contend that alterations in the law, since made by statute, to give a greater power to the Executive in dealing with suspected vessels, are to be taken as the measure of the obligations incumbent on the British Government by international law. Catching at a few words in the Report of the Royal Commissioners, who, in recommending certain statutory additions to the law, add: "In making the foregoing recommendations we have not felt ourselves bound to consider whether we were exceeding what could actually be required by international law, but we are of opinion that if those recommendations should be adopted, the municipal law of this realm available for the enforcement of neutrality will derive increased efficiency, and will, so far as we can see, have been brought into full conformity with your Majesty's international obligations,"—the United States desire that it shall be taken, notwithstanding that the Commissioners expressly say that their recommendations are independent of any considerations of international law, that these statesmen and learned jurists meant that without these additions the law of England failed to come up to the exigencies of international law. Such an argument is really undeserving of serious notice.

Equally unfounded is the assertion that the provisions of the Foreign Enlistment Act are only a statutory declaration of the common law of England. The enactment of that statute could only be declaratory of the common law, if co-extensive with the obligations of international law; whereas, in fact, it went far beyond them. The opinion of the judges, pronounced as far back as the beginning of the last century, that even the sale of armed ships was not contrary to the law of England, shows the rashness and the incorrectness of this assertion.

Right conferred on belligerent by municipal law.

But it is claimed on behalf of the United States that, whether the Foreign Enlistment Act was, or was not, more than co-extensive with international obligations, the United States were entitled, irrespectively of the Rule of the Treaty of Washington, to have it put in force in all its rigour for their protection. This involves the important question whether, where the municipal law of the neutral is more stringent than the international law, a belligerent can claim, as of right, the putting in force of the municipal law in his behalf, and make the omission to do so a ground of grievance, as founding a right of redress at the hands of a neutral Government. A few short considerations will serve to dispose of this question, which, indeed, seems to answer itself.

When a Government makes its municipal law more stringent than the obligations of international law would require, it does so, not for the benefit of foreign States, but for its own protection, lest the acts of its subjects in overstepping the confines, oftentimes doubtful, of strict right, in transactions of which a few circumstances, more or less, may alter the character, should compromise its relations with other nations. It was in this spirit and with this object that the Foreign Enlistment Act was passed, as is shown by its preamble, which is in the following terms:—

"Whereas the enlistment or engagement of His Majesty's subjects to serve in war in foreign service, without His Majesty's licence, and the fitting out and equipping and arming of vessels by His Majesty's subjects, without His Majesty's licence, for warlike operations in or against the dominions or territories of any foreign Prince, State, Potentate, or persons exercising or assuming to exercise the powers of Government in or over any foreign country, colony, province, or part of any province, or against the ships, goods, or merchandize of any foreign Prince, State, Potentate, or persons as aforesaid, or their subjects, *may be prejudicial to and tend to endanger the peace and welfare of this kingdom*: And whereas the laws in force are not sufficiently effectual for preventing the same:"——

Now, it is quite clear that the obligations of the neutral State spring out of, and are determined by, the principles and rules of international law, independently of the municipal law of the neutral. They would exist exactly the same, though the neutral State had no municipal law to enable it to enforce the duties of neutrality on its subjects. It would obviously afford no answer on the part of a neutral Government to

a complaint of a belligerent of an infraction of neutrality, that its municipal law was insufficient to enable it to insure the observance of neutrality by its subjects; the reason being that international law, not the municipal law of the particular country, gives the only measure of international rights and obligations. While, therefore, on the one hand, the municipal law, if not co-extensive with the international law, will afford no excuse to the neutral, so neither, on the other, if in excess of what international obligations exact, will it afford any right to the belligerent which international law would fail to give to him.

In one respect, and in one respect only, does the municipal law, when in excess of international law, give a right to the belligerent. Equality being of the essence of neutrality, he has a right to insist that the neutral subject shall equally be compelled to keep within the municipal law in dealing with the adversary as when dealing with himself. A belligerent is also beyond question perfectly at liberty to urge upon the neutral Government, in the way of solicitation or even of remonstrance, to enforce the municipal law; but so long as it is not enforced against himself he has no right to redress, because it is not put in force against his enemy.

I am at a loss exactly to understand for what purpose these points have been brought forward, and so strenuously insisted on in the American arguments. For, the rule prescribed to us by the Treaty, and to the benefit of which the United States are, therefore, entitled at our hands, is in the very terms of the Foreign Enlistment Act. I presume the purpose was to create a foundation for the imputation against Great Britain of not having acted in good faith. In that respect I may have to advert to these arguments again. For my present purpose it is enough to have cleared the ground of them.

Effect of Proclamation.

In like manner when it is sought, in the Case of the United States, to make the Queen's Proclamation of neutrality the measure of the international obligations of her subjects, every lawyer ought to know that this is to give to a Royal Proclamation an authority which it does not possess. The purpose of such a Proclamation, used only in great conjunctures, is to remind the subject of the provisions of the law, and to warn him against breaking it; and if, after such warning, a man offends against the law, his offence is aggravated by the fact that he has set the injunctions of the Sovereign at defiance; but such a Proclamation cannot make or add to the law, or alter it in the smallest particular. The Proclamation of 1861 was in the accustomed form. It drew attention to the enactments of the Foreign Enlistment Act, and warned all persons subject to British law that, if they did any acts in contravention of that Act, or in violation of the law of nations—as by enlisting in the military service, or serving in any ship of war or transport, of the contending parties; or going or engaging to go beyond the seas for the purpose of enlisting, or procuring, or attempting to procure, within Her Majesty's dominions, others to do so; or fitting-out, arming, or equipping any vessel to be employed as a ship of war, or privateer, or transport, by either of the contending parties; or by breaking or endeavouring to break any blockade lawfully and actually established by or on behalf of either of the said contending parties; or by carrying officers, soldiers, despatches, arms, military stores, or materials, or any article or articles considered and deemed to be contraband of war, according to the law or modern usage of nations, for the use or service of either of the contending parties—all persons so offending would incur and be liable to the several penalties and penal consequences by the said Statute or by the law of nations in that behalf imposed or denounced. The Queen's subjects are further warned that all persons entitled to Her protection, if they should misconduct themselves in the premises, would do so at their peril and of their own wrong, and that they would in nowise obtain any protection from Her Majesty against any liabilities or penal consequences.

The effect is that persons are warned that infractions of the Foreign Enlistment Act will be visited with the penalties of that statute, while acts within the penalties of international law will be liable to those penalties (namely, seizure and confiscation of property), and that against the latter penalties no protection from the Crown must be expected.

But the Proclamation contains no prohibition of these latter acts, namely, dealing in contraband of war, or breaking blockade; nor, if it did, would such prohibition make such acts an offence: such a Proclamation has never been understood by British statesmen or lawyers as making either of these things an offence against the municipal law, or as what the Government was called upon to prevent, or would be justified in attempting to prevent.

Nor have similar Proclamations of Presidents of the United States been dealt with as imposing additional obligations on American citizens, or as subjecting them to

additional penalties, or as carrying the obligations of the State further than those imposed by international law. The American authorities which I have cited establish this beyond all possibility of controversy.

Equipment of vessels under rule of Treaty.

To return to the subject of the equipment of vessels. Though I have thought it desirable, with a view to other parts of this case, to work out the question of neutral commerce to its full extent, and though I have come to the conclusion that by the general law of nations the sale of a ship of war, though intended for the use of a belligerent, is not, when merely a commercial transaction, a breach of neutrality; yet, as Great Britain has consented that the mere equipping of such a ship, though done in the way of trade, shall be taken to have been a breach of neutrality which the British Government was bound to use due diligence to prevent, I agree with the rest of the Tribunal that we must for the present purpose, in respect of the fitting out and equipping of vessels, take the rules of the Treaty as the test of the alleged omissions and consequent liability of the Queen's Government.

Construction of Rules of Treaty.

Though of opinion that Her Majesty's Government were quite right in saying that the Rules laid down by the Treaty are not such as international law would have prescribed at the time these claims arose, I agree that we are bound by the Rules, and that it is our duty to give full effect to them in dealing with these claims. However great and unexampled the concession made by Great Britain in consenting to be bound, in respect of past international obligations, by rules which had no existence in international law when the breaches of neutral obligations complained of are alleged to have occurred, I still think that we must proceed in this inquiry as though the Rules of the Treaty had been, either by international law or by convention between the two countries, binding on Great Britain at the time of the civil war. I cannot but concur with Mr. Evarts that we must give the same effect to those Rules as regards the past as we should give to them if dealing with a case which had arisen since they were agreed to by the two nations, nor do I indeed understand this proposition to be disputed by the Counsel on the part of Great Britain. The question is whether due diligence was used by the British Government to satisfy the exigency of the obligations prescribed by those Rules.

Due diligence, what?

I proceed then to consider what is this "due diligence," which the British Government admits that it was bound to apply to prevent the fitting-out and equipping of the vessels in question.

I apprehend that such diligence would be neither greater nor less than any other neutral Government would be bound to apply to the preventing of any breach by its subjects of any head of neutral duty prescribed by international law.

The difficulty of the position is, that the question has not hitherto come within the range of juridical discussion on subjects connected with international law. Hitherto, where a Government has acted in good faith, availing itself fairly of such means as were at its disposal, it has not been usual to consider it responsible to a belligerent Government for acts of its subjects that might have eluded its vigilance, or that the degree of diligence exercised by it should be submitted to judicial appreciation. And no country has insisted more strongly on this as the limit of national responsibility than that of the United States. We must endeavour to find a solution for ourselves.

As I have already observed, I cannot agree that the question of what is "due diligence" should be left to the unassisted mind of each individual arbitrator; nor can I agree that the solution is to be found in the facts of each individual case; and though judges may be often disposed to apply the maxim, to which our honourable President has more than once referred, *ex facto jus oritur*, it is, I think, one which must not be pushed too far. I agree with M. Troplong, who, writing on this subject with reference to civil law, after referring to the different opinions of jurists on the subject of diligence, says:—

"Il est vrai que jusqu'à présent les Tribunaux se sont montrés assez indifférents sur ces disputes de la chaire; mais peut-être pourrait-on leur faire le reproche de n'avoir amorti la vivacité de la question, qu'en étouffant tout ce qui est discussion de système et point de droit, sous la commode interprétation des faits, et sous un équitable mais facile arbitraire. Néanmoins, dans cette matière, comme dans toutes les autres, il y a des règles qu'il faut se garder de dédaigner: elles aident le magistrat, elles font luire de précieuses lumières pour ceux qui ont mission de discuter sur les faits et de les juger. Ces règles m'ont paru simples et judicieuses; je vais les exposer comme je les entends; dans tous les cas, et dussé-je me tromper, je prie le lecteur de ne pas m'adresser, comme fin de non-recevoir, le reproche de me livrer à d'oiseuses digressions. De tous les systèmes, le moins excusable, à mon avis, c'est celui qui, sous prétexte de fuir l'esprit-de système, se fait une loi de n'en avoir aucun."*

* "Code Civil Expliqué," vol. i, p. 479.

It seems to me, therefore, right, before proceeding to deal with the facts, to seek in the domain of general jurisprudence for principles to guide us in judging how far the obligations of Great Britain have or have not been satisfied.

iligentia and *ulpa.*

No branch of law has been the subject of more discussion among juridical writers than that of *diligentia* and its correlative *culpa*, the latter being neither more nor less than the absence of the former. I was prepared to expect, from the able men who have prepared the pleadings of the United States, some assistance to guide us to right conclusions as to the standard of diligence required of a neutral Government for insuring the obedience of its subjects in matters of neutrality. But after a vague statement that "the extent of the diligence required to escape responsibility is, by all authorities, gauged by the character and magnitude of the matter which it may effect, 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,"* the only authority cited in any detail is that of an obsolete author, whose exposition of the Roman law has been exploded by modern science. After this, the Case breaks out into the following vague and declamatory statement, not of what the law is, but of what the United States' Government desire it shall be understood to be:—

"The United States understand that the diligence which is called for by the Rules of the Treaty of Washington is a *due* diligence; that is, a diligence proportioned to the magnitude of the subject and to the dignity and strength of the Power which is to exercise it;—a diligence which shall, by the use of active vigilance, and of all the other means in the power of the neutral, through all stages of the transaction, prevent its soil from being violated;—a diligence that shall in like manner deter designing men from committing acts of war upon the soil of the neutral against its will, and thus possibly dragging it into a war which it would avoid;—a diligence which prompts the neutral to the most energetic measures to discover any purpose of doing the acts forbidden by its good faith as a neutral, and imposes upon it the obligation, when it receives the knowledge of an intention to commit such acts, to use all the means in its power to prevent it.

"No diligence short of this would be 'due;' that is, *commensurate with the emergency or with the magnitude of the results of negligence.* Understanding the words in this sense, the United States find them identical with the measure of duty which Great Britain had previously admitted."†

This is, of course, to beg the whole question in dispute. But it is obvious that a matter of so much importance, as lying at the very root of this inquiry, requires a more logical and precise consideration than the foregoing rhetorical statement presents.

Opinions of Jurists.

The jurists of the seventeenth century, among whom Vinnius occupies a prominent place,‡ 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 obligation, 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."‖

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.

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* United States' Case, p. 152. † Ibid., p. 158.

‡ See Comment., lib. iii, tit. xv, De Commodato.

§ See "Allgem. Bürgerl. Gesetzbuch," § 1297. ‖ Vol. iii, p. 360.

"Qu'est ce que la diligence d'un bon père de famille?" asks M. Troplong:—*

"C'est la diligence de celui qui, comme le dit Heineccius, tient le milieu entre l'avare aux cent yeux, et l'homme négligent et dissipé. C'est dans le système dont M. Ducarroy est l'organe, et que j'adopte pleinement, la diligence qu'un individu, aussi diligent que les hommes le sont 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 family in general." "The care to be taken is 'qualem diligens paterfamilias suis rebus adhibere *solet*.'"

After distinguishing between *culpa* in criminal and in civil cases, the same learned writer says:—

"It is important, therefore, not so much to distinguish the degree of *culpa*, but rather to decide the starting-point at which responsibility for inattention and negligence commences.

"This starting-point is settled according to one rule for all those cases in which there exists, not a simple responsibility for *dolus* (and *culpa lata*), but where *culpa* is to be imputed; *culpa* being admitted in those cases where the conduct falls short of the measures which a *diligens paterfamilias* is in the habit of observing in his affairs.

"Only under some few obligatory conditions is a decision more favourable to the debtor admissible, in so far that in these cases he is allowed to excuse himself from the responsibility, by proof that in his own affairs he is by habit equally negligent."†

"The ordinary conduct of an intelligent, prudent, and careful *Haus-Vater*, of a 'bonus et diligens paterfamilias,'" says Rivier in the Rechtslexicon of Holzendorff, "affords the normal measure of the obligation of diligence. He who so conducts himself is in general free from all reproach. If he acts otherwise he is in *culpa* and responsible."‡

"The measure," says Dr. Windscheid, "by which to determine whether particular conduct is open to the charge of negligence, or not, is the conduct of men in general."§

Professor Unger, in his "System des Oesterreichischen Allgem. Privatrechts,"‖ thus writes of *culpa levis*, according to Austrian law:—

"*Culpa levis* consists in the omission of that care which an attentive and judicious head of a family regularly observes (*diligentia diligentis patrisfamilias*). The want of this care, this kind of *culpa*, is generally understood, when speaking merely of oversight, of *culpa* simply. The observance of a higher degree of care than this is not required; this is the lightest offence for which a man can be made responsible; a *culpa levissima*, going beyond *culpa levis*, does not exist either according to general or to Austrian law. The *culpa levis* forms the boundary of responsibility. It is by itself *omnis culpa*: on the other side of this limit begins the province of *accident*, for which the actors are not held liable."

"The Civil Code treats of this *culpa levis* in § 1297, where it states the highest degree of diligence and attention required to be that 'which can be exercised by ordinary capacities.' The omission of this care forms the lightest offence for which any one can be held responsible. By the diligence and attention 'which can be exercised by ordinary capacities' must, however, be understood what, in another place, the Code calls the attention 'of a trusty and diligent head of a family,' the care 'of a good householder.'"

Stubenrauch in his Commentary on the Austrian Code treats the whole subject of *culpa* with much ability and learning. He ends by saying:—

"It is to be assumed that every man, who is in possession of his faculties, is capable of that degree of diligence and attention which can be exercised by men of ordinary capacity. Whoever by the absence of this diligence and care causes injury to another, incurs liability."¶

Mr. Justice Story, with the good sense which characterizes his writings, says:—

"Common or ordinary diligence is that degree of diligence which men in general exert in respect to their own concerns. It may be said to be the common prudence which men of business and heads of families usually exhibit in affairs which are interesting to them; or, as Sir William Jones has expressed it, it is the care which every person of common prudence and capable of governing a family takes of his own concerns. It is obvious that this is adopting a very variable standard, for it still leaves much ground for doubt as to what is common prudence, and who is capable of governing a family. But the difficulty is intrinsic in the nature of the subject, which admits of an approximation only to certainty. Indeed, what is common or ordinary diligence is more a matter of fact than of law, and in every community it must be judged of by the actual state of society, the habits of business, the

* "Code Civil Expliqué," vol. i, § 371.
† "Beiträge," &c., vol. iii, p. 360. ‡ "Rechtslexicon," vol. i, tit. "Culpa."
§ Windscheid, "Lehrbuch des Pandektenrechts," Band 1, p. 256. ‖ Vol. ii, p. 243.
¶ Stubenrauch, "Comm. zum Allg. Ost. B. Gesetzbuch," pp. 1294–97.

general usages of life, and the changes, as well as the institutions, peculiar to the age. So that, although it may not be possible to lay down any very exact rule, applicable to all times and all circumstances, yet that may be said to be common or ordinary diligence in the sense of the law which men of common prudence generally exercise about their own affairs in the age and country in which they live. It will thence follow, that in different times and in different countries the standard is necessarily variable with respect to the facts, although it may be uniform with respect to the principle; so that it may happen that the same acts which, in one country, or in one age, may be deemed negligent acts, may, at another time or in another country, be justly deemed an exercise of ordinary diligence. . . . .

"What is usually done by prudent men in a particular country in respect to things of a like nature, whether it be more or less, in point of diligence, than what is exacted in another country, becomes in fact the general measure of diligence."*

The same standard is, in practice, applied in the English law. The older authorities, indeed, speak of three degrees of negligence, and of "gross" negligence as being necessary in some cases to found liability; but the tendency of modern decisions has been to apply in all cases the sound practical rule that in determining the question of negligence, the true test is whether there has been, with reference to the particular subject matter, that reasonable degree of diligence and care which a man of ordinary prudence and capacity might be expected to exercise in the same circumstances. (See what is said by Tindal, L. C. J., in Vaughan *v.* Menlow (3 B. N. C., 475); by Parke, B., in Wyld *v.* Pickford (8 M. and W., 461); by Cresswell, J., in Austin *v.* Manchester, Sheffield and Lincolnshire Railway (10 C. B., 454); and by Rolfe, B., in Wilson *v.* Brett (11 M. and W., 115).

While, however, I thus seek in the writings of jurists, and the law of different nations, some standard for the measure of diligence, I readily concede that the application of that standard must depend on the circumstances of each individual case, and on the view which the Judge may, in his conscience, form of how far the conduct of the individual complained of may or may not have been that which ordinary prudence and sense of duty would have prescribed. I entirely agree with what is said by the learned editors of Zachariæ's "Droit Civil Français," on Article 1137 of the French Code:—

"L'Article 1137 se résume en un Conseil aux Juges de n'avoir ni trop de rigueur ni trop d'indulgence, et de ne demander au débiteur que les soins raisonnablement dus à la chose qu'il est chargé de conserver, ou de faire, soit à raison de sa nature, soit à raison des circonstances variables à l'infini qui modifient son obligation pour la rendre ou plus large ou plus étroite."†

What is here said by the learned editors of Zachariæ appears to me to afford the true criterion. It is for the Judge to determine, according to the best of his judgment, with reference to the facts of the particular case, and with reference to the thing to be done or left undone, whether what has been done, or left undone, as the case may be, has been what could reasonably and justly have been expected from a person of ordinary capacity and prudence in the affairs of life. More than this is not to be expected.

Same principle applied to Government.

I have cited these authorities because, in the absence of any reference to the question of diligence among writers on international law, it seems to me that the principle that prevails as to men's conduct in the affairs of life may by analogy be well applied to the discharge of its duties by a Government. Applying this standard, one nation has a right to expect from another, in the fulfilment of its international obligations, the amount of diligence which may reasonably be expected from a well-regulated, wise, and conscientious Government, according to its institutions, and its ordinary mode of conducting its affairs; but it has no right to expect more. The assertion of the obligation of a neutral Government, as stated in the American Case, —that "the diligence is to be proportioned," not only to "the magnitude of the subject," but also to "the dignity and strength of the Power which is to execute it"—as though there could be one measure of diligence for a powerful State, and another for a weak one—a diligence "which shall prevent its soil from being violated"—which "shall deter designing men, &c."—thus making the neutral Government answerable for the event—and "which prompts to the most energetic measures"—appears to me much too extensive, and altogether inadmissible.

Heads of diligence.

The diligence required of a Government to prevent infractions of neutrality may relate (1) to the state of its municipal law; (2) to the means possessed by it to prevent

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* Story on Bailments, § 14.

† Zachariæ, "Droit Civil Français," edited by MM. Massé and Vergé, vol. iii, p. 400.

such infractions; (3) to the diligence to be used in the application of such means to the end desired.

Law. As to the law, the subject may be divided into the prohibitive law, or, as it is termed in the American Case, the punitive law, and the preventive law, that is, the law whereby the Government is armed with the power and means of prevention.

As regards the prohibitive or punitive law, no difficulty can arise. It is plain that to satisfy the exigency of due diligence, and to escape liability, a neutral Government must take care, not only that its municipal law shall prohibit acts contravening neutrality, but that the law shall be upheld by the sanction of adequate punishment, that is to say, of such as may reasonably be expected to deter persons from offending against it.

Means at disposal of Government. As regards the preventive law, doubtless a Government should be armed by law with power to prevent an infraction of the law, when it knows, or has reasonable ground to believe, that such infraction is about to take place.

But when we come to the question of the means which by law should be placed at the disposal of the Government, difficulties of a very formidable character immediately present themselves.

The more despotic and unlimited the power of a Government, the more efficacious will be the means at its command for preventing acts which it is desired to prevent.

Is this a reason, in a country where absolute and unlimited power is unknown, where every power is exercised in subordination to the law, and where for any interference by the Government with the rights of person or property, redress may immediately be sought, for investing the Executive with an absolute and irresponsible power, at variance with the whole tenour and spirit of the national institutions, in order to protect a belligerent from the possibility of injury from a violation of neutrality?

Again, a nation has a system of procedure which is in harmony with its institutions, and with which it is satisfied. According to that system, persons against whom the law is to be put in force cannot be subjected to be interrogated in order to establish their criminality. Proof must first be produced, from which, while it remains unanswered, a presumption of guilt arises, before they can be called upon for a defence. Because a different system might be more efficacious in enabling the Government to establish a case for confiscating a suspected vessel, for the protection of a belligerent, is the legislature called upon to change the law because other nations become involved in war?

Again, the government of a country has been carried on for years according to an established system of official routine. This system may be somewhat complicated, and may render the action of the Executive less speedy than it might otherwise be. But it is safe, and has been found to work sufficiently well in carrying on the affairs of the nation at home and abroad. Because a more rapid and a more direct action on the point to be reached might be obtained by a simplification of the official machinery, is a Government to be held guilty of negligence, because, not foreseeing what was about to happen, it had not altered its ministerial arrangements accordingly?

A Government, in all matters involving legal consideration, is in the habit of consulting and acting under the advice of lawyers specially appointed to advise it. The purpose is the laudable one of insuring the perfect legality of the proceedings of the Government; but this advantage necessarily involves some loss of time, during which the action of the Executive is for the moment suspended. Is this practice inconsistent with the diligence required of a neutral Government? Honestly intending to do what was right, is it to be held responsible because a vessel equipped for war has taken advantage of such a delay, though perhaps, in the particular instance, accidentally prolonged?

I can only answer these questions in the negative. I do so on the ground, as to some of them, that they are things which no Government could reasonably be asked to do; as to all, that they were not such things as a Government of ordinary prudence and sagacity, carrying on its affairs in the usual way in which the affairs of Governments are carried on, could have foreseen the necessity of providing for.

Action of Government. Passing from the law, and the means which the law should place at the disposal of a Government, to enable it to repress intended violations of neutrality on the part of its subjects, to the action of the Government in the use of such means, it seems to me that two things are incumbent on a Government:—

1st. That it shall use due diligence to inform itself, by the use of the means at its disposal, whether a violation of the law is about to be committed; and,

2ndly. That being satisfied of the fact, it shall use due diligence in applying its means and power of prevention.

These conditions honestly and *bonâ fide* satisfied, no Government, as it seems to me, can be held liable for the acts of its subjects, but such acts must be deemed to be beyond the reach of any control which it can reasonably be expected to exercise.

But here questions of great importance, and of equal difficulty, present themselves:—

(1.) Is a Government, intending faithfully to discharge its duty towards another Government, to be held responsible for a mere error of judgment? As for instance in thinking a vessel not liable, in point of law, to seizure, when in fact she was so; or in thinking the evidence in a particular case insufficient when it was sufficient.

(2.) Is a Government wanting in due diligence if it declines to seize a vessel at the instance of a belligerent, when properly satisfied that, though there may be circumstances of a suspicious character, the only evidence which can be adduced will not justify the seizure before the law, and that the vessel will therefore be released?

(3.) Having seized a vessel and brought the matter before the proper legal authority, is a Government to be held responsible because, through some mistake of the Court, either of law or fact, there has been a miscarriage of justice?

(4.) Is it to be answerable for accidental delay, through which an opportunity becomes afforded to a vessel to evade the eventual decision of the Government to seize her?

(5.) Is a Government to be held responsible for error of judgment in its subordinate officers, especially when these officers are at great distance, and not acting under its immediate control? Is it, under such circumstances, to be answerable for their possible negligence, or even for their misconduct?

These are matters of infinite importance to neutral nations, who may be drawn within the vortex of wars in which they have no concern, if they are not only to be harassed and troubled by the demands and importunities of jealous and angry belligerents, but are, in addition, to be held responsible—to the extent, perhaps, of millions—for errors of judgment, accidental delay, judicial mistake, or misconduct of subordinate officers, acting not only without their sanction, but possibly in direct contravention of their orders.

We are not informed whether the two Governments have, in compliance with the pledge contained in the Treaty of Washington, invited other nations to adopt its rules; but if it is to be established that these rules carry with them a liability so extensive, I should very much doubt whether such an invitation, if made, would be attended with much success.

Any decision of this Tribunal founded on such a liability would have the effect, I should imagine, of making maritime nations look upon belligerent Powers with very considerable dread.

It is to be remembered that a Government cannot be taken to guarantee the event; in other words, to be answerable at all hazards and under all circumstances for a breach of neutrality by a subject, if it occurs. In spite of the law, and of the vigorous administration of the law, offences will take place, and neither at home nor abroad can rulers be held, under all circumstances, answerable to those who suffer from them. All that can be expected of the Government of a country is that it shall possess reasonable means to prevent offences, and use such means honestly and diligently for the benefit of those who are entitled to its protection. The terms of the Treaty, which require no more than "due diligence," exclude all notion of an absolute unconditional responsibility. This is evidently the meaning of an observation of the British Counsel at the close of the fifth section of his Argument on "due diligence," which the President of the Tribunal appears to have found some difficulty in understanding.

Errors of judgment.

This being so, I have some difficulty in saying that a Government, acting in good faith, and desiring honestly to fulfil its obligations, can be held liable for errors of judgment, unless indeed these are of so patent a character as to amount to *crassa negligentia*.

Delay.

Prolonged and unnecessary delay is, in the very nature of things, incompatible

with diligence. But delay, within reasonable limits, honestly intended for the investigation of facts or the due consideration of the proper course to be pursued, is not so. Delay arising simply from accident ought not to be imputed as negligence. Accident can never be made the ground of an imputation of negligence, though it may found a legal claim where a party is *in morâ*.

Seizure of vessels.

As regards the seizure of a vessel under the Foreign Enlistment Act, with a knowledge that the evidence would be insufficient to justify it, I hold that such a seizure, whether for the purpose of furthering the ends of a belligerent, or because some suspicion might attach to the vessel, would have been unjustifiable both in policy and principle.

For no Government can be called upon to institute legal proceedings under such circumstances. Every Government prosecution, which ends in failure, is, in itself, productive of mischief. It lessens the authority of the Executive by making it appear to have acted harshly and unjustly, and creates sympathy, perhaps unmerited, for parties against whom its efforts have been directed, and who have escaped from its pursuit. It impairs the authority of the law, by leading to the belief that it may be infringed with impunity, thereby holding out encouragement to crime. A government would be acting in violation of the spirit of the Constitution, as well as against law and right, if it seized a vessel, the property of a subject, unless it believed such vessel to be justly and legally liable to condemnation on legal and sufficient proof. Moreover, such a proceeding would be useless as well as arbitrary. The Government would be unable to defer indefinitely the decision of the question, but, on the contrary, would be bound to submit the case to the proper tribunal at the earliest practicable moment. In the case supposed, the result would necessarily be that the vessel must be released and allowed to depart unmolested.

It must be borne in mind that the British Government possesses no despotic or arbitrary power. It could neither assume nor exercise such a power, even to protect a belligerent or maintain its own neutrality.

Judicial miscarriage.

As regards any miscarriage of justice in matters within the sphere of the municipal law, it appears to me utterly out of the question to hold that a Government, having done what in it lay,—as by seizing a vessel, and bringing it properly before the competent Court—can be held liable because, through some mistake or accident, justice may have been defeated.

A breach of the law having been committed in the equipping or arming of a vessel for belligerent purposes, all that the Government could do under the Foreign Enlistment Act, was to seize the delinquent vessel and bring it into a proper Court for condemnation. This done, and the evidence of the facts in such a case having been submitted by the public prosecutor to the Court, the functions of the Government are at an end. It can do no more. The rest is with the law. In England, in America, in every well-constituted and well-regulated State, the executive and judiciary powers are separated by a broad and impassable barrier. There is no authority in the State, however high, that would venture to interfere with the discharge of the judicial office. It would be considered a violation of the most sacred principles, and an outrage on all propriety, to seek to control, or even to influence directly or indirectly, the decision of a Judge, even of the most inferior tribunal.

This being so, the Government of a neutral cannot justly or reasonably be held responsible for all the mischief which a vessel, equipped in violation of its law, may do throughout the course of, possibly, a protracted war, because a suit, which it has properly instituted, fails through a mistake of the Judge. To decide in the affirmative would be to establish a rule hitherto unknown, and calculated to impose on neutral States a degree of responsibility altogether unprecedented and unheard of.

Liability for acts of subordinates.

As regards liability for the acts or omissions of subordinate officers, it seems to me, that, while a Government may properly be held responsible for what is done, or omitted to be done, by its orders, or under its own immediate control, it would be most unreasonable to hold it answerable for the acts or negligences of subordinates, at all events unless it afterwards ratifies and adopts what these may have done.

In the matter of civil rights, individuals may be liable for the negligence of those to whom they depute the conduct of their affairs; but, considering the complicated machinery of political government, especially when distant Colonies and dependencies are concerned, and the consequent necessity of employing subordinate officers, it would be unreasonable and unjust to hold that the negligence of a subordinate, more

especially from mere error of judgment, as, for instance, in allowing a vessel to take too much coal, was a want of "due diligence" on the part of the Government for which it can justly be held liable.

The following passage from the British Counter-Case sums up so well the different sides of this question that I do not hesitate to produce it at length :—

"That due diligence requires a Government to use all the means in its power, is a proposition true in one sense, false in another; true, if it means that the Government is bound to exert honestly and with reasonable care and activity the means at its disposal; false, impracticable, and absurd, if it means that a liability arises whenever it is possible to show that an hour has been lost which might have been gained, or an accidental delay incurred which might, by the utmost foresight, have been prevented; that an expedient which might have succeeded has not been tried; that means of obtaining information which are deemed unworthy or improper have not been resorted to; or that the exertions of an officer or servant of Government have not been taxed to the utmost limit of his physical capacity.

"Nor can we fail to observe that, in proportion as we extend the duty of prevention incumbent on neutral Governments, from hostile enterprises which are open and flagrant to acts of a more doubtful character which border on the line betwixt the lawful and the unlawful, it becomes more and more difficult to exact from the neutral, in the performance of that duty, peculiar and extraordinary vigilance and activity. The duty of preventing the open assembling within neutral territory of an armed hostile expedition against a neighbouring country is plain and obvious, and requires only a prompt exercise of adequate force. But it is otherwise when we come to acts of a different class, the criminality of which depends on a latent intention; such, for example, as the mere procuring for belligerent purposes from the yards of a neutral shipbuilder, whose ordinary business it is to build ships of all kinds for customers of all nations, a vessel with some special adaptation for war. There is nothing in the relation of a neutral to a belligerent to cast on the former the duty of exercising within his own territory a constant and minute espionage over ordinary transactions of commerce for the protection of the latter. This relation, always onerous to the neutral, is at the same time, it must be remembered, purely involuntary on his part. It is forced on him by the quarrels of his neighbours in which he has no concern, or by their internal discords when those discords break out into civil war."*

While I readily admit that the measure of diligence which a Government applies to the affairs it has to administer, if the ordinary course of its administration is negligent and imperfect, is not necessarily to be taken—any more than it would be in the case of an individual—as the measure of diligence which it is to apply in the discharge of international obligations, yet credit should be given to a Government for a properly diligent discharge of public duty.

Furthermore, if a given law and a particular system of administration have been found by practical experience sufficient to protect the interests of the Government in the important matter of the public revenue, and also to ensure the observance of neutral duties on the occasion of all former wars, surely it is highly unreasonable and unjust to condemn the whole system as defective, and the Government as negligent for not having amended it in anticipation of future events.

It must not be forgotten, that since the passing of the British statute, wars have occurred in all parts of the world, but no complaints of the violation of that statute have occurred till American citizens had recourse to new modes of defeating or evading it.

Such, in my opinion, are the principles by which we should be guided in deciding whether Great Britain has or has not failed to satisfy the requirements of due diligence. I proceed to apply them to the different heads of complaint preferred by the United States.

Municipal Law of Great Britain.

One main head of complaint on their part is that the municipal law of Great Britain, as contained in the Foreign Enlistment Act, was insufficient to enable the British Government to enforce the observance of the duties of neutrality by its subjects. We have first a general condemnation of English Acts of Parliament. "English Acts," we are told, "are so overloaded with a mass of phrases, alike unprecise and confused, with so much of tedious superfluity of immaterial circumstances, as if they were specially designed to give scope to bar chicanery, to facilitate the escape of offenders, and to embarrass and confound the officers of the Government charged with the administration of law. Such, indeed, has been the ordinary complexion of the legislation of Great Britain, and this style of complex verbosity of legislation has unhappily been transmitted to the United States." But then we have the satisfaction of learning that "there it begins to encounter steady efforts of reformation, which are conspicuous in the legislation of many of the American States.†

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* British Counter-Case, page 22.

† United States' Argument, p. 61.

Of the Foreign Enlistment Act we are told that "Its practical inefficiency was glaringly apparent on the face of all the relative diplomatic correspondence between Great Britain and the United States."

That it was "valueless, except as occasion should arise to make it serve as a pretext to cover, in diplomatic communication with other Governments, indifference, unfriendly or hostile animus, on the part of some British Minister."

British Ministers are represented as "floundering along in the flat morass of the meaningless verbosity and confused circumlocution of an Act of Parliament." They are represented as having been "compelled to drift into the condition of foreign war rather than break free from the entanglement of the cobweb meshes of that Act."

It strikes me that those who address us in this strange style must suppose us to be ignorant that the English Act of 1819 was framed on the model of the American Act of 1818; that it is, in the main, identical in language, and is, in one, and that an important particular, more stringent than its predecessor.

Foreign Enlistment Act.

The English Act, in the part of it with which we are concerned, makes it an offence to "equip, furnish, fit out, *or* arm, within the United Kingdom or the Queen's dominions, without the Royal license first obtained, any ship or vessel, with the intent or in order that such ship or vessel shall be employed in the service of any foreign prince, State or Potentate, or of any foreign colony, province, or part of any province or people, or of any person or persons exercising or assuming to exercise any powers of government in or over any foreign State, colony, province, or part of any province or people, as a transport or storeship, or with intent to cruize or commit hostilities against any prince, &c., &c., with whom the Queen is not at war." To attempt to equip, &c., any such ship or vessel with a like intent, or to procure it to be done, as well as knowingly to aid and assist, or be concerned, in so doing, is equally made an offence. The penalty attached to the offence is fine and imprisonment, or either of them, at the discretion of the Court, and the forfeiture of the vessel, with all its accessories, and of all materials, arms, ammunition and stores, which may be found on board, on the vessel being prosecuted and condemned; such prosecution and condemnation being directed to be had "in like manner, and in such courts, as ships and vessels may be prosecuted and condemned for any breach of the laws for the protection of the revenues of Customs and Excise, or of the laws of trade and navigation."

Preventive law.

So much for the prohibitive or punitive part of the law. The preventive part consists in a provision that the ship or vessel may be seized by any officer of Her Majesty's customs or excise, or any officer of the Royal Navy, who is by law empowered to make seizures for any forfeiture incurred under the revenue laws, or laws relating to trade or navigation within the limits of their particular jurisdictions.

Comparison with American Acts.

On comparing the enactment relating to the fitting out of ships with the corresponding enactment of the American Statute, it will be found that the English Act, on which so much vituperative criticism has been lavished, is in fact, as regards the equipment of vessels, more comprehensive and effective than the former. For, while the English Statute makes it an offence to equip *or* arm, in the disjunctive, by the American Statute the offence consists in fitting out *and* arming, in the conjunctive, thus bringing the vessel a stage further on towards belligerent completion before the law can interpose.

It is true that the Judges in the Court of Exchequer having been divided in opinion, in the case of the Alexandra, as to whether the arming of a vessel was not necessary before the intent that she should be employed for belligerent purposes could be inferred, the result in that case was that the more comprehensive enactment of the English Statute failed in its effect. But when it is said, in somewhat strong language, that the effect of the decision in the Alexandra case was to "emasculate" the English Statute, it must be observed that, if such was the case, the effect was only to reduce the English Act to the condition in which the American Statute had been from its birth. I think it unnecessary, on the present occasion, to express any opinion on the question on which the Judges of the Court of Exchequer were divided; I will only, in passing, repeat my conviction that neither the American nor the English Statutes were ever intended to interfere with the execution of orders from belligerents by American or British shipbuilders, but simply to prevent the ports of the respective countries from being used for fitting out privateers, or being made the base of hostile expeditions. But the distinction between equipping and arming, and equipping without arming, is immaterial for the present purpose; for, in point of fact that

distinction never created any difficulty in the action of the British Government. In the cases both of the Florida and the Alabama the only question on which the action of the Government was arrested was as to the sufficiency of the evidence of the vessel being intended for the service of a belligerent.

reventive powers British and merican Acts.

But it is with reference to the preventive powers conferred on the Executive by these acts that the Case and Argument of the United States principally assail the British Statute, and triumphantly assert the superiority of the American Act; maintaining that, while the British Act depends on the sanction of penalties, the American Act places power in the hands of the Executive which effectually secures it against infraction of the law.

Acquainted with the two Acts, I read, I must say, with much surprise, the following passage in the Argument of the United States:—

"The great difference between the two consists in the cardinal fact that the provisions of the British Act are merely *punitive*, and to be carried into effect only by judicial instrumentality; whereas the American Act is preventive, calls for executive action, and places in the hands of the President of the United States the entire military and naval force of the Government, to be employed by him in his discretion for the prevention of foreign equipments and foreign enlistments in the United States."*

This appears to me a thoroughly inaccurate representation of the effect of the American Act, which, as I understand it, confers no discretionary power on the President, beyond that of employing the military or naval forces of the Republic to support the law, if necessary. Referring to the different violations of neutrality made offences by the Act, the 8th section provides that —

"In every case in which a vessel shall be fitted out and armed, or attempted to be fitted out and armed, or in which the force of any vessel of war, cruizer, or other armed vessel, shall be increased or augmented, or in which any military expedition or enterprise shall be begun or set on foot, contrary to the provisions and prohibitions of this Act; and in every case of the capture of a ship or vessel within the jurisdiction or protection of the United States as before defined; and in every case in which any process issuing out of any Court of the United States shall be disobeyed or resisted by any person or persons having the custody of any vessel of war, cruizer, or other armed vessel of any foreign Prince or State, or of any colony, district, or people, or of any subjects or citizens of any foreign Prince or State, or of any colony, district, or people; it shall be lawful for the President of the United States, or such other person as he shall have empowered for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, for the purpose of taking possession of and detaining any such ship or vessel, with her prize or prizes, if any, in order to the execution of the prohibitions and penalties of this Act, and to the restoring the prize or prizes in the cases in which restoration shall have been adjudged, and also for the purpose of preventing the carrying on any such expedition or enterprise from the territories or jurisdiction of the United States against the territories or dominions of any foreign Prince or State, or of any colony, district, or people, with whom the United States are at peace."

To any one who reads this section with any degree of attention, its meaning, I think, must be clear. No arbitrary power is given to the President; nor any power of seizing a vessel at all, except "*in order to the execution of the prohibitions and penalties of the Act.*" No discretionary power whatever is given him except that of using force, where force is required, for overcoming resistance.

The enactment was contained in the original Act of 1794, which was passed shortly after the French Minister, Genet, had set the Government at defiance and threatened to resist by force any attempt to detain a privateer illegally armed in the port of Philadelphia, and after the French Vice-Consul at Boston had actually rescued by force a suspected vessel which had been seized by the United States' Authorities.

The section was obviously directed against the repetition of such an occurrence, and was necessary to enable the President to use the forces of the State on a sudden emergency without having recourse to the Senate. The section gives the President no power which he would not have had without it, except where recourse to actual force is necessary. It is an entire misrepresentation to say that he has a discretionary power to seize and detain a vessel without bringing her before the proper Court for adjudication. His power is to employ the State force, if necessary, among other things, to seize a vessel, "*in order to the execution of the prohibitions and penalties of the Act,*" which implies that the vessel must be submitted, in the usual course, to the proper legal process to decide on her condemnation or release. Often as the action of the Government was invoked by the Governments of Spain and Portugal, during their colonial wars, to prevent the arming of vessels in the ports of

* Argument of the United States, p. 53.

the United States, frequent as have been the raids and hostile expeditions from American territory since, no instance has been adduced of the exercise of this alleged discretionary power by a President of seizing a vessel and keeping her, without putting the matter into due course of law, and I feel tolerably confident that no such instance has ever occurred.

Instances may have occurred, as in the case of the Spanish gun-boats building at New York in 1869, in which it was considered necessary to provide for the use of force to arrest ships believed to be about to go forth on military expeditions; but such seizures have been followed by the ordinary course of legal procedure and inquiry, or the intended expedition having been prevented or else abandoned, the vessel has been restored without any further proceeding. Instances have no doubt occurred in which vessels have been seized by order of the President, as head of the Executive, as vessels might be seized by order of Her Majesty's Government; but this was only that the statute might be put in force. In like manner vessels may have been seized under the ordinary civil authority, and it being found that there was no sufficient case against them, may have been set free. But no instance, I believe, has occurred, except where force was actually necessary, of the seizure of a vessel by a President, in the mere exercise of executive power, suspending the ordinary action of the law. No example of such a proceeding has been, or I believe can be, adduced, with the single exception of the case of Gelston *v.* Hoyt, to which I am about to refer, in which the experiment to exercise such a power was tried and failed.

By the decision of the Supreme Court of the United States in the last-mentioned case, which is reported in the 4th vol. of Curtis' Reports, p. 228, the view I have taken of the effect of the American Act is conclusively borne out. An action having been brought by a shipowner against a civil officer for the seizure and detention of a ship, the defendant pleaded the order of the President, but the plea was held bad. In giving judgment Mr. Justice Story says:—

"The argument is that, as the President has authority, by the Act, to employ the naval and military forces of the United States for this purpose, *à fortiori* he might do it by the employment of civil force. But, upon the most deliberate consideration, we are of a different opinion. The power thus entrusted to the President is of a very high and delicate nature, and manifestly intended to be exercised only when, by the ordinary process or exercise of civil authority, the purposes of the law cannot be effectuated. It is to be exerted on extraordinary occasions, and subject to that high responsibility which all executive acts necessarily involve. Whenever it is exerted, all persons who act in obedience to the executive instructions in cases within the Act are completely justified in taking possession of and detaining the offending vessel, and are not responsible in damages for any injury which the party may suffer by reason of such proceeding. Surely, it never could have been the intention of Congress that such a power should be allowed as a shield to the seizing officer in cases where that seizure might be made by the ordinary civil means? One of the cases put in the section is, where any process of the Courts of the United States is disobeyed and resisted; and this case abundantly shows, that the authority of the President was not intended to be called into exercise, unless where military and naval forces were necessary to insure the execution of the laws. In terms the section is confined to the employment of naval and military forces; and there is neither public policy nor principle to justify an extension of the prerogative beyond the terms in which it is given. Congress might be perfectly willing to intrust the President with the power to take and detain, whenever, in his opinion, the case was so flagrant that military or naval force were necessary to enforce the laws, and yet with great propriety deny it where, from the circumstances of the case, the civil officers of the Government might, upon their private responsibility, without any danger to the public peace, completely execute them. It is certainly against the general theory of our institutions to create great discretionary powers by implication; and in the present instance we see nothing to justify it."

I cannot help expressing my surprise that, with this decision before them, American lawyers should have submitted so incorrect a statement to this Tribunal. If, indeed, what is meant is that the power of the President to use the forces of the State, to prevent forcible violations of neutrality, gives any superior efficacy to the American system, the answer is that which has been given by Sir R. Palmer in his most able argument, namely, that in all cases similar to those referred to in the American Act, the Sovereign of Great Britain possesses full power to use force, civil or military, such as the case may call for.

The first American Neutrality Act of 1794 was silent as to the authority by whom vessels infringing the law should be seized, proceedings being apparently left to be taken by any person choosing to become an informer, to whom half the penalty and half the forfeited property is to go. From the case of Gelston *v.* Hoyt, just cited, it however appears that at the time that cause was decided, in all cases of the forfeiture of vessels the duty of seizure devolved on the officers of Customs. In this respect, therefore, the practice of the two countries would be the same.

Loud complaints having been made by the representatives of Spain and Portugal,

of the number of privateers fitted out and manned, from ports of the Union, by American citizens, and preying on the commerce of the two countries, under commissions from the revolted colonies, a new Statute was passed in 1818, which, in addition to the enactments of the Act of 1794, which otherwise remained the same, contained two new provisions.

Section 10 provided that:—

"The owners or consignees of every *armed* ship or vessel sailing out of the ports of the United States, belonging wholly or in part to citizens thereof, shall enter into bond to the United States, with sufficient sureties, prior to clearing out the same, in double the amount of the value of the vessel and cargo on board, including her armament, that the said ship or vessel shall not be employed by such owners to cruize or commit hostilities against the subjects, citizens, or property, of any foreign Prince or State, or of any Colony, district, or people, with whom the United States are at peace."

By Section 11 special power was given to Collectors of Customs—

"To detain any vessel manifestly built for warlike purposes, and about to depart the United States, of which the cargo shall principally consist of arms and munitions of war, when the number of men shipped on board, or other circumstances, shall render it probable that such vessel is intended to be employed by the owner or owners to cruize or commit hostilities upon the subjects, citizens, or property of any foreign State, or of any colony, district, or people with whom the United States are at peace, until the decision of the President be had thereon, or until the owner or owners shall give such bond and security as is required of the owners of armed ships by the preceding section of this Act."

But the power thus given would evidently not apply to the case we have here to deal with, of vessels leaving equipped, but without an armament, and having no arms or munitions of war on board.

In like manner the bonding clause just quoted (section 10) applies only to *armed* ships, and therefore would equally have been unavailable. Besides which it applies only to ships belonging in whole, or in part, to American citizens, and would therefore obviously have no application to a ship sold to a foreign Government.

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 favour 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.

British Act of 1870.

Great stress is laid in the pleadings of the United States on the British Act of 1870, passed on the Report of the Neutrality Commissioners. The Act is held up as the standard of neutral duty and of the requirements necessary to give effect to it. No doubt that Act introduced very material changes, and did much to strengthen the hands of the Executive. It made it an offence to *build*, or agree to build, or procure to be built, as well as to equip or arm. It did away with all question as to intent, by making it sufficient if the party doing any of these things knows, or even has reasonable cause to believe, that the vessel will be employed in the service of a belligerent. To dispatch a vessel with such intent, knowledge, or reasonable cause of belief, is added to the category of offences. Still more remarkable is the new proceeding introduced, in addition to the former process for the condemnation of the vessel, for the purpose of testing

the character of a suspected ship. If the Secretary of State, or Chief Executive Authority in any place, is satisfied that there is reasonable and probable cause for believing that a ship within Her Majesty's dominions has been, or is being, built, commissioned, or equipped, contrary to the Act, and is about to be taken beyond the limits of such dominions, he may issue his warrant to any officer of the Customs, or public officer, or commissioned officer of the army or navy, who is thereupon to seize, search, and detain the ship. The owner may apply, indeed, to the Court of Admiralty for the restoration of the vessel; but it is incumbent upon him, in order to obtain it, to establish that the Act has not been contravened. So that the order of procedure is reversed. Instead of it being necessary for the prosecutor to establish, at all events a *primâ facie* case of guilt, the owner has, in the first instance, to establish innocence—a proceeding alien altogether to English jurisprudence.

No doubt these are great changes—possibly improvements. But is it just to say that the pre-existing law was so essentially defective as that the British nation can be held liable by reason of its imperfections? Law, like all other human institutions, is in a constant state of progress and change. New events, new conjunctures, new combinations of circumstances, the lessons of experience, from time to time point out to the lawgiver the necessity of altering the work of the past to adapt it to the requirements of the present. Is every amendment of the law to carry with it the condemnation of the legislation which preceded it?

At all events, it does not lie in the mouths of Americans to say so in the present instance. I have just passed their own law in review. According to it, it is not an offence to build or equip a vessel unless it be also armed; knowledge, or reasonable ground of belief, is not, as under the Act of 1870, sufficient; the intent must be proved. The intermediate process given by the latter Act, and by which the burden of proving the innocent character of the ship, in the first instance, is cast on the owner, is unknown.

For all practical purposes the neutrality laws of the United States and of Great Britain, prior to the late war, were substantially the same. With this model Act now for two years before them, the United States have done nothing to bring their law up to the standard of it. How can they now with any pretence of justice ask that Great Britain shall be tried by the test of a law which is as much in advance of their own present law as it is of the past law of Great Britain?

When, notwithstanding this, one reads in the United States' Argument that "the British Government has stood obstinately on confessedly defective legislation of neutrality;" that "it is not yet emancipated from the national prejudices which obstructed Mr. Canning;" that it "still lags behind the United States in appreciation of the true principles of public law, which lie at the foundation of the relations of independent Sovereign States;" it is difficult to express the feeling which arises consistently with the seriousness which belongs to the present occasion.

It is true that it is not the law of the United States, but that of Great Britain, that is now on its trial. It may not be enough to say that if Great Britain is black America is no whiter. It may not be enough to say, as Great Britain might do in so many instances, "Si in me iniquus es judex, eodem ego te crimine condemnabo." Yet a comparison of the respective laws of the two countries is by no means superfluous. For a remark is here to be made, which applies also to many other parts of the present controversy, namely, that the Government of the United States can have no right to require more of that of Great Britain than it could itself have rendered, had the position of the two countries been reversed, and Great Britain had been the belligerent and the United States the neutral Power. For, in the absence of convention, equality and reciprocity lie at the very root of international obligations, and no nation has a right to demand of another more than under the like circumstances it would have been able itself to render.

Negotiations for amendment of the Foreign Enlistment Act during the Civil War.

The statement I have quoted above from the United States' Argument, that "the British Government has stood obstinately on confessedly defective legislation of neutrality," refers, I presume, to the communications which passed, during the war, between the Government of Great Britain and that of the United States on the subject of an amendment of the British Foreign Enlistment Act. With respect to these communications, the facts, shortly stated, are as follows:—In 1861 and again 1863-64, Mr. Adams suggested (in the first instance, with a view to check the British colonial trade in articles contraband of war), that it might be of advantage if the British legislature would pass an Act similar to the temporary Act passed by the United

States in 1838, which had reference only to expeditions, or exports of arms (not carried by sea), between the United States and any foreign territory conterminous with the United States. The precedent of this legislation was actually followed by Canada in 1864, when events made it requisite. No other request for an alteration of this British law was at any time made on the part of the United States.

On the 19th of December, 1862, Earl Russell wrote thus to Mr. Adams:—

". I have the honour to inform you that Her Majesty's Government, after consultation with the Law Officers of the Crown, are of opinion that certain amendments might be introduced into the Foreign Enlistment Act, which, if sanctioned by Parliament, would have the effect of giving greater power to the Executive to prevent the construction, in British ports, of ships destined for the use of belligerents. But Her Majesty's Government consider that, before submitting any proposals of that sort to Parliament, it would be desirable that they should previously communicate with the Government of the United States, and ascertain whether that Government is willing to make similar alterations in its own Foreign Enlistment Act, and that the amendments, like the original statute, should, as it were, proceed *pari passu* in both countries.

" I shall accordingly be ready to confer at any time with you, and to listen to any suggestions which you may have to make by which the British Foreign Enlistment Act and the corresponding statute of the United States may be made more efficient for their purpose."*

In reply to this overture (which was received with equal courtesy and caution by the Government of the United States) Mr. Adams was instructed not to make any suggestions whatever, but to state (according to Earl Russell's report of the conversation) " that his Government were ready to listen to any propositions Her Majesty's Government had to make, but they did not see how their own law on this subject could be improved," or (according to Mr. Adams' own report) that the Government of the United States considered their own law as " of very sufficient vigour."† Earl Russell thereupon said that the Cabinet, under the advice of the Lord Chancellor (Lord Westbury) had come to the same conclusion with reference to the law of Great Britain, " so that no further proceedings need be taken at present on the subject." Earl Russell's overture was not founded on any opinion of the insufficiency of the British law for the performance of the international obligations of Great Britain, but simply on the advice of the Law Officers that certain amendments might be possible which would increase the power of the Executive Government to deal with cases within the scope of that law. There could be no possibility, however, of carrying such amendments through Parliament unless similar amendments had been simultaneously made in the law of the United States, and the reply of the United States, throwing upon Great Britain the whole responsibility of making propositions in the matter, gave no assurance that those propositions if made, would lead to any useful result. If anything had been needed to confirm this impression, it would be found in Mr. Seward's answer when informed of what had passed. Writing to Mr. Adams on the 2nd of March 1863, he says:—

" It remains for this Government only to say that it will be your duty to urge upon Her Majesty's Government the desire and expectation of the President, that henceforward Her Majesty's Government will take the necessary measures to enforce the execution of the law, *as faithfully as this Government has executed the corresponding statutes of the United States.*"‡

mparison with reign Laws.

Not content with instituting a comparison between the neutrality law of Great Britain and that of the United States, the American Case has gone on to compare both with the municipal law of other States; which comparison it seeks by some strange manipulation to turn in favour of the United States, though, as we have seen, the laws of the two countries were, at the time in question, substantially the same.

Having gone carefully through the laws of the leading maritime nations, I find none in which the equipping or arming of vessels for the use of a belligerent was, prior to the breaking out of the American civil war, prohibited, except under circumstances which would make it a violation of neutrality according to international law. After the breaking out of the war, in one or two countries, as in France and Brazil, the law in this respect was put on the same footing as the law of Great Britain and America prior to the dispute. In some, as in Italy, it has been altered since. In these cases the altered law is referred to in the Argument of the United States as though it had existed at the time of the war.

In the laws of those States which had hitherto taken but little part in maritime

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* United States' Appendix, vol. ii, p. 92.
† British Appendix, vol. vi, No. 1, p. 48; United States' Documents, vol. i, p. 668.
‡ United States' Documents, vol. i, 669.

affairs, no law on the subject of equipping or arming ships was perhaps to be expected. I only observe, therefore, as it were in passing, that Austria had no law relative to this subject. Law of Austria.

In answer to an inquiry made on the part of Her Majesty's Government, the Austrian Minister for Foreign Affairs thus responds :—

"Apart from the principles which lie at the foundation of this declaration (the Declaration of Paris of 1856), there exists, however, no law in Austria, nor any other order generally binding, which could be made to apply to violations of neutrality by Austrian subjects.

"The Imperial Government have endeavoured to supply this want in cases of war between other States, by promulgating in legal forms special regulations for the preservation of neutrality applicable only to the war in question. Thus, in the year 1854, in consequence of the war then existing, the Ministerial Ordonnance of May 25, 1854, was promulgated, of which copy is inclosed herewith.

"In such special declarations the generally acknowledged principles of international law, as well as the known views of the belligerent Powers on certain points, have been taken into consideration, in order, as much as possible, to obviate any complaints of infringement of neutrality.

"There does not exist, however, a law of this kind applicable to all future occasions, and more particularly there are no general laws in Austria prohibiting the construction, equipment, or manning of ships (in Austrian harbours) which are destined for belligerent Powers, or are suspected of being so."*

There is nothing, therefore, to prevent the equipping or arming of ships for a belligerent by the laws of Austria.

In like manner it appears from the note furnished to Her Majesty's Representative at Berlin, that no law exists in Prussia prohibiting the building or sale of ships.† Law of Prussia.

The Swiss law on the subject of neutrality has been introduced in the United States' Argument in terms of laudation; but as in the nature of things it can have nothing to do with maritime neutrality, I presume it has only been brought forward out of compliment to our Swiss colleague, and I need say nothing further on the subject. Law of Switzerland.

I pass on to maritime nations. And first, as to France. It is certain that there is no prohibition in the French Codes against the building or equipping of ships for a belligerent. The only provision relative to a breach of neutrality by a French subject is to be found in the 84th and 85th Articles of the Code Pénal, which are in these terms :— Law of France.

"Art. 84. Quiconque aura, par des actions hostiles non approuvées par le Gouvernement, exposé l'Etat à une déclaration de guerre, sera puni du bannissement, et si la guerre s'en est suivie, de la déportation.

"Art. 85. Quiconque aura par des actes non approuvés par le Gouvernement exposé des Français à éprouver des représailles sera puni du bannissement."

On these articles M. Treitt, the learned Counsel to the British Embassy, makes the following observations :—

"Vous voudrez bien remarquer la généralité de ces expressions, *quiconque, actions hostiles;* le législateur n'a pas voulu définir ce qu'il faillait entendre par *actions hostiles,* il en a laissée *l'appréciation souveraine aux juges.*

"Il ne s'agit point dans les Articles 84 et 85 du Code Pénal des machinations et manœuvres au profit d'une Puissance étrangère, et ayant pour objet de provoquer des hostilités. Ces machinations pratiquées dans une intention et un but criminels rentrent dans les différentes espèces de trahison, lesquelles sont punies par les Articles 76 à 83 du même Code. Les Articles 84 et 85 s'appliquent aux simples cas d'imprudence, de témérité, de négligence; c'est moins l'intention que le fait matériel qui est puni. La loi ne voit que *le résultat;* ainsi: 'La France a-t-elle été exposée à une déclaration de guerre, la guerre a-t-elle été déclarée? Les Français ont-ils été exposés à des représailles?' Ces seules questions résolues affirmativement entraineront l'application d'une des peines si sévères prononcées par la loi, et en outre le paiement de dommages-intérêts qui peuvent toujours être réclamés.

"Il faut donc trois conditions pourqu'il y ait lieu à l'application des Articles 84 et 85 du Code Pénal :—

"1. Que l'action soit hostile.

"2. Que l'action n'ait pas été approuvée par le Gouvernement.

"3. Que la France a été exposée à une déclaration de guerre ou des Français exposés à des représailles.

"Je précise ces trois circonstances parceque c'est le pouvoir judiciaire seul qui est appelé à les résoudre et à décider de la culpabilité.

"Si les juges décident que telle action n'est point une action hostile, et par conséquent non-violatrice de la neutralité, le Gouvernement devra respecter cette décision et pourra l'opposer au belligérant qui se plaindrait.

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* Report of Neutrality Laws Commission, p. 39, British Appendix, vol. iii.

† Ibid., p. 65.

"Si devant les juges l'accusé excipait d'une approbation, soit tacite, soit expresse par le Gouvernement, l'action incriminée ne pourrait plus être punie.

"Enfin, si l'action hostile n'avait pas pour conséquence des représailles ou une éventualité de guerre, elle cesse d'être criminelle."*

Writing to Mr. Fane, then British Minister at Paris, M. de Moustier, the Minister for Foreign Affairs, says:—

"A proprement parler, il n'y a pas de disposition dans la législation Française qui marque d'une manière précise les limites de la neutralité à observer entre deux Puissances étrangères qui sont en état de guerre, les questions de cette nature étant d'un caractère mixte, et trouvant leur solution dans les principes généraux du droit international."†

It is clear, therefore, that the French law went no further than to provide for the punishment of any infraction of international law which has the effect of exposing France to a declaration of war or to reprisals. Now, as we have seen, the sale even of armed ships is not an offence against neutrality and could not produce the consequences referred to in the Articles of the Code. It is true the Government has the power of preventing the arming of vessels in its own hands, if it thinks proper to use it, as the exportation of arms, except with the permission of the Government, is prohibited under heavy penalties,—not, indeed, with the motive of preventing breaches of neutrality, but from motives of policy of a very different character. If, indeed, the construction of an armed vessel formed part of an enterprise having for its immediate object hostile operations against a belligerent Power, then, as I have already pointed out, the whole would amount to a violation of neutrality.

But an Imperial Decree of the 10th June, 1861, passed with a view to the war which had then broken out, contained in its 3rd Article the following provision:—

"Il est interdit à tout Français de prendre commission de l'une des deux parties pour armer des vaisseaux en guerre, ou d'accepter des lettres de marque pour faire la course maritime, ou de concouris d'une manière quelconque à l'équipement ou à l'armement d'un navire de guerre ou corsaire de l'une des deux parties belligérantes."‡

Thus, the law of France in respect of the equipping and arming of ships of war, was placed on the same footing as that of Great Britain and America.

Law of Belgium.

Belgium, which, as it is known, has adopted the French Codes, has likewise the 84th and 85th Articles of the Code Pénal; but with the exception of severe laws against privateering, or the reception of privateers, the prohibitive and preventive power of the law depends on the Articles in question.

Law of the Netherlands.

The Netherlands, in like manner, having also adopted the French Code, have the 84th and 85th Articles; but no special provision as to equipping or arming of vessels in the way of trade existed prior to the year 1866, as appears from the express statement of M. van Zuylen de Nyevelt, the Netherlands Minister for Foreign Affairs, in a letter to Mr. Ward, found in the Appendix to the British Case.§

It is true that M. de Zuylen makes the following observation:—

"Quant aux moyens coactifs dont le Gouvernement pourrait disposer pour empêcher des violations de sa neutralité, les Articles 84 et 85 du Code Pénal peuvent aussi dans quelques cas servir à ce but. Ceux, par exemple, qui tacheraient d'équiper ou de vendre des vaisseaux de guerre dans nos ports pour le compte des belligérants pourraient être poursuivies en vertu de ces articles; les navires alors seraient saisis comme pièce de conviction et par là même leur sortie serait empêchée."

But it is to be remarked that the foregoing observation as to the possible application of the 84th and 85th sections of the Penal Code to the equipping or sale of ships is given only as a matter of opinion; no instance appears to have occurred in which the equipping or sale of a vessel of war has been held to be an offence within these Articles. It must obviously depend on whether what was done amounted to a violation of international law affording a just cause of war.

The regulations issued by the Dutch Government in 1866 do not touch the case of the equipment or sale of ships, but only the admission of belligerent vessels into Dutch ports. It may be remarked, in passing, that it is expressly provided by Article 4 of the Regulations, that "ships of war may remain an unlimited time in

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* Report of Neutrality Laws Commission, p. 45, British Appendix, vol. iii. † Ibid., p. 46.
‡ British Appendix, vol. iii, p. 22.
§ Report of Neutrality Laws Commission, p. 63, British Appendix, vol. iii.

Dutch harbours and estuaries, and may also provide themselves with an unlimited supply of coal."*

Law of Spain.

Spain has two provisions corresponding to the Articles of the French Code, viz.: Article 148 of the Codigo Penal, and Article 258 of a Statute of 1822 :—†

"Article 148. Whosoever shall, without having been permitted to do so by competent authority, have provoked or given motive to a declaration of war against Spain on the part of another Power, or shall have exposed Spanish subjects to suffer vexations or reprisals against their persons or properties, shall be punished with imprisonment; and if such person be a public functionary, he shall be punished with temporary reclusion."

"Art. 258. Whosoever shall, without the knowledge, authority, or permission of the Government, have committed hostilities against any allied or neutral Power, or shall have exposed the State to suffer for that cause a declaration of war, or if such hostilities shall have been the ground for reprisals against Spaniards, he shall be condemned to give public satisfaction for such offence, and to reclusion or imprisonment for a term of from two to six years, and shall pay a fine equal to one quarter of the amount of damages he shall have occasioned, without prejudice to any further punishment which he may be liable to incur for the violence committed. If said hostilities shall have brought on an immediate declaration of war, or if such declaration shall have preceded the time of the trials, the offender shall be punished with transportation."

But there is no law which touches the equipping or arming of ships of war for a belligerent. The decree relating to neutrality issued on the occasion of the American Civil War is set out in the British Appendix.‡ It contains no prohibition relating to the equipping or arming of ships.

It is stated, indeed, in the United States' Argument§ that the Codigo Penal, in Article 151, forbids the expediting of "cruizers." Is it possible that the writers are ignorant that the term "destinare buques *al corso*" does not refer to cruizers but to privateers?

Law of Portugal and Brazil.

Portugal has a corresponding provision in the 148th Article, the Empire of Brazil in the 83rd Article, of the Penal Code of the respective countries. In the Brazilian Code, the offence consists in "committing, without the order or the authorization of the Government, hostile acts against the subjects of another nation, so as to endanger peace or provoke reprisals."

In the report presented to His Majesty the Emperor of Brazil on these laws by D. Silva Ferrão, set out in the later United States' documents,‖ there is the following very pertinent observation :—

"Thus, it remains understood that if the fact in itself were not such as to give just reason for war, according to international right, it could never be reputed a crime even were it not authorized by the Government, and were it eventually followed by war. Such a fact is not then a reason but a pretext for war."

In this elaborate report, in which the effect of the foregoing law is fully discussed, I find no reference whatever to the equipment or arming of ships, as being within it.

The Government of Brazil, like that of France, upon the breaking out of the civil war made special provision by law for the enforcing of neutrality. By a Circular of the 1st of August, 1861, the Presidents of the different provinces were instructed as follows :—¶

"The Confederate States have no recognized existence; but, having constituted a distinct Government *de facto*, the Imperial Government cannot consider their naval armaments as acts of piracy, nor refuse them, with the necessary restrictions, the character of belligerents, which they have assumed.

"In conformity with this, Brazilian subjects are to abstain from all participation and aid in favour of one of the belligerents, and they must not take part in any acts which can be considered as hostile to one of the two parties, and contrary to the obligations of the neutrality.

"The exportation of warlike articles from the ports of the Empire for the new Confederate States is absolutely prohibited, whether it is intended to be done under the Brazilian flag or that of another nation.

"The same trade in contraband of war must be forbidden to Brazilian ships, although they may be destined for the ports subject to the Government of the North American Union.

"No ship with the flag of one of the belligerents, and which may be employed in this war, or intended for it, can be provisioned, equipped, or armed in the ports of the Empire; the furnishing of victuals and naval provisions indispensable for the continuation of the voyage not being included in this prohibition.

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* Report of Neutrality Laws Commission, p. 63, British Appendix, vol. iii.
† Appendix to United States' Counter-Case, p. 1062.
‡ British Appendix, vol. iii, p. 24.
§ Page 68.
‖ Appendix to the United States' Counter-Case, Part IV, p. 988.
¶ British Appendix, vol. iii, p. 24.

"No ship of war or privateer shall be allowed to enter and remain with prizes in our ports or bays more than twenty-four hours, except in case of forced arrival, and they shall in no way be allowed to dispose of the said prizes, or of objects coming from them."

Thus, going far beyond other nations, Brazil prohibited not only the sale of ships, but all trade in articles contraband of war even in its own ports.

Serious disputes having arisen in the course of the ensuing year between the Governments of the United States and Brazil on the subject of Confederate cruizers received in ports of the Empire, the Government, in order to prevent as far as possible the occasion of such troublesome remonstrances, published the still more stringent regulations contained in the Circular of the 23rd of June, 1863, set out in the 7th Volume of the Appendix of the United States, regulations much more rigorous than those which have been adopted by any other nation.* But, as these regulations relate entirely to the reception of belligerent vessels in Brazilian ports, it is unnecessary to dwell upon them here.

Law of Italy.

Italy has in the 174th and 175th Articles of the Penal Code, provisions corresponding to those of the French Code:—†

"Article 174. If any person whosoever shall, by acts not authorized by the Government of the King, have exposed the State to a declaration of war, he shall be punished with banishment; if the war has actually occurred, he shall be punished with temporary penal servitude.

"Art. 175. If any person whosoever shall, by acts not approved of by the Government of the King, have exposed the subjects of the kingdom to reprisals, he shall be punished with banishment even for a term of ten years or with imprisonment, without prejudice to any further penalty to which he may be liable on account of the acts he has committed. If the offender be a public functionary, he shall be punished with banishment."

So stood the law at the time of the breaking out of the Civil War between the Northern and Southern States of America. In the course of it the King of Italy, in an Ordinance of the 6th of April, 1864, but, so far as I have been able to discover, then for the first time, adopted the regulations established three years before by the Emperor of the French. By Article IV, "No Italian subject shall take commission from either belligerent Power to arm ships for war, or accept letters of marque to cruize, or assist in any way in fitting out, arming, or preparing for war a vessel or privateer of the said belligerents."‡

The Naval Code, which was published in 1866, in the chapter relating to the neutrality of the State towards foreign Powers (chap. vii), has the following provisions:—§

"In case of war between Powers towards which the State remains neutral, privateers or vessels of war with prizes shall not be received into the harbours or roadsteads, except in cases of stress of weather.

"They will have to leave as soon as the danger has ceased.

"No ship of war or privateer belonging to a belligerent will be allowed to remain longer than twenty-four hours in a port, harbour, or roadstead of the State, or in the adjacent waters, even when alone, except in case of necessity arising from bad weather, of shipwreck, or of an absence of the means necessary to carry on the navigation with safety.

"In no case will they be permitted during their stay in the port, harbour, or roadstead of the State to sell, exchange, or barter, or even give away any of the prizes (taken in war).

"The ships of war of a friendly Power, even when belligerent, are permitted to touch or even to remain in any harbour, port, or roadstead of the State on condition that the object of their mission be exclusively a scientific one.

"In no case can a belligerent ship avail itself of an Italian port for the purposes of war, or of obtaining arms and munitions. It shall not be able under the pretence of repairs to execute any alterations or other works designed to augment its warlike force.

"Nothing shall be furnished to vessels of war or to belligerent privateers beyond articles of food and commodities, and the actual means of repair necessary to the sustenance of their crews and the safety of their navigation.

"In the case in which vessels of war, whether privateers or merchantmen of the two belligerent nations, are both together in a port, harbour, or roadstead of the State, there shall be an interval of at least twenty-four hours between the successive departures of the vessels of one belligerent and those of the vessels of the other.

"This interval can be increased according to the circumstances brought before the maritime authorities of the place.

"The capture of prizes as well as any other act of hostility between two belligerent ships within the territorial waters or the adjacent waters of the islands of the State will constitute a violation of territory."

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* United States' Documents, vol. vii, p. 110; British Appendix, vol. iii, p. 24.

† American MS., Part IV, p. 949.

‡ Report of Neutrality Laws Commission, p. 62, British Appendix, vol. iii.

§ Ibid.

In all these countries, at the time to which our attention has to be directed, the question whether there had been a breach of the municipal law by a subject turned on whether there had been a breach of neutrality, such as to expose the nation to war or reprisals. The equipping or arming of vessels for sale in the way of commerce does not come into question at all. It is, therefore, manifest that the municipal law, both of Great Britain and the United States, was far more stringent, though the punishment under the foreign law in case of a breach of the law was more severe, by reason of the greater gravity of the result, when a nation becomes exposed to war, or possibly actually involved in it.

I next turn to the law of the Northern nations on the subject of neutrality.

Law of Denmark.

The law of Denmark relating to ships, with reference to neutrality, is fully set out in the third volume of the British Appendix.*

Denmark appears to be one of the very few countries that have gone the length of prohibiting to the subject the carriage of articles contraband of war. But though unusually strict in that respect, and minute as to its regulations in many others, the law contains no prohibition of the equipping or arming of ships of war for the purpose of sale.

Law of Sweden.

The Swedish Ordonnance of April 8, 1854, while it expressly prohibits, by the 8th section, the arming or equipping of vessels for the purpose of *privateering*, is wholly without any prohibition against doing so with reference to ships armed or equipped for a belligerent State.†

Law of Russia.

The only Article in the Russian Code relating to neutrality is the 259th, which is as follows :—‡

"If any Russian subject in time of peace shall by open force attack the inhabitants of a neighbouring state or those of any other foreign country, and shall thereby subject his own country to the danger of a rupture with a friendly Power, or even to an attack by such foreign subjects on the territory of Russia, for such a crime against international law, the offender and all those who participate voluntarily in his enterprise, with a knowledge of its objects and illegality, shall be sentenced to lose all their civil rights, and be condemned to hard labour in a fortress for a term of eight to ten years."

With the exception of this Article, says M. de Westmann, in answer to an official inquiry from the British Government,§ "La législation Russe ne renferme pas de dispositions ayant pour but d'empêcher sur le territoire de la Russie l'accomplissement d'actes dont les puissances belligérantes pourraient se plaindre comme d'une violation du principe de neutralité."

There being thus no law in Russia relating to ships of war, and, as I have shown, none such in Prussia, I was surprised, after reference to the efficient regulations of the Dutch Government, followed afterwards by an assertion that by those regulations the construction of cruizers was prohibited (which it is not), to see it stated that "similar laws were to be found in Russia and in Prussia," as to the latter of which it is added (in a friendly spirit no doubt), that it "once had occasion to apply its laws to the acts of British Agents."

Laws as to privateers.

But while the codes of so many maritime nations are silent as to the equipping or arming of ships of war in the way of trade, the codes of several—for example, Belgium, Denmark, Sweden—prohibit the *fitting out of privateers*. Here again the Argument of the United States falls into the same strange mistake as before. It represents these Governments as preventing not only the armament but also the construction of *cruizers*.‖ I can hardly suppose the writer ignorant of the meaning of the term *corsaire*, the term used in the laws in question, and which never has but one meaning, that of *privateer*, or in French phrase that of a "vaisseau armé en course *par des particuliers*, mais avec l'autorisation du Gouvernement."¶ Neither of these countries has any law against the construction of *cruizers*. Such a statement, therefore, ought not to have been made.

The Argument of the United States winds up the comparison of the British law with that of other countries with the following remarkable observations :—**

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* Report of Neutrality Laws Commission, p. 40, British Appendix, vol. iii.

† Ibid., pp. 66, 67.

‡ Ibid., p. 65.

§ Ibid.

‖ Argument of the United States, p. 72.

¶ Littré, *ad verb.*; and see Merlin, "Repertoire," *tit.* "Prises Maritimes."

** Pages 71, 72.

"The institutions of Italy, Brazil, Switzerland, France, Spain, Portugal, the Netherlands, and all other Governments of Europe, indeed, except Great Britain, expressly assume, as do the institutions of the United States, that volunteer and unauthorized military and naval expeditions, undertaken in a neutral country, are to be restrained, because tending to involve such country in war with the country aggrieved. Infringements of the law are punished mainly for that reason, including the protection of the national sovereignty.

"Hence, in all those countries, except Great Britain, the *punitive* law is a secondary fact; the primary fact being the preventive action of the Government.

"The United States perfectly understood this, the true relation of things, and while they indicted persons, and arrested ships, they did not, when occasion required action, rely on such merely punitive, or at most auxiliary, means, but called into play the armed forces of land and sea to support the Executive in summary acts of prevention by force for the maintenance not only of the sovereignty but of the neutrality of the Government.

"Neither Lord Russell, in his correspondence with Mr. Adams, nor the framers of the British Case, appear to have had any clear conception of these higher relations of the subject, although distinctly and explicitly stated in the best works of international law of Great Britain herself.

"Great Britain alone pretends that punitive law is the measure of neutral duties: all other Governments, including the United States, prevent peril to the national peace through means of prerogative force, lodged, by implied or express constitutional law, in the hands of the Executive."

A stranger misrepresentation could scarcely have been penned. The assertion that the institutions of Great Britain do not assume that volunteer and unauthorized military and naval expeditions, undertaken in a neutral country, are to be restrained, is without the shadow of a foundation. It is equally untrue and unjust to say that Great Britain pretends that punitive law is the measure of neutral duties. Great Britain pretends nothing of the kind. The best answer to these unwarranted assertions is the fact, that the Alabama was attempted to be seized; that the Alexandra was seized; as were the Pampero and the Birkenhead rams, and the Florida at Nassau; by virtue of the preventive power alone; and that, if in any of those cases resistance had been offered, or force required, force would, as a matter of course, have been resorted to immediately to enforce the law.

But while the United States thus impugn the efficacy of the British law, and dwell upon the executive, as contradistinguished from legal, power possessed by their own, and, as they allege, by foreign Governments—of which, by the way, they offer no proof whatever—at another time, with startling inconsistency, they assert that the Government of Great Britain possesses this very executive power, and make the omission to put it in force the subject of vehement complaint.

The imagination of the writer must have been singularly lively, while his conscience must have slept, who could venture to put on paper the following passages:—*

"No independent State exists, either in Europe or America, encumbered with constitutional incapacity in this respect.

"Violations of neutrality are issues of war and peace. Whatever power in a State declares war, or makes peace, has jurisdiction of the issues of peace and war, including of course all violations of neutrality.

"In point of fact, such authority is not a quality of despotic Government only: it belongs equally to the most constitutional Government, as appears, for instance, in the political institutions of constitutional Republics, like Switzerland and the United States, and in constitutional Monarchies, like Italy and Brazil"—

The selection by the Counsel of the United States of the countries of the four other members of the Tribunal was, I presume, accidental. But let us go on:—

"The Counsel of the United States submit these propositions as undeniable and elementary truths.

"Yet the Case and Counter-Case of the British Government assume and persistently argue that the sole instrument possessed by the British Government to enforce the performance of neutral obligations, at the time of the occurrences in question, was a particular Act of the British Parliament.

"Every Government in Europe or America, except Great Britain, asserts and exercises authority to prevent its liege subjects (and *à fortiori* commorant aliens), from doing acts which tend to involve it in a war with any other Government.

"But the British Government maintains that the sovereign State of Great Britain and Ireland, the Imperial mistress of the Indies, the proudest in fame, the richest in resources, and (including her transmarine possessions) the most populous of the great States of Europe, does not possess constitutional power to prevent mercenary law-breakers among her own subjects, or bands of desperate foreign rebels, commorant on her soil, from dragging her into acts of flagrant violation of neutrality, and thus affording, to tending to afford, just cause of war to other foreign States!

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* United States' Argument, pp. 43–45.

"And such is the defence of Great Britain in answer to the reclamations of the United States!

"It would be difficult to find any other example of a great State defending itself against charges of wrong by setting up the plea of its constitutional incompetency and incapacity to discharge the most common-place duties of a sovereign State.

"Great Britain is not in that condition of constitutional disability which her Ministers pretend.

"We find, on the most cursory observation of the constitution of Great Britain, that the declaration of war, the conclusion of peace, the conduct of foreign affairs,—that all these things are in Great Britain elements of the prerogative of the Crown.

"We cannot believe and do not concede that in all these greater prerogative powers there is not included the lesser one of *preventing* unauthorized private persons from engaging in private war against a friendly foreign State, and thus committing Great Britain to causes of public war on the part of such foreign State.

"If the exercise of such power by the Crown involves derogation of the rights of private persons which Ministers fear to commit, they should obtain a proper Act of Parliament, either for antecedent general authorization or for subsequent protection, all which is within the scope of the theoretic omnipotence of Parliament.

"The British Ministers do not scruple to suspend the privileges of the writ of *habeas corpus*, whether with or without previous Parliamentary authorization, and whether in the United Kingdom, or in the Colonies, on occasion of petty acts of rebellion or revolt, that is, the case of *domestic war: à fortiori* they should and may arrest and prevent subjects or commorant foreigners engaged in the commission of acts of foreign war to the prejudice of another Government.

"Is it possible to deny or to doubt that British Ministers might as well do this as the Ministers of Switzerland, Italy, Brazil, and the United States in like circumstances?"—

Again Switzerland, Italy, Brazil, and the United States——

"Has the Queen of the United Kingdom of Great Britain and Ireland less executive power than the President of the United States? And if she have less, could not the deficient power be granted to her by Act of Parliament, just as readily as similar executive power, in this relation, has been granted to the President of the United States by their Congress?

"But there is no such deficiency of power in the British Ministers: their own conduct in pertinent cases proves conclusively that they have the power, and can exercise it, when they choose, without affording occasion of any serious doubt or denial of the constitutionality of their acts.

"Be it remembered that the excuse of the British Government, for omitting to detain the Alabama, and other Confederate cruizers, was the alleged want of power to act outside of the Foreign Enlistment Act.

"And yet, subsequently to the escape of the Alabama from the port of Liverpool, on occasion of the construction in the ports of Great Britain of certain other vessels for the Confederates, commonly spoken of as the Laird rams, the British Government seized them upon its own responsibility in virtue of the prerogative power of the Crown, and so prevented their departure to make war against the United States."

Sitting on this Tribunal as in some sense the representative of Great Britain, I cannot allow these statements to go forth to the world without giving them the most positive and unqualified contradiction. They are wholly uncalled for, as being unnecessary to determine the question whether, in particular instances, Great Britain had been wanting in diligence; they are not only unjust, but in the highest degree ungenerous—I use the mildest expression I can find—on an occasion when Great Britain is holding out the hand of friendship and conciliation to America, and though, perhaps, at a heavy sacrifice, is seeking to bury all sense of past grievance by submitting the claims of the United States to peaceful and friendly arbitration. But it is not only that these observations are ungenerous and unjust. There is in this extraordinary series of propositions the most singular confusion of ideas, misrepresentation of facts, and ignorance, both of law and history, which were perhaps ever crowded into the same space, and for my part I cannot help expressing my sense, not only of the gross injustice done to my country, but also of the affront offered to this Tribunal by such an attempt to practise on our supposed credulity or ignorance.

It is not true that "the Case and Counter-Case of the British Government assume and persistently argue that the sole instrument possessed by the British Government to enforce the performance of neutral obligations at the time of the occurrences in question, was a particular Act of the British Parliament."

It is not true that the British Government has ever "maintained that Great Britain did not possess constitutional power to prevent mercenary subjects or foreign rebels from dragging her into acts of flagrant violation of neutrality."

It is not true that "a great State" is here "defending itself against charges of wrong by setting up the plea of its constitutional incompetency and incapacity to discharge the most common-place duties of a sovereign State."

The transparent fallacy which runs through the whole of this series of declamatory assertions consists in confounding infractions of the municipal law with infractions of neutrality properly so called. Though, by convention between the two Governments, the equipping of a ship without arming may have acquired, *ex post*

facto, for the purpose of the present arbitration, the character of a violation of neutrality, no agreement can change the substantive reality of things belonging to the past. Now, at the time the occurrences took place on which the present claims arise, to equip a ship in the way of trade, though intended for the service of a belligerent, was not, as I have already shown, and as Mr. Adams himself, in all fairness, fully admits an offence against international law, and therefore was not a violation of neutrality. While, therefore, in a case of actual violation of neutrality, as by sending forth an armed ship, or a ship immediately about to be armed, for the purpose of immediate warfare, the executive power might, *ex proprio vigore*, interfere, and if necessary by force, to prevent such a proceeding, the seizure of a vessel unarmed, and not immediately about to go forth, and in respect of which, therefore, no breach of neutrality had taken place, could only be done by virtue of the municipal law, as constituted by the Act of Parliament. But if a seizure was to be made under the Act, it was necessary that proof should be forthcoming to justify and uphold it. Therefore, it was true, that as regarded the equipping of ships, the powers of the Executive were limited to cases in which proof of a breach of the Act was forthcoming. Therefore it was that, in the case of the Florida, the Government, thinking there was not sufficient evidence of belligerent purpose, abstained from seizing, and, in that of the Alabama, delayed the seizure for a time. Therefore it was that, in the later cases of the Alexandra and the rams, the Government, being advised that the evidence was sufficient, proceeded to seize. Hence, in discussing the question whether it was, at that period, and in the then admitted state of international law, the duty of the Government to seize the vessels in question, it is necessary to refer to the Foreign Enlistment Act to ascertain what were the powers of the Government. The distinction is a very obvious one, and one which persons must be, I should think, wilfully blind not to see.

The assertion—coming from the quarter from which it proceeds—the Government of a great Republic—where all executive power, I should have imagined, would be clearly defined by law, and exercised in subordination to it—that the British Government should have proceeded, independently of, and, if necessary, in defiance of the law, to seize ships and arrest subjects, as well as foreigners, engaged, as it is termed, in acts of foreign war to the prejudice of another Government, surprises me, I must say, not a little; but when, as the ground of such an assertion, I am told that "British Ministers do not scruple to suspend the privileges of the writ of *habeas corpus*, whether with *or without* previous parliamentary authorization, whether in the United Kingdom or in the colonies, on occasion of petty acts of rebellion or revolt, that is, the case of *domestic war*," I find myself lost in amazement, and seek in vain to discover what can possibly be meant by so strange a statement. War, whether it be domestic or foreign, is of course war; and, in regard to those who are actually engaged in war, the law of war necessarily supersedes the civil law and civil rights, and would, *per se*, suspend the privileges of the Habeas Corpus Act. But, if it is meant that, even in time of war, the Executive could, as regards persons not taking part in the war, or not coming within the operation of martial law, suspend the Habeas Corpus Act without an Act of Parliament, the assertion is equally unfounded and surprising, whether looked at in an historical or in a legal point of view.

But a discovery has been made by those who drew up the United States' Argument which I must say appears to me, as an English lawyer, surpassing strange. It is that, that which could not have been done towards seizing vessels under the Foreign Enlistment Act, for want of evidence necessary to support a seizure under that Act, might have been done with a high hand, by virtue of the prerogative of the Crown; in support of which strange doctrine the following instances are given, in which it is alleged that what was done was done by virtue of the prerogative. Such are:—

"The Queen's Proclamation of Neutrality, of May 13th, 1861.

"The regulations issued by the Government of Her Majesty in regard to the reception of cruizers and their prizes in ports of the Empire, June 1st, 1861, June 2nd, 1865.

"The executive orders to detain the Alabama at Queenstown and Nassau, August 2, 1862.

"The executive orders to detain the Florida at Nassau, August 2, 1862.

"The executive orders to detain the rams at Liverpool, October 7, 1863.

"The debate and vote in Parliament justifying the detention of the rams by the Government 'on their own responsibility,' February 23, 1862.

"The executive order that, 'for the future no ship of war belonging to either of the belligerent Powers of North America shall be allowed to enter or to remain, or to be in any of Her Majesty's ports for the purpose of being dismantled or sold,' September 8, 1864.

"The final executive orders to retain the Shenandoah in port, 'by force, if necessary,' and to 'forcibly seize her upon the high seas,' September and October, 1865."*

In addition to which, the final decision of the Government, with regard to the Tuscaloosa, is referred to, as also the opinion of the Law Officers, advising the seizure of the Alabama at Liverpool, and the rejection, at the instance of the Law Officers, of the clause proposed to be inserted in the Neutrality Act of 1870 for prohibiting the entry of vessels, equipped in contravention of the Act, into British ports.

While I quite see how likely statements of this sort are to produce an effect on the minds of persons not familiar with the constitutional law of Great Britain, I am at a loss to understand how Counsel, familiar with English law, can take upon themselves to make them.

The limits of the Royal prerogative are ascertained and defined: they certainly do not include a power to interfere with the liberty, property, or industrial pursuits of the subject, except where such power is expressly conferred by law. In the instances given, with the exception of the Queen's Proclamation, as to the effect of which I have already spoken, and the Regulations as to the admission of belligerent vessels to British ports, and the accommodation there to be afforded to them, which are undoubtedly matter of Royal Prerogative, and the order in respect of the Shenandoah, which was, as will hereafter be seen, a most exceptional case, every instance enumerated was, though in one sense an act of the Executive, yet an act done by virtue of power conferred by the Foreign Enlistment Act and not by virtue of the prerogative. As an English Judge and lawyer, I affirm that, short of their going out as a hostile expedition, in which case force might undoubtedly be used, these vessels could not have been seized under the exercise of prerogative power.

Comparison between Great Britain and United States as to observance of neutrality.

Throughout the statements of the United States a comparison is drawn between the conduct of the United States and that of Great Britain in reference to the maintenance of neutrality. When the British Government retorts with instances of American default in this respect, the answer comes that it is Great Britain, not the United States, that is now on its trial. And this is perfectly true; but when the plaintiff seeks to prejudice the defendant in the eye of the judge and of the world, and at the same time to secure favour to himself by holding up his own conduct as righteous and immaculate, whereby to make that of the defendant appear more black, it is but fair that his pretensions should be submitted to the criticism to which he justly exposes himself.

The Argument of the United States asks at the hands of this Tribunal for a rigorous enforcement of the obligations of neutrality against Great Britain, on the ground that, while the latter has been unmindful of its duties as a neutral, the United States have maintained a consistent and unvarying course in the most exemplary fulfilment of those duties. I select one from many passages in which a comparison between the two nations, in this respect, is invidiously made:—

"*Qualis ab incepto talis ad finem.* With consistency unwavering, and at whatever hazard of domestic or foreign inconvenience, even if it were friendly Powers like France and Great Britain with which we were thus brought into contention, the United States have steadily adhered to principles of international neutrality; and we may well, therefore, demand the observance of those principles or reparation for their non-observance on the part of Great Britain."†

It becomes, therefore, perfectly legitimate to take—as is done in the British Counter-Case—a retrospect of the history of American neutrality so vauntingly extolled in the papers before us. It cannot be fair or just that a country in whose ports privateering against the commerce of friendly nations has been openly carried on upon the largest scale, and from whose shores armed expeditions and raids have in so many instances gone forth, should seek to enlist the favour of this Tribunal, in order to swell the damages against Great Britain, by holding itself up as a model of neutral perfection. It is not so much for this purpose, however, that I advert to the history of the past, as it is for that of showing that there is no foundation for the assumed superiority of American laws or institutions in respect of the fulfilment of neutral obligations. The use of a review of American history in this respect will readily be seen.

Legislation of 1794.

America undoubtedly has the credit of being the first nation that, by positive

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* United States' Argument, pp. 324, 325.

† Ibid., p. 94.

legislation, sought to restrain its subjects within the strict limits of neutrality. But those who make this boast as against Great Britain should also remember that it was through the acts of American citizens that such legislation first became necessary. The large and just mind of the greatest of American statesmen saw at once the reproach and the danger arising to his country from her ports being used for the building and equipping of privateers by American citizens, and for sending them out, manned with American crews, commissioned by the French Government, to make war on British vessels while the United States and Great Britain were at peace. For, as I have already observed, this was the mischief against which the legislation of 1794 was directed.

At that time no complaint had arisen of ships of war being built for a belligerent. The complaint, again and again made by the British Minister, was of "the practice," as Mr. Jefferson calls it, "of commissioning, equipping, and manning vessels in American ports, to cruize on any of the belligerent parties."* The Government of General Washington was perfectly sincere in its desire to prevent American ports from being used for this purpose; and, had there always been Washingtons at the head of affairs, the well-founded complaints of Spain and Portugal, in 1816 and 1817, might never have arisen. I say "well-founded complaints," for the few vessels built or equipped in Great Britain during the late civil war bear but a small proportion to the organized and systematic privateering which was carried on from American ports at the period I am referring to.

Complaints of Spain.

I first take the case of Spain, as it appears in the correspondence set out in the third volume of the British Appendix.

On the 2nd of January, 1817, Don Luis de Onis, Minister of Spain to the United States thus addresses Mr. Monroe, then Secretary of State:—

"Sir, "*Washington, January 2, 1817.*

"The mischiefs resulting from the toleration of the armament of privateers in the ports of this Union, and of bringing into them, with impunity, the plunder made by these privateers on the Spanish trade, for the purpose of distributing it amongst those merchants who have no scruple in engaging in these piracies, have risen to such a height, that I should be wanting in my duty if I omitted to call your attention again to this very important subject.

"It is notorious that, although the speculative system of fitting out privateers, and putting them under a foreign flag, one disavowed by all nations, for the purpose of destroying the Spanish commerce, has been more or less pursued in all the ports of the Union, it is more especially in those of New Orleans and Baltimore, where the greatest violations of the respect due to a friendly nation, and if I may say so, of that due to themselves, have been committed; whole squadrons of pirates having been fitted out from thence, in violation of the solemn Treaty existing between the two nations, and bringing back to them the fruits of their piracies, without being yet checked in these courses, either by the reclamations I have made, those of His Majesty's Consuls, or the decisive and judicious orders issued by the President for that purpose."

After setting forth depredations done by three American privateers, he continues:—

"The Consul at New Orleans informs me, that the pirate Mitchell, with the vessels under his command, fitted out by different merchants at that port, of whom a Mr. Dupuy is supposed to be the principal, has lately taken several Spanish prizes to Galveston, and that from the proceeds of their sales he has remitted to the said deputies 105,000 dollars, which he has deposited in the Bank of Louisiana, after deducting the shares of the captain and crew, amounting, as is supposed, altogether to 200,000 dollars. The same Consul adds that two of the prizes, one from Campeachy, and the other from Guatemala, were burnt, and their crews landed by that savage monster, near Boquilla de Piedras, that they might be, as they actually were, put to death by his great friend, Villapinto, a noted rebel ringleader, who, being pursued by the King's troops, had retreated to the seashore to make his escape. Of ninety men composing these crews, only nine were saved.

"The Consul at Norfolk informs me of the arrival there of a privateer schooner from Buenos Ayres, one of several fitted out at Baltimore, and wholly owned there; that from what he has been able to ascertain, among other vessels she plundered a Spanish ship, laden with a cargo of cochineal, indigo, and specie, to the amount of more than 200,000 dollars, and proceeded to Baltimore to divide the spoil among the concerned. The said Consul, in the discharge of his duty and exercise of his rights, addressed an application to the Collector of the Customs, copy of which is annexed, and also of the answer of the Collector, by which you will perceive that he declines this just reclamation. I could cite innumerable other cases, as well attested as those I have just stated, but I omit them, as their detail would fatigue you, without tending to demonstrate more effectually that they proceed from the non-observance by the officers of this Government of the President's Proclamation, and of the Treaty of Limits and Navigation between the two Governments."†

On the 16th of January Don Luis writes again:—

* British Appendix, vol. v, p. 242.

† Ibid., vol. iii, p. 99.

"I have just received information from the King's Consul at New Orleans of the capture, within sight of the Balize of that port, and at little more than musket-shot from the land, of the Spanish schooner Hipolita, Captain Don Buenaventura March, by the pirate Jupiter, under the Margarita flag. To enable you fully to judge of the atrociousness of this capture, manifestly in violation of the territory of the United States, I have the honour to inclose the declaration of the captain of the said schooner, made before His Majesty's Consul at the aforesaid port, by which it appears he was at anchor in the Pass of the Mississippi, and with pratique from the Balize, on board, when he was boarded by the aforesaid pirate, and so inhumanly treated by him as to be left weltering in his blood on the deck.

"It would be superfluous to affect your sensibility by a detail of the multiplied injuries and outrages incessantly sustained by His Majesty's subjects in these ports; they have already been admitted by the President in his Message to Congress, recommending the adoption of such measures as in their wisdom may appear best calculated to repress them, thereby offering to the King my master a pledge that his Excellency admits the necessity of indemnifying them as far as possible. It is, however, with great regret that I have to remark on the delay in carrying such urgent measures into execution, and that the injuries complained of have not been prevented by a due observance of the laws of nations, and of the existing Treaty, which, by the Constitution, has the force of law in all the Courts, in consequence of its ratification by the President and the Senate."*

On the 10th of February Don Luis complains of five more privateers belonging to ports of the States, as having taken prizes, and being engaged in cruizing against Spanish ships.†

On the 26th of March he writes:—

"I have just been informed that there have entered at Norfolk two pirates, under the flag of Buenos Ayres, the principal of which is called the Independencia del Sud, armed with 16 guns and 150 men; her captain is the well-known pirate called Commodore Chaytor. The second is the schooner Romp, which, to enter into that port, has changed her name to that of Atrevida; she has a crew of 70 men, and appeared to be commanded by a person called Grinnolds. Both vessels were built and fitted out at Baltimore, belong to citizens of that place, and others in this Republic, and their crews and captains are of the same. Their entrance into Norfolk has been public, to revictual, and return to their cruize against the subjects of the King, my master; but their principal object is to place in safety the fruits of their piracies, which must be of great importance, if we attend to the information from Havana, which states that they have robbed a single Spanish vessel coming from Vera Cruz, of 90,000 dollars; and to the fact that, on the 21st of the present month, they had deposited 60,000 dollars in the Bank of Norfolk, had landed a number of packages of cochineal, and had declared that they had taken to the amount of 290,000 dollars. I am informed that the person called Commodore Chaytor was about to set out for Baltimore, probably to settle accounts, and divide his robberies with the persons interested in the outfit. It is a circumstance worthy of remark, that these two pirates saluted the fort at Norfolk, and that it returned the salute upon the same terms as would have been done with a vessel of war of my Sovereign, or of any other nation acknowledged by all independent Powers."‡

At the same time another vessel, the Orb, is made the subject of equally strong complaint:—

"The pirate Orb, fitted out at Baltimore, under the name of the Congress, and flag of Buenos Ayres, commanded by Joseph Almeida, a Portuguese, and a citizen of this Republic, has had the audacity to return and enter the said port, there to deposit a part of his robberies. The piratical character of this vessel is as fully acknowledged as it is proved that she was armed and manned with people of this country, and of others in the above-mentioned port, and that she had made different prizes in the neighbourhood of Cadiz and other ports; since there now is in the port of New York the Spanish polacre, the Leona, captured by her, whose cargo, consisting of 200,000 dollars, is concealed, where it is not known; and in the same port of Baltimore there are deposited the proceeds of the Spanish brig Sereno and her cargo, captured by the same vessel. No evidence can, in my judgment, be offered which gives greater certainty to facts so notorious. If by chance anything could be added thereto, it would be the acknowledgment of their atrocities. Nevertheless, I have the mortification to say, that neither this notoriety nor the reclamations of His Majesty's Consul at that port, have as yet been sufficient to produce those steps which are required by humanity to secure the person of this notorious pirate, to take the declarations of the crew, and to prevent their enjoying their plunder to the prejudice of the lawful owners."§

One cannot help being struck with the similarity of the complaints of the Spaniard with those of which we have lately heard so much. The ships are "pirates;" the facts are "notorious;" "no further evidence can be necessary."

In like manner we have Mr. Rush answering as though it had been from Downing Street:—

"I have had the honour to receive your two notes, dated the 26th of this month, stating that you have been informed that two armed vessels which have been committing unauthorized depredations upon the commerce of Spain have recently arrived at Norfolk, and that a third, liable to the same charge, has arrived at Baltimore, thus bringing themselves within the reach of those laws against which, in the above and in other ways, it is alleged they have offended.

"Conformably to the constant desire of this Government to vindicate the authority of its laws and

* British Appendix, vol. iii, p. 101. † Ibid., p. 102. ‡ Ibid., p. 105. § Ibid., p. 106.

the faith of its Treaties, I have lost no time in writing to the proper officers, both at Norfolk and Baltimore, in order that full inquiry may be made into the allegations contained in your notes, and adequate redress and punishment enforced, should it appear that the laws have been infringed by any of the acts complained of.

"I use the present occasion to acknowledge also the receipt of your note of the 14th of this month, which you did me the honour to address to me, communicating information that had reached you of other and like infractions of our laws within the port of Baltimore; in relation to which I have to state that letters were also written to the proper officers in that city, with a view to promote every fit measure of investigation and redress. Should it prove necessary I will have the honour to address you more fully at another time upon the subjects embraced in these several notes. In the meantime I venture to assure myself, that in the readiness with which they have thus far been attended to, you will perceive a spirit of just conciliation on the part of this Government, as well as a prompt sensibility to the rights of your Sovereign."*

Don Luis replies as Mr. Adams or Mr. Dudley might have done:—

"By your note of yesterday I am apprized that the President, on being informed by the notes to which you have replied, of the audacity with which the pirates armed in this country introduce into it the fruits of their robberies, has been pleased to give suitable orders to the authorities at Norfolk and Baltimore, that having ascertained the facts which I have brought to his knowledge, they should duly proceed according to law against the violators of the Laws of this Republic. The District Attorney for the United States at Baltimore has replied to the King's Consul there, that he has no evidence upon which he can proceed against Captain Almeida; but if a witness should offer, who will depose to the facts referred to, he will proceed to order an embargo to be laid on his vessel. I am perfectly aware that good order, the personal security of individuals, and the prevention of any violence being committed upon them, require that suits should be instituted according to the rules of Court; but when a crime is notorious to all, and is doubted by none, when the tranquillity and security of the State, the honour of the nation, and the respect that independent Powers owe to each other, are interested in putting a stop to crimes so enormous as those I have had the honour to denounce to you, it appears to me that the magistrates are authorized to collect a summary body of information, to inquire whether the public opinion is doubtful, and if there be ground to institute a suit. The Collector of the Customs cannot be ignorant that the three vessels, which I have named to you, were built and fitted out at Baltimore; that they were cleared at that Custom-house as Americans; that their crews were, at their departure, composed of citizens of this Union, as were their Captains; and that the effects which they have landed can only come from Spanish countries. What stronger testimony, if more is wanted, than their own declaration, can be desired to proceed against these pirates?

"The ship's papers, the declarations of the crews, the log-book, are all testimony which can throw light upon the truth or falsehood of the crime alleged, and make it unnecessary to trouble them until it be ascertained that there is ground for proceeding judicially against them."†

Next comes a complaint of the capture of a Spanish brig by the pirate Almeida, commanding the Orb or Congress, with depositions of sailors of the captured vessel.‡

These letters, like those of Mr. Adams, are accompanied by others from the local Consuls, with copies of correspondence between those functionaries and the collectors of the ports. Thus Don Antonio Villalobos having called on Mr. Mallory, Collector of Norfolk, to seize two noted privateers, the Independencia del Sud and the Atrevida, saying that these vessels had been "improving their equipment and considerably augmenting their crew," Mr. Mallory writes, as Mr. Edwards might have done:—

"In reply I conceive it proper only to remark, that these vessels have not been unnoticed by me, and that, in my conduct towards them, I shall endeavour, as I have done, to observe that course which my official duties appear to me to have prescribed. In pursuing which, that I may have the aid of every light to guide me which facts can afford, and as the allegations thus made by you, in an official form, must be presumed to be bottomed on positive facts, which have come to your knowledge, you will have the goodness, I trust, to furnish me, with as little delay as possible, with the evidence of their existence in your possession."§

The Spanish Dudley replies:—

"With regard to the evidence you require I will not hesitate to say that, as the facts I have stated are matter of public notoriety, known to everybody, and I had no reason to suppose that you were ignorant of them, I did not deem it incumbent upon me to add any proof to the simple narration of them; and I was confident that, by going on to point out to you the stipulations and laws which are infringed in consequence of those facts, you will think yourself authorized to interfere in the manner requested.

"I will assert, Sir, as a known fact, that the brig now called Independencia del Sud is the same vessel which was formerly known under the name of the Mammoth privateer, belonging to Baltimore, armed and equipped in that port, from which she sailed under the command of the same James Chaytor, who still commands her; that the very same James Chaytor was necessarily then, and cannot have ceased since to be, a citizen of the United States, is settled and has a family in Baltimore, whence his wife came down a few days ago in the packet Walter Gray, and is now in this town on a visit to her husband; that he has enlisted men in this port, many of whom are not so obscure as not to be generally

* British Appendix, vol. iii, p. 106. † Ibid., p. 107. ‡ Ibid., p. 108. § Ibid., p. 112.

known. I will mention, as an example, Mr. Young, of Portsmouth, who is now acting as first lieutenant on board the said brig. I will assert as a fact that the Atrevida is the very schooner known before under the name of the Romp, the same that underwent a trial for piracy before the Federal Court in this State; that her present commander, Captain Grinnolds, is a native of one of the neighbouring towns, and very well known in this place; and finally, that this vessel has been at one of the wharves altering her copper, which I call an improvement in her equipment.

"If these public facts, falling within the knowledge of every individual, require more proof than the public notoriety of them, I must request to be informed as to the nature of that proof, and also whether you are not warranted to act upon just grounds of suspicion without that positive evidence which is only necessary before a Court of Justice."*

The Collector did not look upon the facts as sufficient to warrant any action on his part.

The correspondence goes on in much the same strain. On the 19th of September Don Luis writes to Mr. J. Q. Adams:—

"A complaint having been laid before His Catholic Majesty's Government by a part of the crew of the Spanish polacca Santa Maria, captured on her passage from Havana to Cadiz by the pirate called the Patriota Mexicano, commanded by José Guillermo Estéfanos, manned with citizens of these States, and covered by their flag, under which he chased and brought-to the said polacre, until, having ascertained her capture, he hoisted the insurgent flag, I have received the commands of the King my Master to request of the President, through your medium, the most decisive measures for putting an end to the abuses practised in the ports of this Union, by arming privateers to cruize against the Spanish trade, thus prostituting the flag of the United States by these predatory acts, and trampling under foot, with an unparalleled audacity, national rights and the existing Treaty between Spain and these States.

"I therefore now renew those urgent reclamations which, on former occasions, I have submitted to the President, through your Department, on this important point; and I trust that the numerous instances of these abuses and horrible depredations will induce his Excellency to adopt energetic measures to restrain these excesses, which so deeply compromit the neutrality of the United States in the eyes of all nations, and are wholly repugnant to the friendship and good understanding happily subsisting between them and His Catholic Majesty."†

In a letter of the 2nd of November, he writes:—

"It is very disagreeable to me to have to repeat to you, Sir, what, unfortunately, I have been several times under the necessity of submitting to the President, through the medium of your predecessors, namely, that the Act of Congress of the 3rd of March, 1817, has in no wise lessened the abuses by which the laws are evaded, and which render entirely illusory the laudable purposes for which they were enacted. From the greater part of the ports of these States there frequently sail a considerable number of vessels with the premeditated intention of attacking the Spanish commerce, which carry their armament concealed in the hold. It rarely happens that they can be arrested, inasmuch as the Collectors of the Customs say that they have not at their disposition the naval force necessary to effect it; on the other hand, armed vessels, under the flag of the insurgents, enter into the ports of the Union, and not only supply themselves with all necessaries, but also considerably increase the means they already have of destroying the trade of Spain, as has recently been the case at New York, whereby (the so-called) privateers of His Majesty's revolted provinces, which are in reality nothing more than pirates, manned by the scum of all countries, enjoy greater privileges than the vessels of independent Powers."†

The same state of things continues in 1818. On the 9th of June, Don Luis de Onis informs Mr. Adams:—

"At my passage through Baltimore, on my way to Philadelphia, it was represented to me by His Catholic Majesty's Consul for the State of Maryland that there were in that port four pirates, or privateers, if you please so to call them, namely, the Independencia del Sud, Captain Grinnold; the Puerredon, *alias* Mangore, Captain Barnes; the Republicano, Captain Chase; and the schooner Alerta, Captain Chaytor. These pirates, denominated privateers, or vessels of war, of the pretended Government of Buenos Ayres, have entered the port of Baltimore for the purpose of dividing the spoil resulting from their depredations on Spanish commerce, and of refitting and arming to renew these excesses on the high seas. It is a matter of universal notoriety at Baltimore that three of the above-named vessels were fitted out there, and the fourth is a schooner captured by them from Spanish subjects; it is no less so that their commanders, and the greater part of the crews are American citizens, and that there is scarcely a single individual belonging to Buenos Ayres to be found among them. * *

"I am aware, Sir, that you will tell me that the Courts are open to the recognizance of claims of this nature, and ready to apply the law to such cases as occur and are supported by suitable testimony; but I am under the necessity of declaring to you that it is in vain to seek such testimony, however clear it may be to everybody. I have demonstrated, in the most pointed manner, to His Majesty's Consul the propriety of directing his intention to points of so much importance; but he has proved to me that a great portion of the commercial people of Baltimore being interested in the cases which produce my present reclamations, no one is willing to come forward and offer testimony against what is termed the general interest; and thus the wise measures of Government are eluded, justice is

* British Appendix, vol. iii, p. 113. † Ibid., p. 118.

paralyzed, and the suits procrastinated and deferred from Court to Court, with a view to deprive His Majesty's subjects of that justice which they have an undoubted right to seek in the tribunals on all their claims."*

Having stated that the vessels, in addition to the object of "conveying to the parties interested at Baltimore the proceeds of their spoliations on the Spanish commerce, and, among others, that of the Philippine Company's ship Triton, to the amount of 1,500,000 dollars, captured by the pirate Independencia del Sud, and carried to Buenos Ayres to be sold there, have a project in fitting out anew and of attacking some possessions of the King my Master on this continent, to which they may more easily send their prizes; that these same privateers have brought in two Spanish prizes, which are at this moment in the port of Baltimore, one of them a vessel belonging to the Royal Navy," he continues:—

"I therefore demand, in the name of the King my Master, the restoration of those prizes, as having been made by American citizens, and vessels fitted out in this country, in violation of the existing Treaty between the two Powers, and that the sailing of the said privateers be stopped, and they compelled to give security for the result of an expedition, of which, without knowing positively that they intend to execute it, I have the strongest grounds for presuming they mean to do."†

The correspondence closes with a letter of Don Luis to Mr. Adams of the 16th of November, 1818, in which he thus writes:—

"Whatever may be the forecast, wisdom, and justice conspicuous in the laws of the United States, it is universally notorious that a system of pillage and aggression has been organized in several parts of the Union against the vessels and property of the Spanish nation; and it is equally so that all the legal suits hitherto instituted by His Catholic Majesty's Consuls, in the courts of their respective districts, for its prevention, or the recovery of the property, when brought into this country, have been and still are, completely unavailing. The artifices and evasions by means of which the letter of the law has on these occasions been constantly eluded, are sufficiently known, and even the combination of interests in persons who are well known, amongst whom are some holding public offices. With a view to afford you and the President more complete demonstration of the abuses, aggressions, and piracies alluded to, I inclose you correct lists, extracted from authentic documents deposited in the archives of this Legation, exhibiting the number of privateers, or pirates, fitted out in the United States against Spain, and of the prizes brought by them into the ports of the Union, as well as of those sent to other ports, together with the result of the claims made by the Spanish Consuls in the courts of this country. Among them you will find the case of two armed ships, the Horazio and Curiazo, built at New York, and detained by His Majesty's Consul there, on the ground of their having on board thirty pieces of cannon concealed, with their carriages, and a crew of 160 men. On which occasion it was pretended that it could not be proved that these guns were not an article of commerce, and they finally put to sea without them, the extraordinary number of officers and crew passing for passengers. The number of privateers, or pirates, fitted out and protected in the ports of this Republic, as well as of the Spanish prizes made by them, far exceeds that contained in the within list, but I only lay before your Government those of which I have certain and satisfactory proofs. The right of Spain to an adequate indemnity for all the spoliations committed by these privateers, or pirates, on the Crown and subjects of His Catholic Majesty, is undeniable; but I now submit it to your Government only to point out the extreme necessity of putting an end to these continued acts of hostility and depredation, and of cutting short these enormous and flagrant abuses and evils, by the adoption of such effectual precautions and remedies as will put it out of the power of cupidity or ingenuity to defeat or elude them."‡

The letter is accompanied by a list of thirty privateers belonging to the port of New Orleans, Charlestown, Philadelphia, Baltimore, and New York, with a formidable list of prizes made by them.

Complaints of Portugal.

During this time similar complaints had been constantly addressed to the United States' Government, on behalf of that of Portugal, by the Minister of the latter Power, the Chevalier Correa de Serra. Portugal being at that time involved in war with the Artigas Government, privateers were in like manner fitted out and manned by American citizens against the commerce of Portugal.

On the 8th of March, 1818, the Portuguese Minister writes to Mr. Adams that he is ordered to lay before the eyes of the United States' Government the case of three Portuguese ships (of which he gives the details) "captured by privateers fitted in the United States manned by American crews and commanded by American captains, though under insurgent colours." He incloses an extract from the documents proving these facts, and offers to place the documents themselves at the disposal of Mr. Adams.§

Mr. Adams, setting, as it were, an example to future British Foreign Secretaries, answers:—

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* British Appendix, vol. iii, p. 123. † Ibid., p. 124. ‡ Ibid., p. 131. § Ibid., p. 149.

"The Government of the United States having used all the means in its power to prevent the fitting out and arming of vessels in their ports to cruize against any nation with whom they are at peace, and having faithfully carried into execution the laws enacted to preserve inviolate the neutral and pacific obligations of this Union, cannot consider itself bound to indemnify individual foreigners for losses by captures, over which the United States have neither control nor jurisdiction. For such events no nation can in principle, nor does in practice, hold itself responsible. A decisive reason for this, if there were no other, is the inability to provide a Tribunal before which the facts can be proved.

"The documents to which you refer must, of course, be *ex parte* statements, which in Portugal or in Brazil, as well as in this country, could only serve as a foundation for actions in damages, or for the prosecution and trial of the persons supposed to have committed the depredations and outrages alleged in them. Should the parties come within the jurisdiction of the United States, there are Courts of Admiralty competent to ascertain the facts upon litigation between them, to punish the outrages which may be duly proved and to restore the property to its rightful owners, should it also be brought within our jurisdiction and found upon judicial inquiry to have been taken in the manner represented by your letter. By the universal laws of nations the obligations of the American Government extend no further."*

Again, on the 15th of October the Chevalier de Serra writes:—

"Sir, "*Washington, October* 15, 1818.

"This very moment I perceive the intelligence that a ship is fitting in the Patuxent to cruize against the Portuguese commerce, and the ship so fitting is no other than the Portuguese fine brig Soam Sexto, taken some weeks before by the Baltimorean privateer Fortuna, sent into Beaufort, North Carolina, and the goods shipped for New York and Baltimore where they are under reclamation. Captain Taylor left Baltimore on Sunday to take charge of her, and the night before the last a great deal of stores left Baltimore for this ship.

"You know perfectly to what extent the Supreme Executive can exert his power to prevent such a breach of all moral and international law; and I dare not doubt that it will be exerted, persuaded as I am of the honourable feelings of this Government.

"I am &c.

(Signed) "JOSEPH CORREA DE SERRA.

"P.S.—There exist now in Baltimore many persons who are able to identify the ship."†

The reply comes—that the vessel shall be seized? No.

"Sir, "*Washington, October* 23, 1818.

"I have had the honour of receiving, and have laid before the President of the United States, your letter of the 15th instant. I am directed by him to inform you that, if you will furnish a list of the names of the persons chargeable with a violation of the laws of the United States, in fitting out and arming a vessel within the United States for the purpose of cruizing against the subjects of your Sovereign, and of the witnesses by whose testimony the charge can be substantiated, directions will be given to the Attorney of the United States for the district of Maryland to institute suits against the persons complained of, in the proper court competent to their trial.

"I pray you, &c.

(Signed) "JOHN Q. ADAMS."‡

Yet there can be no doubt that, during this time, the United States Government were honestly sincere in their desire to put down the scandal occasioned by this wholesale system of privateering. Several vessels were seized, of which some were actually condemned, others released only on giving security; but the practice continued, vessels being enabled to elude all the vigilance and activity of the officials. As late as the 23rd of November, 1819, the Chevalier de Serra writes in a disconsolate strain, representing the evil as increasing rather than diminishing:—

"Sir, "*Philadelphia, November* 23, 1819.

"I have the honour of submitting to you the following facts and considerations:—

"During more than two years I have been obliged by my duty to oppose the systematic and organized depredations daily committed on the property of Portuguese subjects by people living in the United States and with ships fitted in ports of the Union, to the ruin of the commerce of Portugal. I do justice to, and am grateful for, the proceedings of the Executive, in order to put a stop to these depredations, but the evil is rather increasing. I can present to you, if required, a list of fifty Portuguese ships, almost all richly laden, some of them East Indiamen, which have been taken by these people during the period of full peace. This is not the whole loss we have sustained, this list comprehending only those captures of which I have received official complaints. The victims have been many more, besides violations of territory by landing and plundering ashore with shocking circumstances.

"One city alone on this coast has armed twenty-six ships which prey on our vitals, and a week ago three armed ships of this nature were in that port waiting for a favourable occasion of sailing for a cruize. Certainly, the people who commit these excesses are not the United States, but nevertheless they live in the United States and employ against us the resources which this situation allows them. It is impossible to view them otherwise than a wide extended and powerful tribe of infidels, worse still than those of North Africa. The North Africans make prizes with leave of their Government according to their laws and after a declaration of war; but these worse infidels of whom I speak, make

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* British Appendix, vol. iii, p. 150, No. 6. † Ibid., No. 7. ‡ Ibid., No. 8.

prizes from nations friendly to the United States against the will of the Government of the United States, and in spite of the laws of the United States. They are more powerful than the African infidels, because the whole coast of Barbary does not possess such a strength of privateers. They are numerous and widely scattered, not only at sea for action, but ashore likewise to keep their ground against the obvious and plain sense of your laws, since most generally, wherever they have been called to the law, they have found abettors who have helped them to invade the laws by formalities.

"I shall not tire you with the numerous instances of these facts, but it may be easily conceived how I am heartily sick of receiving frequent communications of Portuguese property stolen, of delinquents inconceivably acquitted, letters from Portuguese merchants deeply injured in their fortunes, and seeing me (as often as has been the case) oppressed by prayers for bread from Portuguese sailors thrown penniless on the shores after their ships had been captured.

"The Executive having honourably exerted the powers with which your Constitution invests him, and the evil he wished to stop being found too refractory, it would be mere and fruitless importunity if I continued with individual complaints except by positive orders. This Government is the only proper judge of what constitutional depositions or arrangements may be established for the enforcement of the laws, and he alone has the means of obtaining them, which are constitutionally shut to any foreign Minister: I trust in the wisdom and justice of this Government that he will find the proper means of putting an end to this monstrous infidel conspiracy, so heterogeneous to the very nature of the United States.

"Before such convenient means are established the efforts of a Portuguese Minister on this subject (the only one of importance at present between the two nations) are of little profit to the interests of his Sovereign. Relying confidently on the successful efforts of the Government to bring forth such a desirable order of things, I choose this moment to pay a visit to Brazil, where I am authorized by His Majesty to go. My age and my private affairs do not allow much delay in making use of this permission, and I intend to profit by the first proper occasion that may offer. The arrangements for my departure will require my personal exertions, and it will not be consequently in my power to make an early or long residence in Washington this winter. As soon as I shall be able I will present myself there to pay my due obeisance to the President of the United States, and my respects to you.

"Accept, &c.

(Signed) "JOSEPH CORREA DE SERRA."*

The United States' Government took the very proper step of getting an Act passed prohibiting the entrance of privateers into certain ports of the United States, but this does not appear to have had the effect of stopping the evil; privateering appears, if we may judge by the continued complaints, to have gone on as before.

On the 8th of June, 1820, the Chevalier de Serra calls attention to a ship, taken by one of the privateers, having been sold by judicial authority "in Baltimore, under the hammer, to Captain Chase, a notorious privateersman, standing under an indictment for piracy."

He adds:—

"It is to be immediately fitted as a privateer (and a formidable one it will prove, by its size and strength, which are those of a good frigate), to cruize against the Portuguese Indiamen, and the command of it to be given, as it is assured, to the notorious Captain Taylor.

"I have not the least doubt that the Supreme Executive of this nation has both the power and the will of putting a stop to this hostile armament, particularly when, as in this case, he has timely information which will be successively put under his eyes, at the very stage of this inimical attempt on the Portuguese commerce."†

Again, on the 16th of July:—

"Sir, "*Wilmington, July* 16, 1820.

"I am ordered by my Sovereign to lay before this Government the names and value of nineteen Portuguese ships and their cargoes, taken by private armed ships, fitted in the ports of the Union by citizens of these States. The values have been ascertained by the proper courts of justice, and revised with all care and attention by the Royal Board of Commerce. In proportion as the value of the other ships stolen is in the same manner ascertained, their names, and the amount of losses, will be laid before this Government."‡

The value of the nineteen ships is stated at 616,158 dollars.

In this letter the Chevalier proposes the appointment of Commissioners to "confer and agree upon what reason and justice demand." The proposal was declined.

The reply was:—

"The appointment of Commissioners to confer and agree with the Ministers of Her Most Faithful Majesty upon the subject to which your letter refers, would not be consistent with the Constitution of the United States nor with any practice usual among civilized nations. The judicial power of the United States is, by their Constitution, vested in their Supreme Court, and in Tribunals subordinate to the same. The Judges of these Tribunals are amenable to their country by impeachment, and if any Portuguese subject has suffered wrong by any act of any citizen of the United States within their jurisdiction, it is before these Tribunals that the remedy is to be sought and obtained. For any acts of citizens of the United States committed out of their jurisdiction and beyond their control, the Government of the United States is not responsible."§

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* British Appendix, vol. iii, p. 155. † Ibid., p. 156, No. 19. ‡ Ibid., No. 20. § Ibid., p. 57.

The proposal was renewed in 1822, but again declined. The Government had done all it could do. "Every attention, compatible with the rights of citizens of the United States and with the laws of nations, had been paid by the Government to the complaints of M. Correa of captures made by privateers fitted out within the United States and partly manned by their citizens." "The laws for securing the faithful performance of the duties of neutrality had been revised and enforced; decrees of restitution had been pronounced by the Judicial Tribunals in all cases of Portuguese captured vessels brought within the jurisdiction of the United States; and all the measures within the competency of the Executive had been taken by that department of the Government for repressing the fitting out of privateers from United States' ports, and the enlistment of citizens in them."

Mr. Adams adds, in a letter to the United States' Minister at Lisbon: "These measures, however, do not appear to have been altogether satisfactory to the Portuguese Government, *doubtless because they are not sufficiently understood by them.*"* The Portuguese Minister thought that the short and simple process would have been to seize the ships, by virtue of the Executive power; but the Mr. Adams of that day thought of "the rights of American citizens and the law of nations."

The pleadings of the United States say little or nothing in answer to the facts relating to Portugal. As to those relating to Spain, they say in a somewhat off-hand way, "What then? if we did injury to Spain we repaired it."† The British Counter-Case answers that the reparation consisted in setting off, in a subsequent Treaty between the two nations, some unascertained claims against the serious claims for actual losses sustained by the Spanish commerce through the acts of American privateers.‡ I agree with the United States that Spain having consented to be satisfied with this reparation, nothing more is to be said on that head. Nor do I think that matters which happened half a century ago can with any fairness be brought forward to the prejudice of the United States in answer to the present claim, not even though provocation might have been given by the assertion of American superiority so ostentatiously obtruded in the pleadings of the United States. But these instances of infractions of maritime neutrality on so large a scale are important for a very different purpose: they show the difficulty of repressing offences of this sort; they show that the asserted superiority of the American law is an empty boast; and they entirely bear out my view as to the alleged power of the President to make up for any deficiency in the ordinary law as administered by the courts. In the long series of complaints made by the Representatives of Spain and Portugal as to the thirty privateers, of the issuing of which from the ports of the United States Don Luis de Onis thus incessantly complains, or as to the twenty-six which the Chevalier de Serra mournfully enumerates as capturing Portuguese vessels, no instance, so far as I am aware, occurs in which, when the Government officials alleged that the evidence was insufficient, the President intervened, by virtue of the discretionary power said to be vested in him, to arrest a vessel.

The temporary Act passed by the American Congress in 1838, on the occasion of the Canadian insurrection, has been more than once referred to in the course of the present controversy.§

American Act of 1838.

The circumstances under which that Act was passed are stated in the Proclamation of President Van Buren, of the 5th of January, 1838, in which he said that information had "just been received that, notwithstanding the Proclamation of the Governors of the States of New York and Vermont, exhorting their citizens to refrain from any unlawful acts within the territory of the United States, and notwithstanding the presence of the civil officers of the United States . . . . arms and munitions of war and other supplies have been procured by the (Canadian) insurgents in the United States; that a military force, consisting in part, at least, of citizens of the United States, had been actually organized, had congregated at Navy Island, and were still in arms under the command of a citizen of the United States, and that they were constantly receiving accessions and aid."

As Congress sits from January to March, the necessary law which the circumstances called for might have been passed at once, but it was delayed till March 10, 1838, and does not appear to have been approved by the President until the 20th of

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* British Appendix, vol. iii, p. 162. † Argument of the United States, p. 83.
‡ British Counter-Case, p. 35.
§ See Case of the United States, p. 134. Argument of the United States, p. 87.

April; even then, it seems either to have been inefficacious or feebly enforced, as on the 21st of November, the President issued another Proclamation:—

"Whereas, there is too much reason to believe that citizens of the United States, in disregard of the solemn warning heretofore given to them by the Proclamation issued by the Executive of the general Government, and by some of the Governors of the States, have combined to disturb the peace of a neighbouring and friendly nation; and whereas information has been given to me, derived from official and other sources, that many citizens in different parts of the United States are associated or associating for the same purpose; and whereas disturbances have actually broken out anew in different parts of the two Canadas; and whereas a hostile invasion has been made by citizens of the United States, in conjunction with Canadians and others, who, after forcibly seizing upon the property of their peaceful neighbour, for the purpose of effecting their unlawful designs, are now in arms against the authorities of Canada, in perfect disregard of their own obligations as American citizens, and of the obligations of the Government of their country to foreign nations:—"

It may here be remarked, in passing, that, while open assistance was thus afforded from the United States to the Canadian insurgents, in 1838, during the whole period of the civil war, the Confederates never once succeeded in directing any hostile operations of importance from Canada against the exposed American frontier; and that, in October 1864, when a few adventurers made the attack on the bank at St. Alban's (a town near the Vermont boundary), prompt measures were taken to prevent any such attempt being renewed from the Canadian side, and an Act was passed by the Canadian Parliament when it met in February 1865, quite as stringent in its provisions as the Act of Congress of 1838.

Expedition of Lopez against Cuba.

Lopez, a Spanish adventurer, had formed a plan in 1849 for an attack on Cuba, with the object of annexing it to the United States. The idea of Cuban annexation was then in great favour with an important political party, who hoped to secure the entrance of a slave-holding State into the Union, and thus counterbalance the growing power of the northern or free States. Lopez accordingly met with much popular support.

On the 11th August, 1849, the President of the United States issued a Proclamation stating that "there was reason to believe that an armed expedition was about to be fitted out in the United States, with an intention to invade the Island of Cuba or some of the provinces of Mexico," and that "the best information which the Executive had been able to obtain pointed to the island of Cuba as the object of this expedition;" and calling upon "every officer of this Government, civil or military, to use all efforts in his power to arrest, for trial and punishment, every such offender against the laws providing for the performance of our sacred obligations to friendly Powers."

On the 7th May, 1850, Lopez left New Orleans in a steamer with about 500 men, accompanied by two other vessels, and, on the 17th, landed at Cardenas, a small town on the north-west side of the island, and occupied the town; but troops arriving shortly afterwards from Havana, he was compelled to re-embark, and escaped to the United States.*

It appears, from the Appendix to the American Counter-Case,† that, on the 25th of May, orders were given for the arrest of Lopez; but the Appendix is silent as to the result, which was that no delay being granted by the district judge to procure evidence against him, he was discharged amid the cheers of a large crowd.

The Spanish Authorities liberated forty-two of Lopez' band, whom they had taken prisoners, and they were taken back to the United States in the United States' ship Albany. A further attempt seems to have been made to bring Lopez and his followers to justice, as, on the 21st of July, the grand jury at New Orleans found a true bill against him and fifteen others, for violating the Act of 1818; but the American Government failed in making out their case, and finally abandoned the prosecution.

On the 25th of April, 1851, the President issued another Proclamation, stating that "there was reason to believe that a military expedition was about to be fitted out in the United States, with intention to invade the island of Cuba," and warning all persons of the penalties they would incur by joining in it. The President concluded by "calling upon every officer of this Government civil and military, to use all efforts in his power, to arrest for trial and punishment every such offender against the laws of the country."§

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* British Appendix, vol. iii. Report of Neutrality Laws Commission, p. 34.
† English text, p. 666; French text, p. 389.
‡ British Appendix, vol. iii. Report of Neutrality Laws Commission, p. 34.
§ Appendix to American Counter-Case, English text, p. 705; French text, p. 120.

Nevertheless, in the following August, Lopez started on a fresh expedition, of which the following details are taken from the President's Message to Congress of December 2, 1851.

Lopez left New Orleans for Cuba on the 3rd of August in the steamer Pampero with 400 men, "with evident intentions to make war upon the authorities of the island." The steamer left stealthily, and without a clearance, and, after touching at Key West, proceeded to the coast of Cuba. Lopez and his band were soon overpowered by the Spanish troops, and Lopez himself was publicly executed at Havana.

The President adds :—

"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 offences in future."*

No such further legislation was, however, carried out; though it was not long before the need for it was again put to the test.

Walker's Expedition against Mexico and Central America.

This time the scene of operations was on the Pacific Coast and the leader chosen to conduct it was the well known Walker; the plan being to gain possession of the Mexican possessions in Lower California.

The attempt was made in October 1853, by an expedition from San Francisco. The invaders seized the town of La Paz, killed seven of its defenders, and wounded others, and committed various excesses. They were reinforced by another expedition, which sailed in the Anita from San Francisco in December, but they were eventually driven out of the country.

This expedition seems to have given rise to a new name, that of "filibusters," which has since been used to designate those who engage in outrages of this description, having their origin in America.

Filibustering became a sort of profession; and, under the name of "transit" and "emigration" companies, schemes were next openly planned for attacking Central America.

Walker sailed for San Francisco on the 4th of May 1855, arrived at Realejo on the 15th of June, and assumed the title of President of Nicaragua, in which capacity he was recognized by the United States' Representative. Having been surrounded at Rivas by the native forces in May 1857, through the mediation of the Commander of the United States' ship of war St. Mary's he was allowed to surrender unmolested, and to be conveyed away on board that vessel, with the remnant of his followers.

On returning to the United States, he organized a fresh expedition, this time at New Orleans. The attention of the Authorities was called to it, and a circular was issued on the 18th September, 1857, which states that "there is reason to believe that lawless persons are now engaged within the limits of the United States, in setting on foot and preparing the means for military expeditions, to be carried on against the territories of Mexico, Nicaragua, and Costa Rica;" after which it proceeds to call upon the District Attorneys and Marshals "to use all *due diligence*, and to avail" themselves "of all legitimate means at" their "command" to enforce the provisions of the Act of 1818.

In October, Lord Napier, Her Majesty's Minister at Washington, had warned the American Secretary of State that 2,000 men had been enrolled, arms purchased, 250,000*l.* subscribed, and that shipping was being hired.

On the 10th of November, Walker was arrested and was held to bail in 2,000 dollars; but, on the very next day, he embarked with 300 unarmed followers from New Orleans for Mobile Bay, where he was joined by fresh recruits in another vessel, the Fashion, in which he sailed for Nicaragua. Some of his band occupied Fort Castillo. He was himself, with the others, detained by the United States' Commodore Paulding in the San Juan River and taken to Aspinwall, whence he returned to the United States.†

* British Appendix vol. iii. Report af the Neutrality Commission, p. 34.

† AmericanCounter-Case Appendix, p. 614.

The Counsel of the United States have taken credit for their Government for this proceeding on the part of the Commodore. They say, "when wrong-doers manifested obstinate persistence of wrong, the military and naval officers of character and discretion, like General Scott, Admiral Paulding, and General Meade, were employed to apply to such persons the only method of prevention applicable to the case, namely, force, to maintain the domestic order and foreign peace of the Government."

As a matter of fact, however, the proceedings of the Commodore were at the time justly censured as having been in excess of his authority.

The President, in his Message to Congress of the 7th of January, 1858,* uses this language:—

"In capturing General Walker and his command after they had landed on the soil of Nicaragua, Commodore Paulding has, in my opinion, committed a grave error. . . . The error of this gallant officer consists in exceeding his instructions and landing his sailors and marines in Nicaragua, whether with or without her consent, for the purpose of making war upon any military force whatever, which he might find in the country, no matter from whence they came. . . . . Under these circumstances, when Marshal Rynders presented himself at the State Department on the 29th ultimo with General Walker in custody, the Secretary informed him 'that the Executive Department of the Government did not recognize General Walker as a prisoner; that it had no directions to give concerning him and that it is only through the action of the Judiciary that he could be lawfully held in custody to answer any charges that might be brought against him.'"

The protest of the Nicaraguan and Costa Rican Governments will be found in the correspondence presented to Parliament respecting Central America, together with a description by Lord Napier of the grievous injury inflicted by the filibusters upon those countries. General Cass replied, on behalf of the United States' Government—

"That unlawful warlike enterprises have been carried on from the United States, composed of persons from different countries, against the territory of Nicaragua, is not to be denied. But during the whole progress of these illegal efforts, the Government of this country has faithfully performed the duty imposed upon it by the laws, as well through public proclamations against such enterprises, as by giving the necessary directions to the proper officers to prevent their organization and departure, as by invoking the action of the judicial tribunals, and also by the employment of its naval force."

He, at the same time, "denied that a fresh invasion was preparing." This was on the 25th of July. In October, President Buchanan found it necessary to issue a Proclamation, containing the following passages, which show that General Cass's information was far from correct, or that the Government officials, from whose reports he had gained it, must have been singularly blind to what was taking place:—

"Whereas information has reached me from sources which I cannot disregard, that certain persons, in violation of the Neurality Laws of the United States, are making a third attempt to set on foot a military expedition within their territory, against Nicaragua, a foreign State with which they are at peace. In order to raise money for equipping and maintaining this expedition, persons connected therewith, as I have reason to believe, have issued and sold bonds and other contracts pledging the public lands of Nicaragua and the transit route through its territory, as a security for their redemption and fulfilment.

"The hostile design of this expedition is rendered manifest by the fact that these bonds and contracts can be of no possible value to their holders unless the present Government of Nicaragua shall be overthrown by force.

"The leaders of former illegal expeditions of the same character have openly expressed their intention to renew hostilities against Nicaragua. One of them, who has already been twice expelled from Nicaragua, has invited, through the public newspapers, American citizens to emigrate to that Republic, and has designated Mobile as the place of rendezvous and departure, and San Juan del Norte as the port to which they are bound. This person, who has renounced his allegiance to the United States, and claims to be President of Nicaragua, has given notice to the Collector of the port of Mobile that 200 or 300 of these emigrants will be prepared to embark from that port about the middle of November."

Two months afterwards, in December 1858, Walker's filibusters actually embarked at Mobile in the sailing schooner Susan, without a clearance, on the pretence of being bound on a coasting voyage. An unsuccessful attempt was made by the revenue cutter to stop them, but was resisted, and the Susan was joined unmolested by the Fashion and the Washington, with military stores.

The expedition afterwards broke down from the Susan being wrecked. Walker and his band then proceeded, in March 1859, to California, whence they were said to have intended to make a descent on Punta Arenas; but this attempt was not carried into execution, and Walker returned to Louisiana.

In November 1859, he, for the third time, eluded the Mobile authorities, and set sail once more from that port in his old vessel the Fashion. The Fashion put back

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* American Counter-Case, Appendix, p. 612.

from want of stores, and some of the persons concerned in the expedition were arrested; but there is no report of their having been punished. He started again in June 1860, in the John A. Taylor, was met off Ruatan by another vessel with arms, and effected a landing on the Central American Coast. His career was brought to a close by his being shot at Truxillo in September 1860.*

Fenian raids.

The British Counter-Case gives a short account of the various Irish-American societies which preceded the Fenian Brotherhood in the United States.

This "American Institution," as the Fenians called it, *declared itself to be "virtually at war" with England,* at a meeting held at Cincinnati in January 1865. Fenian bonds were issued, and soon afterwards the following extraordinary spectacle was presented:—

The Head Centre, as he was previously called, of the Brotherhood was styled President of the Irish Republic; the Executive Council entitled themselves "Senators" with a President; a house was hired at a rental of 1,200 dollars; Secretaries of the Treasury, of War, &c., were appointed; and the Irish Republic was declared to be founded at New York.†

Menaces of invading Canada were held out at numerous public meetings, and were made good by a Fenian raid on the 1st of June, 1866, from Buffalo against Fort Colborne in Canada. This was speedily repulsed and sixty-five prisoners were taken, while the remainder of the Fenians recrossed the river into the United States, where they were arrested to the number of 375 by the American authorities, and their arms were taken from them. The subsequent events are thus narrated in the British Counter-Case, and the statement has not been contradicted:—

"The stores of arms at Buffalo, Ogdensburgh, and St. Alban's, were also seized by the United States' District Marshals. On the 5th of June, the arrest of the other Fenian leaders was ordered; and on the 6th, the President issued a Proclamation, stating that it had become known to him that certain evil-disposed persons had begun to set on foot, and had provided and prepared, and were still engaged in providing and preparing, means for a military expedition and enterprise, which expedition and enterprise was to be carried on from the territory and jurisdiction of the United States against British territory; and authorizing the United States' military forces and militia to be employed 'to arrest and prevent the setting on foot and carrying on the expedition and enterprise aforesaid.'

"On the same day on which this Proclamation was signed, the Fenian prisoners at Buffalo were released on their own recognizances; and, on the 7th, O'Neill and two other principal leaders were also released on bail.

"Another band of Fenians made a demonstration near St. Alban's, but retreated immediately on the appearance of a Canadian regiment.

"Several arrests were made at St. Alban's, and elsewhere; and Roberts, the President of the Fenian Senate, and chief instigator of the raid, was taken into custody at New York. His examination commenced on the 11th; on the 12th he was released on parole; and the District Attorney eventually abandoned the prosecution from want of evidence, with the intention of preferring an indictment before the Grand Jury.

"On the 23rd July, the House of Representatives of the United States passed the following resolutions:—

"'Resolved, that the House of Representatives respectfully request the President of the United States to urge upon the Canadian authorities, and also the British Government, the release of the Fenian prisoners recently captured in Canada.

"'Resolved, that this House respectfully request the President to cause the prosecutions instituted in the United States' Courts against the Fenians to be discontinued if compatible with the public interests.'

"In pursuance of the second of these Resolutions, the Attorney-General instructed the District-Attorney at Buffalo to abandon the Fenian prosecutions there, and they were abandoned accordingly.

"The prosecution was also withdrawn in the cases of Sweeney, Spear, McMahon, and the other leaders of the Vermont frontier demonstration, who had been arrested, but released on bonds of 5,000 dollars after a day's detention; and the intended indictment of Roberts was dropped as a matter of course.

"In October, the Government decided to return some of the arms which had been taken from the Fenians."‡

A bond was on this occasion taken from the editor of the "Buffalo Fenian Volunteer" and another Fenian sympathiser, that the arms should not be used in violation of the Neutrality Laws.

The remainder of the arms taken at Buffalo and Ogdensburgh were returned in the following year.

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* British Appendix, vol. iii; Report of Neutrality Commission, p. 35. † Ibid., p. 41.
‡ British Counter-Case, p. 43.

During 1867 the Fenians were occupied in promoting disturbances and outrages in England and Ireland.

In 1868 they obtained from the United States' Governor the return of 1,300 muskets seized at St. Alban's. In November 1868, the Fenian leader O'Neill marched in review through Philadelphia, with three regiments in Fenian uniform, numbering, as reported, 3,000 men.

Nothing however happened till 1870, when the second Fenian raid upon Canada took place from St. Alban's and Malone. Repulsed at both places the Fenians sought refuge, as usual, across the frontier.

Several of the leaders were arrested and a quantity of arms taken possession of by the United States' Authorities. Altogether 13 tons of arms are said to have been seized at the two raids, and conveyed to the United States' Arsenals; besides these a field-piece and numbers of rifles were abandoned on the scenes of action. On the 12th of July the trials of the Malone raiders took place; two were condemned to two years' imprisonment and a fine of 10 dollars, and one to one year's imprisonment and a similar fine. On the 29th of July the St. Alban's raiders were tried: O'Neill was sentenced to two years' imprisonment and a fine of 10 dollars; another of the leaders to nine months' imprisonment, and a fine of 5 dollars; and another to six month's imprisonment and a fine of 1 dollar. The proceedings against two others were postponed. On the 12th of October, O'Neill and his companions received an unconditional pardon from the President.

On the day on which the pardon was granted the President published a Proclamation, warning evil-disposed persons that the law forbidding hostile expeditions against friendly States would for the future be rigorously enforced:—

"Whereas divers evil-disposed persons have, at sundry times, within the territory or jurisdiction of the United States begun, or set on foot, or provided, or prepared the means for military expeditions, or enterprises to be carried on thence, against the territories or dominions of Powers with whom the United States are at peace, by organizing bodies, pretending to have powers of Government over portions of the territories, or dominions, of Powers with whom the United States are at peace, or by being, or assuming, to be members of such bodies; by levying or collecting money for the purpose, or for the alleged purpose, of using the same in carrying on military enterprises against such territories or dominions; by enlisting or organizing armed forces to be used against such Powers, and by fitting out, equipping, and arming vessels to transport such organized armed forces to be employed in hostilities against such Powers.

"And whereas it is alleged, and there is reason to apprehend that such evil-disposed persons have also, at sundry times, within the territory and jurisdiction of the United States, violated the law thereof by accepting and exercising commissions to serve by land or by sea against Powers with whom the United States are at peace, by enlisting themselves or other persons to carry on war against such Powers; by fitting out and arming vessels with intent that the same shall be employed to cruize or commit hostilities against such Powers, or by delivering commissions within the territory or jurisdiction o the United States for such vessels, to the intent that they might be employed as aforesaid," &c.

On the 5th of October last, less than a year after his release, and after this Proclamation, O'Neill led a third raid against Canada on the Pembina frontier, but was arrested by the United States' troops, and this time met with entire immunity, being discharged on the ground that there was no evidence of his having committed any overt act within the United States' territory."*

As stated in the British Counter-Case, the Proclamation of October 1870, referred not only to the Fenians, but to expeditions in aid of the existing Cuban insurrection, some of which are mentioned.

Expeditions in aid of the Cuban insurrection.

The correspondence between the Spanish Minister at Washington and the United States' Government on the subject of these expeditions against Cuba is, in parts, so applicable to the present question, that I cannot refrain from quoting some passages.

Mr. Lopez Roberts writes thus to Mr. Fish on the 18th of September, 1869:—†

"Certain malcontent Cubans have established themselves in the United States, especially in New York, and these are endeavouring, by every means in their power, not to conquer their independence by their own efforts, but to gain at present the sympathies of the American people, in order afterwards to seek the aid of this Government for their cause. The history of what has taken place in the last few months is the clearest proof of this. In a state of peace, it has been seen with astonishment that associations were publicly organized in many ports belonging to a friendly nation, said associations being composed of the agents of the insurgents, with no other object than that of directing their attacks

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* British Counter-Case, p. 45.

† Papers relating to Cuban Affairs, presented to the House of Representatives, February 21, 1870, p. 131.

against Spain. Enlistments of men have also taken place during whole weeks, as if the object were to form expeditions authorized by law, and consequently with the consent of the authorities. These emissaries have carried their spirit of speculation so far as to take advantage of the good faith of emigrants from Europe, sending them to fight in Cuba, under command of the so-called General Jordan and other officers, who fought on the side of the South in the civil war. Hostile demonstrations have likewise been suffered to take place against a nation which, in 1861, had not even allowed (in order not to wound the susceptibility of the United States) the title of belligerents to be given to an insurgent population numbering 6,000,000 or 7,000,000 of whites, who occupied a third of the territory of the Republic, and were in possession of such resources that they were only conquered by prodigies of valour, military talent, and heroic perseverance; and, after having seen the departure of various filibustering expeditions in broad daylight, and unmolested, from New York and other Federal ports, the Minister of Spain finally found himself obliged, by the incomprehensible apathy of the authorities, to take the initiative in order to prevent these repeated infractions of the neutrality laws."

To this Mr. Fish replies as follows, on the 13th October, 1869:—*

"This Government allows freedom of speech and of action to all, citizens or strangers, restricted only to the observance of the rights of others and of the public peace. The constitution of the United States secures to the people the right peacefully to assemble, and also to keep and bear arms; it secures them in their persons against unreasonable search and seizure, and provides that no warrant shall issue but upon probable cause, supported by oath or affirmation, and that no person shall be deprived of life, liberty, or property without due process of law.

"If certain malcontent Cubans (subjects of Spain) have misconstrued and abused the privileges thus accorded by a liberal Government, the Undersigned need not remind Mr. Roberts what the occurrences, daily reported from across the ocean, are showing, that Governments cannot always restrain their malcontent subjects or residents. Laws will be broken at times; and happy is that form of Government that can control the tendency of evil minds, and restrain, by its peaceful agencies, the violence of evil passions.

"The Undersigned is forced to admit with regret, that an unlawful expedition did succeed in escaping from the United States and landing on the shores of Cuba. It escaped from the United States without having attracted any notice or suspicion on the part of the Government, or its officers or agents, and, as the Undersigned believes, without any suspicion on the part of the agents of the Spanish Government. Previous to its departure, Mr. Roberts had been frequently informed that this Government would act upon any information or suggestion which it could obtain through its own agents, or that might be furnished by the Spanish authorities or their agents."

On the 17th of December, 1870, Mr. Roberts writes to Mr. Fish to complain of the conduct of the United States' authorities in permitting the departure from New York of the Hornet, a notorious vessel, which, as would appear from the British Counter-Case,† has since succeeded in landing an expedition in Cuba. This vessel, formerly a despatch-boat in the United States' navy, was sold, in June 1869, by the Navy Department to a certain Señor Macias. She was seized on her departure from Philadelphia, but released, and proceeded to Halifax, where she was again detained by the British authorities, but discharged, as no arms were found on board. Leaving Halifax, she sailed along the United States' coast, taking on board, at different points, cannon, small arms, ammunition, and men, and put into Wilmington. Here she was again seized, and a prosecution was instituted against some of the officers and crew. These proceedings seem to have terminated ineffectively, and the vessel was eventually released, upon bonds being given that she would not be used in violation of the neutrality laws. From Wilmington she proceeded to New York, where she was once more seized, and again released.

Mr. Roberts incloses in his note a letter addressed by the Spanish Consul at New York to the United States' District Attorney, in which, after recapitulating the above facts, the Consul goes on:—

"I have now information on which I rely with perfect confidence, that this steamer, in the hands of said Macias and his agents, is being fitted out at this port, to at once sail, to take on board at sea a military expedition from Nassau of some 200 men and military officers, which will leave there in a vessel, and another military expedition from Key West of some 100 men, under command of one Cabaleiro; after all of which, and taking on board at sea arms provided, one Cisueros (who with General Jordan was joint commander of the Perit expedition from this city) will take charge of and conduct her to the coast of Cuba.

"I respectfully submit that the ownership and history of this steamer, together with the outfit on board and her preparations, easily ascertainable by this Government, if prompt movement be made, are sufficient to call for the exercise of the ample preventive power of this Government against her departure. Trusting that, in a proper way, I have complied with the disposition of this Government that I lay complaints of this character before, I hereby leave in your hands the responsibility of permitting

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* Papers relating to Cuban Affairs, p. 138.

† Page 466.

this formidable instrument to proceed on her illegal expedition to the great injury of my Government."*

What is the reply of the District Attorney? Does he take the suspicions of the Consul as facts until disproved, and proceed at once to detain the vessel? Not so. He answers:—

"You accompany your letter with no proof or evidence that would authorize me to seize the Hornet for the alleged intended breaches of our neutrality laws, or to take any steps beyond those I have already taken. I have caused the most rigid scrutiny to be exercised, to see that the Hornet has taken on board nothing of a nature to indicate the hostile intentions you mention. I am advised that her intention is to clear and sail in ballast for Nassau. What her intentions may be on reaching that port are things that remain unproven, and in nowise indicated except by the intimations of your favour. I cannot legally act on mere surmise, but if furnished with proper evidence I shall not hesitate to take any steps necessary to prevent violations of our laws."†

The violation of the laws was not prevented. Mr. Roberts complains that "that same day the steamer Hornet put to sea from the port of New York, without the judicial authorities of the Federal Government having taken such measures to prevent her departure as should have been dictated to them by the circumstances and criminal antecedents of the aforesaid vessel."

To this complaint of reliance upon the law for preventive measures, instead of having recourse to *prerogative force*, Mr. Fish thus replies:—

"The Undersigned has the honour, 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 forwarded 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 of conviction of a Consul, but upon proof submitted according to the forms required by law."

Mr. Fish, therefore, though he had promised to refer the matter to the Department of Justice, is of opinion that "the District Attorney complied with his duty and would not have been justified in taking steps for the seizure of the vessel on the unsupported representations of the Consul, after the failure of that officer to furnish the requisite proof to authorize her continued detention."‡

After these details it can admit of no doubt that the history of the United States has been marked not only by systematic privateering against nations with whom the United States were at peace, but also by a series of hostile expeditions carried out in the most determined manner by American citizens against the territories of neighbouring and friendly nations.

The Counsel of the United States appear to have been aware of the anomalous position in which their Government is placed by the contrast between the manifest failure on its own part to repress these undertakings, and the strictness with which it now attempts to enforce against Great Britain the duty of diligence to repress far less flagrant breaches of neutrality directed against itself. A number of documents have accordingly been appended to the United States' Counter-Case showing (though in an imperfect and fragmentary manner) the various instructions and Proclamations which have been issued by the President and Government officials of the United States for the prevention of these enterprizes. These documents, however, omit to mention the results, some of which I have thought it necessary to state. Nevertheless, they tend strongly to confirm the statements of fact contained in the Appendix to the Report of the Neutrality Commissioners and those made in the Counter-Case of the British Government, and which have not been contradicted.

The story of all these expeditions, as told in a great part in the Proclamations of the different Presidents, is pretty much the same.§ Some scheme of annexation, or

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* Papers relating to Foreign Relations of the United States, presented to Congress, December 4, 1871, d. 781.

† Papers relating to Foreign Relations of the United States 1871, pp. 781, 782. ‡ Ibid., p. 786.

§ See President's Proclamations of December 2, 1851, October 30, 1858, and October 12, 1869. British Counter-Case, pp. 37, 39, 45.

other form of invasion is started, public meetings of sympathisers are held, a reckless soldier of fortune is selected for chief, funds are raised by bonds issued on the security of the public lands of the country which it is proposed to conquer, arms are collected, recruits advertised for under some transparent verbal concealment of the object, and at last a certain number of men are got together and embark, or otherwise set forth. If the country against which the attack is directed is feeble or unprepared, scenes of outrage and bloodshed follow, until the marauders are driven to the coast, where they find refuge on board American vessels (in some cases it has been on board ships of war), and return to the protection of the United States to prepare for a fresh attack. If the country is able vigorously to repel them, as in the case of the Fenian raids, they content themselves with a demonstration on the frontier, seek at once asylum, are disarmed, and the ringleaders are perhaps tried. Those who are convicted are almost certain of an immediate pardon. After an interval the arms are restored, and unless the scheme has become so discredited by failure as to be incapable of revival, preparations are forthwith recommenced for another attempt, and everything goes on as before.

In the cases particularly mentioned in the British Counter-Case, viz., the expeditions of Lopez, Walker, and the Fenian raids, it will be observed that it cannot be said that the Government of the United States had not full information of the projected enterprises, and ample time for giving such instructions as might seem to be requisite for their prevention. Indeed, it is maintained in the Argument of the United States' Counsel (p. 90), that "the President of the United States acted in advance to enforce not diligence only, but active vigilance in all subordinate officers of the Government."

How successfully that vigilance and diligence was eluded may be gathered from the facts which have just been stated.

In the face of such facts the following comparison between the United States and Great Britain as to the observance of neutral obligations, to the disparagement of the latter, seems, to say the least of it, somewhat surprising :—

"As to the deportment of the Executive in the course of these occurrences, we confidently appeal to the mass of official acts and correspondence contained in the documents annexed to the American Counter-Case, to prove that the American Government not only did everything which law required, but did everything which was humanly possible, by preventive vigilance, as well as by punitive prosecution, to discharge the neutral obligations of the United States.

"Did the American Government, at any time, or on any occasion, either wilfully or with culpable negligence, fail to discharge those obligations? We deny it; although, in the midst of almost continual warfare, both in Europe and America, it is possible that violations of law may have occurred, in spite of all preventive efforts of that Government."*

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"During all this long period, the United States steadily laboured to prevent equipment of vessels in their ports to the prejudice of Spain. The successive Presidents of the United States were positive in instruction to all subordinate officers, and vigilant in observation, to enforce the execution of the laws of neutrality, international as well as municipal, Prosecutions were instituted by the Courts; vessels unlawfully captured were restored, by judicial or administrative order; and the principles of neutrality were proclaimed and maintained in every act, whether of the Courts or of the Executive."*

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"Whilst England professes, as her view of public law, that constitutional Governments must of necessity allow themselves to drift continually into war by reason of having no other means to keep peace except an Act of Parliament, and that confessedly insufficient, the United States, on the other hand, have as constantly maintained, and do now maintain, that it is the duty of all Governments, including especially constitutional Governments, to discharge their neutral duties in obedience to rules of right, independent of and superior to all possible Acts of Parliament. In consonance with which doctrine it is that every President of the United States, from President Washington to President Grant inclusive, has never failed to apply due diligence, voluntarily, *sponte sua*, in the vigilant discharge of his own official duty, not in mere complaisance to foreign suggestion, by himself or by other officers of the Government, to prevent all unlawful enterprises of recruitment or equipment in the United States."†

Laws, no doubt, have been passed, and proclamations in abundance issued. But, in spite of all this, privateering, armed incursions into countries at peace with the United States, hostile raids, and filibustering expeditions have gone on as before. The practical result is that the Counsel of the United States cannot be permitted to prejudice the British nation and Government before the Tribunal and the world by an imaginary representation of the neutrality of the United States; and some allowance should be made for Great Britain if, on a far more humble scale, something of the same sort should have happened on her shores, seeing that, with a law said to be perfect, and

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* United States' Argument, p. 82.

† Ibid., p. 76.

with the loftiest sense of neutral obligations, the Government of the United States have not found it altogether possible to prevent their citizens from occasioning trouble to neighbouring nations, whether at war or at peace, and giving to other Governments much cause of complaint and remonstrance against their own.

The observation which thus legitimately arises is not got rid of by an attack on the past maritime policy of Great Britain, or by a reference to "the numerous piratical enterprises fitted out in former times against the possessions of Spain in America, and the honour accorded to the chiefs of those expeditions, such as Drake and Hawkins."

However offensive this telling sentence may have been intended to be, though an Englishman I readily forgive it for the sake of the charming simplicity which has made its authors forgetful of the fact that, at the time when Drake and Hawkins went forth on the enterprises they term "piratical," the ancestors of their countrymen and their own still formed a part of the British nation. May not some of the old blood which warmed the hearts and animated the courage of those bold adventurers, still flow in the veins of their Transatlantic descendants, who have made the name of "filibuster" detract somewhat from our idea of the perfect character of American neutrality?

Complaints of unfriendliness.

Having compared the law of the two nations in the matter of neutrality, I should, in the natural order of things, have now proceeded to the facts connected with the different vessels, were it not for the unexpected course pursued by the representatives of the United States in seeking to prejudge the question to which the inquiry before this Tribunal is directed—namely, whether the British Government was wanting in due diligence in respect of the equipment of certain specified ships—by imputing to the British nation an intentional disregard of its duties as a neutral, and to the British Government not only a want of diligence in the discharge of its duty for the protection of the United States against violations of neutrality, but a *wilful negligence*, arising out of an undue partiality and desire to favour the Confederates.

For this purpose, the representatives of the United States before this Tribunal have gone into the whole history of the time; and, not content with disparaging the institutions of Great Britain and reviling her law, have sought to cast obloquy on her Government, on Statesmen whom the British people have been in the habit of looking up to, and, indeed, on the British nation itself.

We are told of "the early and long-continued unfriendliness of the British Government;" that "Her Majesty's Government was actuated by a conscious unfriendly purpose towards the United States." Again and again we are told of the unfriendliness and insincere neutrality of the British Cabinet. "The Cabinet were actuated by an *insincere neutrality* to hasten the issue of the Queen's Proclamation." "The feeling of personal unfriendliness towards the United States continued during a long portion or the whole of the time of the commission or omission of the acts complained of." Finally, we are told that "the facts established show an unfriendly feeling which might naturally lead to, and would account for, a want of diligence bordering upon *wilful negligence*."

Earl Russell is made the object of unworthy and unjustifiable attack. He is represented as having "evinced a consistent course of partiality towards the insurgents." "When information as to the Florida was conveyed to Her Majesty's Principal Secretary of State for Foreign Affairs, he interposed no objection to her sailing from Liverpool." Surely the writer must have known he was doing grievous injustice in making such a statement. The Florida sailed from Liverpool on the 25th of March. As will appear when we come to the facts connected with that vessel, Earl Russell had heard nothing about her for a month before. Again, "when the overwhelming proof of the complicity of the Alabama was laid before him, he delayed to act till it was too late." He who penned this must have known that the delay was not Lord Russell's, and that, but for an unlucky delay, accidentally occurring elsewhere, so far as the action of his Lordship in that affair was concerned, the Alabama would have been stopped.

Of the Cabinet which has been thus assailed, three distinguished members are no more. But he who, at the difficult time in question, presided over the foreign relations of Great Britain, still lives among us in the fulness of years and honour. There have, of course, been many who, in the strife of party politics, have been opposed to Earl Russell; there have been others who have differed from him in particular incidents of his political conduct; but never did it occur to political enemy—personal enemy he never could have had—to question for a moment the lofty sense of honour, the high and unimpeachable integrity, the truthfulness, the straightforwardness, which have characterized the whole of his long and illustrious career.

When the history of Great Britain during the nineteenth century shall be written, not only will there be none among the Statesmen who have adorned it, whose name will be associated with greater works in the onward path of political progress than that of Earl Russell, but there will be none to whom, personally, an admiring posterity will look back with greater veneration and respect. That this distinguished man should feel deeply aggrieved by the unworthy attack thus made on the Government of which he was a leading member, and on himself personally, it is easy to understand: but there are attacks which recoil upon those who make them; and of this nature are aspersions on the honesty and sincerity of Earl Russell.

Speaking of the Officials in the Colonies, the Case of the United States asks the Tribunal to bear in mind what it calls "these constant demonstrations of partiality for the insurgents." "They show," it is said, "a persistent absence of real neutrality, which should throw suspicion upon the acts of the British officials as to the vessels, and should incline the Tribunal to closely scrutinize their acts."

The British nation comes in, of course, for a share of the abuse thus freely bestowed. British neutrality is described sometimes as "partial and insincere," sometimes as "habitually insincere." "Great Britain framed its rules, construed its laws and its instructions, and governed its conduct in the interest of the insurgents."

I have called this an "unexpected" course; for, assuredly, neither the British Government nor the British people were prepared to expect that, after Great Britain had not only expressed, openly and before the world, her "regret" that vessels should have left her shores which afterwards did damage to American commerce, but had voluntarily consented to make good that damage, if it could be shown that any want of sufficient care on the part of the British Authorities had rendered the equipment and evasion of those vessels possible—on an occasion when, in the peaceful and amicable settlement of any claim the United States might have against Great Britain, the remembrance of past grievances or past resentments was to be for ever buried, and the many ties which should bind these two great nations together, drawn closer for the time to come—advantage should be taken to revive with acrimonious bitterness every angry recollection of the past, and, as it would seem, to pour forth the pent-up venom of national and personal hate. Deploring the course which has thus been taken, as one calculated to mar the work of peace on which we are engaged, I comfort myself with the conviction that a great nation, like the people of the United States, seeing in the present attitude of Great Britain a cordial and sincere desire of reconciliation and enduring friendship, animated itself by a kindred spirit, will not approve of the hostile and insulting tone thus offensively and unnecessarily adopted towards Great Britain, her statesmen, and her institutions, throughout the whole course of the Case and Argument presented on behalf of the United States.

Alleged evidence of unfriendly feeling.

In support of the alleged unfriendly feeling which the United States ascribe to the British Government, as the foundation of the charge of partiality towards the Insurgent States, where the Government should have been neutral, they refer, in the first place, to certain speeches made on different occasions by leading members of the Ministry.

There can be no doubt that these speeches not only expressed the sentiments of the speakers, but may be taken to have been the exponents of the sentiments generally entertained at the time. But it is a mistake to suppose that those sentiments involved any unfriendliness towards the United States. In truth, why should any such unfriendliness have existed? The cherished sentiments of the British people on the subject of slavery had strongly tended to alienate them from the South, and the recent public discussion of the subject of slavery, on which the South felt so sensitively, had produced feelings of by no means a friendly character on the part of the latter towards Great Britain. The North might, therefore, not unnaturally calculate on the sympathy of Great Britain, if not on its active support, in a conflict with the South. How was it that what might thus have been expected *à priori*, was not realized to the extent of such expectation, and that where active sympathy, or even actual support might have been looked for, impartial neutrality took its place? The causes are not difficult to find. In the first place, it appeared to many that right and justice were on the side of the seceding States. To such persons it seemed that when eleven great provinces, with a population of several millions, forming fully one-fourth of the Union, impelled by the conviction that the political views of the majority of the Federal States were, if not antagonistic to, at all events inconsistent with, their interests, desired to separate themselves from the Union, to which they were bound only by the tie of a voluntary Confederation, an attempt to coerce them by the sword into a forced continuance in it, when it must henceforth be hateful to them, was to make the issue one of might rather than of right.

Others there were—men of calm judgment and reflection—who, while they deplored a disruption of the great American Union, yet thought that a reunion effected by the subjugation of the South was not to be desired in the true interest either of the victors or the vanquished; that before such a result could be brought about, a prolonged and fearful contest must have taken place, in which the best blood of the South would have been shed, its resources exhausted, its prosperity destroyed for years, its spirit humiliated and broken, making its restoration to the Union of little value, except so far as the pride of the Federal States might be concerned; that, consequently, the Union having thus been torn asunder, it would be better for both parties that each should be left to work out its own destiny, and develop its own resources, in the vast regions to which its dominions might extend. Many, too, there were who deplored this contest the more because they believed that, despite the superior force and resources of the North, the subjugation of the South was impossible, and that the prolongation of the contest could only lead to useless sacrifices on either side. This view proved erroneous in the result, but it was not the less honestly entertained. A strong impression, too, could not fail to be produced on the public mind by the energy, determination, and courage displayed by the South, and the generous ardour with which its population risked life and fortune in the desperate struggle for national independence, so resolutely maintained to the last against infinitely superior force. Whatever the cause in which they are exhibited, devotion and courage will ever command respect; and they did so in this instance. Men could not see in the united people of these vast provinces, thus risking all in the cause of nationality and independence, the common case of rebels, disturbing peace and order on account of imaginary grievances, or actuated by the desire of overthrowing a Government in order to rise upon its ruins. They gave credit to the statesmen and warriors of the South—their cause might be right or wrong—for the higher motives which ennoble political action, and all the opprobrious terms which might be heaped upon the cause in which he fell, could not persuade the world that the earth beneath which Stonewall Jackson rests does not cover the remains of a patriot and a hero.

Public feeling in Great Britain, however, never went beyond this, that both parties having appealed to arms, they should be dealt with on terms of perfect equality, and that whatever was conceded to the one should not be withheld from the other, —to use a common expression, that they should be left to fight it out fairly, without Great Britain throwing her weight into either scale, as the Northern States seemed to think she should have done in their favour, not perhaps by actual assistance in war, but by withholding from the Confederates the character of belligerents, and by treating their ships of war as pirates and denying them access to British ports. For the United States appear to have been unable to understand the position assumed by the British Government in making any concession whatever in favour of the Insurgent States. It appeared to them like an act of perfidy towards a friend. Had not political and commercial relations bound Great Britain and the United States closely together for many years? How then could Great Britain take any step which should give any advantage to an enemy of the United States? Two things were lost sight of in this reasoning. First, that the Insurgent States, with whom the United States were now waging war, had formed part of that Union with which Great Britain had had the intimate relations referred to—the second port in the Empire, through which the cotton trade was carried on, having had all its relations with the South; secondly, that Great Britain had the interests of her own commerce to look after, which were seriously compromised in the warfare as carried on by the United States. The blockade of the Southern ports, established by the North with a view to the speedier subjugation of the South, deemed by the North of such paramount importance as to render all consideration for the interests of Great Britain unnecessary, was about to paralyze the industry of Lancashire, and bring famine and disaster on thousands. Great Britain accepted the position and acknowledged the blockade. Was she not, in other respects, to look after her own interests? It was natural enough that, in the first heat and passionate excitement, the North should take the view it did of the conduct of Great Britain. I cannot but think the time has come when it might take a calmer and a juster view. It will do so hereafter, in spite of those who still seek to rekindle the flame of discord, the "ignes," which in their hands may be truly said to be "suppositos cineri doloso."

The charge of partiality and of wilful negligence having been thus brought requires to be disposed of. For, though partiality does not necessarily lead to want of diligence, yet it is apt to do so, and in a case of doubt would turn the scale. Where a sinister motive exists, *culpa*, which might otherwise be excused, becomes indeed *dolo proxima* and inexcusable. Besides, sitting on this Tribunal, as I have already said,

as in some sense the representative of Great Britain, while I may say with perfect truth, "pudet hæc opprobria nobis dici potuisse," I should not have fulfilled my duty if I did not see whether their refutation cannot be found in the facts before us.

Complaints of unfriendly conduct.

Independently of having permitted the equipment of ships, three main heads of complaint are placed on record against the Government of Great Britain:—1. That it acknowledged the Confederate States as belligerent; and as a consequence, refusing to treat their ships of war as pirates, admitted them to British ports on the same footing with the war ships of the United States; 2. That it did nothing to prevent the agents of the Confederate States from procuring ships and supplies of arms and munitions of war from England; 3. That it did nothing to stop the blockade-running, carried on through the British port of the Bahamas and Bermuda.

Acknowledgment of belligerency.

The contention of the United States that Great Britain was not warranted in acknowledging the Confederate States as belligerents might find its answer in the unanimous concurrence of the great maritime Powers in following her example. But independently of this, the course thus pursued may without difficulty be shown not only to have been strictly warranted by international law, but also to have been the only one which could with propriety have been adopted.

First, let us see how stood the facts at the time of the recognition of the Confederate States as belligerents by the Queen's Government.

Between the November of 1860 and April of 1861, seven Southern States of the Union, South Carolina, Florida, Mississippi, Alabama, Georgia, Louisiana, and Texas, had not only renounced their allegiance to the Federal Government and declared themselves independent, but had formed themselves into a Confederation, under the title of the "Confederate States;" had adopted a federal constitution, with all the necessary elements of Government; and had appointed a President. They were in exclusive possession of the territory of these States, to the total and absolute exclusion of the former Federal Government. They had taken measures to raise an army, and had voted upwards of 2,000,000 dollars for the creation of a navy. In April 1861 hostilities had actually commenced. By the 13th of April Fort Sumter had fallen. The arsenal at Harper's Ferry was seized a few days later. On the 15th, the President of the United States called out the militia, to the number of 75,000 men.* On the 17th, the President of the Confederate States issued a Proclamation inviting applications for letters of marque and reprisal, to be granted under the seal of the Confederate States, against ships and property of the United States and their citizens.†

On the 19th of April President Lincoln issued a further Proclamation, declaring the ports of the seven States blockaded;‡ and on the 27th, issued a like Proclamation with regard to the ports of North Carolina and Virginia, which, in the meantime, had joined the Confederation.

Here then were nine States, with a population of more than five millions of people, exclusive of the negro population—in other words, one fourth of the United States—shortly afterwards to be joined by two other States—which had established a *de facto* Government, which Government had possession of the entire territory within the limits of those States, and exercised all the powers and functions of Government; with an organized army prepared to wage war with the rest of the States for the establishment of national independence, and which had actually commenced hostilities by the capture of forts occupied by Federal forces. No one could deny that this was in fact war, and war about to be conducted on a great scale—a war to which the original Government, the authority of which was thus contested in arms, could not deny the character of war with all the incidents which attach to it.

On the 4th of May, 1861 (nine days before the date of Her Majesty's Proclamation of Neutrality), Mr. Seward himself wrote to Mr. Dayton at Paris:—

"The insurgents have instituted revolution with open, flagrant, deadly war, to compel the United States to acquiesce in the dismemberment of the Union. The United States have accepted this civil war as an inevitable necessity."§

From the beginning the operations of the war were carried on as in a war between nations, according to the usages of war among civilized States. No attempt was made to treat insurgent prisoners as traitors or rebels.

Under such circumstances it is impossible to deny that a neutral State had a

* British Appendix, vol. iii, p. 2. † Ibid., p. 4. ‡ Ibid., p. 7.
§ 'United States' Documents, vol. i, p. 35.

right to accord to the Insurgent Government the character of a belligerent. Whether it would be morally justified in doing so must depend on the circumstances in which it found itself placed relatively to the parties to the contest. All publicists are agreed, that where an integral portion of a nation separates itself from the parent State, and establishes *de facto* a Government of its own, excluding the former Government from all power and control, and thereupon a civil war ensues, a neutral nation is fully justified in recognizing the Government *de facto* as a belligerent, though it has not as yet acknowledged it as a nation; and, from the time of the acknowledgment of its belligerent status, the Government *de facto* acquires, in relation to the neutral, all the rights which attach to the status of a belligerent of an established nationality.

Vattel.

"When," says Vattel, "a party is formed in a State which no longer obeys the Sovereign, and is of strength sufficient to make head against him, or, when in a republic, the nation is divided into two opposite factions, and both sides take arms, this is called a civil war."*

Again:—

"When 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 each is independent of all foreign authority, no one has the right to judge between them. Each of them may be right. It follows, in virtue of the voluntary law of nations, then, that the two parties may act as having equal right."†

Martens says:—

"Foreign nations 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."

Hautefeuille.

Hautefeuille says on this subject:—

"En effet, les peuples étrangers ne peuvent intervenir entre les belligérants; la qualité de sujets revoltés que l'une des deux donne à l'autre, doit être écartée par eux; ils ne sont, et ne peuvent être, juges de la justice ou de l'injustice de la guerre. Les nations qui désirent rester neutres doivent accepter la possession de fait; si elles veulent être respectés par les deux parties, elles doivent les reconnaître et les respecter également tous les deux. Le prince étranger qui refuserait de remplir les devoirs de la neutralité envers les insurgés ne saurait exiger d'eux d'être regardé comme neutre; il serait à leurs yeux l'allié de leur ennemi, et ils le traiteraient comme tel avec justice. D'un autre côté le souverain qui combat pour ramener sous son obéissance ses sujets revoltés ne saurait s'offenser que les neutres remplissent leurs devoirs envers ses ennemis, puisqu'il ne peut exiger qu'ils deviennent ses alliés, et que, s'ils refusaient de remplir ces devoirs, ils seraient effectivement ses alliés, les ennemis de ses adversaires."‡

Professor Bluntschli.

Professor Bluntschli, though writing adversely to Great Britain on the Alabama question, yet, as to the status of the Confederates as belligerents, has the following passages:—§

"Du reste, le parti révolté qui opère avec des corps d'armée militairement organisés, et qui entreprend de faire triompher par la guerre son programme politique, agit, alors *qu'il ne forme point un Etat* tout au moins comme s'il en constituait un, *au lieu et place d'un Etat* (an Staates statt). Il affirme la justice de sa cause et la légitimité de sa mission *avec une bonne foi égale à celle qui se présume de droit chez tout Etat belligérant.*" (Pages 455, 456.)

Again:—

"Pendant la guerre on admet, dans l'intérêt de l'humanité, que *les deux partis agissent de bonne foi pour la défense de leurs prétendus droits.*" (Page 458.)

And at pages 461, 462:—

"Si l'on tient compte de toutes ces considérations, on arrive à la conclusion suivante. C'est que, à considérer d'un point de vue impartial, tel qu'il s'offrait et s'imposait aux Etats *Européens*, en présence de la situation que créaient les faits, la lutte engagée entre l'Union et la Confédération, c'est-à-dire, entre le Nord et le Sud, il était absolument impossible de ne pas admettre que les Etats Unis fussent alors engagés dans une *grande guerre civile*, où les deux partis avaient le caractère de Puissances politiquement et militairement organisés, se faisant l'une à l'autre la guerre, suivant le mode que le droit des gens reconnaît comme régulier, et animées d'une égale confiance dans leur bon droit. Les uns pouvaient éprouver plus de sympathie pour l'Union qui avait pour elle toute la supériorité d'un Etat reconnu et d'une autorité constitutionnelle, d'autres pouvaient faire des vœux pour le succès de la Confédération, qui n'était pas encore reconnue comme Etat Féderal nouveau, mais qui espérait de se conquérir une existence propre. *Tout le monde était d'accord qu'il y avait guerre et que dans cette guerre il y avait deux parties belligérantes.*"

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* "Droit des Gens," liv. iii, § 292. † Ibid., liv. ii, § 56.
‡ "Droits et Devoirs de Nations Neutres, vol. i, p. 231.
§ "Revue de Droit International," 1870, pp. 455, 456, &c.

The principles by which a neutral State should be governed as to the circumstances under which, or the period at which, to acknowledge the belligerent status of insurgents, have been nowhere more fully and ably, or more fairly stated than by Mr. Dana, in his edition of Wheaton, in a note to Section 23:— Mr. Dana.

"The occasion for the accordance of belligerent rights arises when a civil conflict exists within a foreign State. The reason which requires and can alone justify this step by the Government of another country, is that its own rights and interests are so far affected as to require a definition of its own relations to the parties. Where a parent Government is seeking to subdue an insurrection by municipal force, and the insurgents claim a political nationality and belligerent rights which the parent Government does not concede, a recognition by a foreign State of full belligerent rights, if not justified by necessity, is a gratuitous demonstration of moral support to the rebellion, and of censure upon the parent Government. But the situation of a foreign State with reference to the contests, and the condition of affairs between the contending parties, may be such as to justify this act. It is important, therefore, to determine what state of affairs, and what relations of the foreign State, justify the recognition.

It is certain that the state of things between the parent State and insurgents must amount, in fact, to a *war*, in the sense of international law; that is, powers and rights of war must be in actual exercise; otherwise the recognition is falsified, for the recognition is of a fact. The tests to determine the question are various, and far more decisive where there is maritime war and commercial relations with foreigners. Among the tests, are the existence of a *de facto* political organization of the insurgents sufficient in character, population, and resources, to constitute it, if left to itself, a State among the nations, reasonably capable of discharging the duties of a State; the actual employment of military forces on each side, acting in accordance with the rules and customs of war, such as the use of flags of truce, cartels, exchange of prisoners, and the treatment of captured insurgents by the parent State as prisoners of war; and at sea, employment by the insurgents of commissioned cruizers, and the exercise by the parent Government of the rights of blockade of insurgent ports against neutral commerce, and of stopping and searching neutral vessels at sea. If all these elements exist, the condition of things is undoubtedly war; and it may be war, before they are all ripened into activity.

"As to the relation of the foreign State to the contest, if it is solely on land, and the foreign State is not contiguous, it is difficult to imagine a call for the recognition. If, for instance, the United States should formally recognize belligerent rights in an insurgent community at the centre of Europe, with no seaports, it would require a hardly supposable necessity to make it else than a mere demonstration of moral support. But a case may arise where a foreign State must decide whether to hold the parent State responsible for acts done by the insurgents, or to deal with the insurgents as a *de facto* Government. (Mr. Canning to Lord Granville on the Greek war, June 22, 1826.) If the foreign State recognizes belligerency in the insurgents, it releases the parent State from responsibility for whatever may be done by the insurgents, or not done by the parent State where the insurgent power extends. (Mr. Adams to Mr. Seward, June 11, 1861, Dip. Corr. 105.) In a contest wholly upon land, a contiguous State may be obliged to make the decision whether or not to regard it as a war; but, in practice, this has not been done by a general and prospective declaration, but by actual treatment of cases as they arise. Where the insurgents and the parent State are maritime, and the foreign nation has extensive commercial relations and trade at the ports of both, and the foreign nation and either or both of the contending parties have considerable naval force, and the domestic contest must extend itself over the sea, then the relations of the foreign State to this contest are far different.

"In such a state of things the liability to political complications, and the questions of right and duty to be decided at once, usually away from home, by private citizens or naval officers, seem to require an authoritative and general decision as to the status of the three parties involved. If the contest is a war, all foreign citizens and officers, whether executive or judicial, are to follow one line of conduct. If it is not a war, they are to follow a totally different line. If it is a war, the commissioned cruizers of both sides may stop, search, and capture the foreign merchant vessel; and that vessel must make no resistance and must submit to adjudication by a prize Court. If it is not a war, the cruizers of neither party can stop or search the foreign merchant-vessel; and that vessel may resist all attempts in that direction, and the ships of war of the foreign State may attack and capture any cruizer persisting in the attempt. If it is war, foreign nations must await the adjudication of prize Tribunals. If it is not war, no such Tribunal can be opened. If it is war, the parent State may institute a blockade *jure gentium* of the insurgent ports, which foreigners must respect; but if it is not a war, foreign nations having large commercial intercourse with the country, will not respect a closing of insurgent ports by paper decrees only. If it is a war, the insurgent cruizers are to be treated by foreign citizens and officials, at sea and in port, as lawful belligerents. If it is not a war, those cruizers are pirates, and may be treated as such. If it is a war, the rules and risks respecting carrying contraband, or despatches, or military persons come into play. If it is not a war, they do not. Within foreign jurisdiction, if it is a war, acts of the insurgents in the way of preparation and equipments for hostility, may be breaches of neutrality laws; while, if it is not a war, they do not come into that category but under the category of piracy or of crimes by municipal law.

"Now, all citizens of a foreign State, and all its executive officers and judicial magistrates, look to the Political Department of their Government to prescribe the rule of their conduct, in all their possible relations with the parties to the contest. This rule is prescribed in the best and most intelligible manner for all possible contingencies by the simple declaration, that the contest is, or is not, to be treated as war. If the state of things requires the decision, it must be made by the Political Department of the Government. It is not fit that cases should be left to be decided as they may arise, by private citizens, or naval or judicial officers, at home or abroad, by sea or land. It is, therefore, the custom of nations for the Political Department of a foreign State to make the decision. It owes it to its own citizens, to the Contending Parties, and to the peace of the world, to make that decision seasonably. If it issues a formal declaration of belligerent rights prematurely, or in a contest with

which it has no complexity, it is a gratuitous and unfriendly act. If the parent Government complains of it, the complaint must be made upon one of these grounds. To decide whether the recognition was uncalled for and premature, requires something more than a consideration of proximate facts, and the overt and formal acts of the Contending Parties. The foreign State is bound and entitled to consider the preceding history of the parties; the magnitude and completeness of the political and military organizations and preparations on each side; the probable extent of the conflict by sea and land; the probable extent and rapidity of its development; and, above all, the probability that its own merchant-vessels, naval officers, and Consuls may be precipitated into sudden and difficult complications abroad. The best that can be said is, that the foreign State may protect itself by a seasonable decision, either upon a test case that arises, or by a general prospective decision; while, on the other hand, if it makes the recognition prematurely, it is liable to the suspicion of an unfriendly purpose to the parent State. The recognition of belligerent rights is not solely to the advantage of the insurgents. They gain the great advantage of a recognized status, and the opportunity to employ commissioned cruizers at sea, and to exert all the powers known to maritime warfare, with the sanction of foreign nations. They can obtain abroad loans, military and naval materials, and enlist men, as against every thing but neutrality laws; their flag and commissions are acknowledged, their revenue laws are respected, and they acquire a quasi political recognition. On the other hand, the parent Government is relieved from responsibility for acts done in the insurgent territory; its blockade of its own ports is respected; and it acquires a right to exert, against neutral commerce, all the powers of a party to a maritime war."

Mr. Dana, though writing after the present dispute, and with reference to it, pronounces no opinion upon it, but the principles he has thus laid down enable us to judge of the matter without difficulty.

The "Santissima Trinidad."

This question was the subject of a solemn decision in the case already cited of the "Santissima Trinidad." One of the points there raised being that the Government of Buenos Ayres, under whose commission the vessel had taken prizes, was invalid, the independence of that State not having been recognized by the Government of the United States, Mr. Justice Story thus disposes of the objection:—

"There is another objection urged against the admission of this vessel to the privileges and immunities of a public ship, which may as well be disposed of in connection with the question already considered. It is, that Buenos Ayres has not yet been acknowledged as a sovereign independent Government by the executive or legislature of the United States, and therefore it is not entitled to have her ships of war recognized by our Courts as national ships. We have, in former cases, had occasion to express our opinion on this point. The Government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed a determination to remain neutral between the parties, and to allow to each the same rights of asylum and hospitality and intercourse. Each party is, therefore, deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war, and entitled to be respected in the exercise of those rights. We cannot interfere to the prejudice of either belligerent, without making ourselves a party to the contest, and departing from the posture of neutrality. 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 as equally the right of each; and, as such, must be recognized by our Courts of Justice, until Congress shall prescribe a different rule. This is the doctrine heretofore asserted by this Court, and we see no reason to depart from it."*

An attempt has indeed been made to show that the judgment in the foregoing case has been overruled or shaken by the succeeding judgment in the case of the Gran Para, in which it is alleged that, notwithstanding the commission of a belligerent Power, a vessel was held to be subject to the jurisdiction of a Court of the United States. I have already shown that, in that case, in which the validity of a capture, made by a privateer fitted out in the United States, was questioned by reason of the illegal character of the capturing vessel, the latter was not a ship of war commissioned by a belligerent Government, but simply an American vessel commissioned as a privateer; nor, indeed, sailing as a privateer under the commission of a recognized belligerent. She still remained, therefore, the private property of an American citizen, unprotected by any commission whatever, and a capture made by her could not be held to be good prize.

In the recent case of the British barque the Hiawatha, and of the Mexican schooner Brillante, which were captured by ships of the United States, for endeavouring to run the blockade, and which had been condemned as prize, an appeal having been brought, and an objection having been taken that the Confederate States could not properly be held to be belligerents, and that consequently the President had no right to establish a blockade, Mr. Justice Grier, in delivering the judgment of the majority of the Court, lays down the following important propositions:—

"Insurrection against a Government may or may not culminate in an organized rebellion; but a civil war always begins by insurrection against the lawful authority of the Government. A civil war

* British Appendix, vol. iii, p. 86.

is never solemnly declared; it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence, have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign; the world acknowledges them as belligerents, and the contest a *war*. *They* claim to be in arms to establish their liberty and independence, in order to become a sovereign State, while the sovereign party treats them as insurgents and rebels who owe allegiance, and who should be punished with death for their treason.

"The laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and miseries produced by the scourge of war. Hence the parties to a civil war usually concede to each other belligerent rights. They exchange prisoners, and adopt the other courtesies and rules common to public or national wars.

"It is not the less a civil war with belligerent parties in hostile array, because it may be called an 'insurrection' by one side, and the insurgents be considered as rebels or traitors. It is not necessary that the independence of the revolted province or State be acknowledged, in order to constitute it a party belligerent in a war according to the law of nations. Foreign nations acknowledge it as war by a declaration of neutrality. The condition of neutrality cannot exist unless there be two belligerent parties. In the case of the *Santissima Trinidad* (7 Wheaton, 337), this Court say: 'The Government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed her determination to remain neutral between the parties. Each party is therefore deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war.'

"The law of nations is also called the law of nature: it is founded on the common consent as well as the common sense of the world. It contains no such anomalous doctrine as that which this Court are now for the first time desired to pronounce, to wit: That insurgents who have risen in rebellion against their Sovereign, expelled her Courts, established a revolutionary Government, organized armies, and commenced hostilities, are not enemies because they are traitors; and a war levied on the Government by traitors, in order to dismember and destroy it, is not a war because it is an 'insurrection.'"

Chief Justice Taney, Mr. Justice Nelson, Mr. Justice Carson, and Mr. Justice Clifford, differed, indeed, from the majority of the Court, on the question as to whether the blockade was, in its inception, lawful, founding their opinion upon the fact that though by the constitution of the United States the President could, in case of invasion or insurrection, call out the national forces, Congress alone could declare war, and that, Congress not having declared war till the 13th of July, 1861, the President had no power to declare a blockade, and consequently that the seizure of these vessels was illegal. But there was no difference of opinion on the question of belligerent status so soon as civil war is declared.

The practice of nations has been entirely in accordance with these principles. All the maritime nations—the others were not concerned in the matter—concurred in according to the Confederate Government the status and rights of a belligerent Power.

Whether acknowledgment premature.

But though it would seem impossible to contest that, at some time during the continuance of the civil war, the recognition of the belligerent status of the Confederate Government must have taken place, it is asserted that the recognition by the British Government was premature. I will endeavour to take a calm and dispassionate view of the position of the parties, and of this much agitated question.

Looking to the state of things which had thus come into existence, Her Majesty's Government could not but see that it would soon become not only right, but also necessary to the protection of British interests, to concede to the Insurgent States the character of belligerents. As soon as it was known in Great Britain that the war was to be extended to naval operations, the interests of British commerce and British subjects required that the belligerent status of both parties to the great struggle, which was evidently about to ensue, should be clearly ascertained and defined. It was plain that a state of things was about to present itself, such as Mr. Dana refers to, as justifying the recognition of belligerency. Much reliance is placed in the Case of the United States,* for the purpose of establishing the desire of the British Government to recognize the insurgents as belligerents at an unduly early period, that as early as the 1st of May, Earl Russell wrote the letter of that date to the Lords of the Admiralty.

The letter is as follows:—

"The intelligence which reached this country by the last mail from the United States gives reason to suppose that a civil war between the Northern and Southern States of the Confederacy was imminent, if indeed it might not be considered to have already begun.

"Simultaneously with the arrival of this news, a telegram, purporting to have been conveyed to Halifax from the United States, was received, which announced that the President of the Southern Confederacy had taken steps for issuing letters of marque against the vessels of the Northern States.

* Page 51.

"If such is really the case, it is obvious that much inconvenience may be occasioned to the numerous British vessels engaged in trade on the coast of the United States and in the Gulf of Mexico, and that timely provision should be made for their protection against undue molestation by reason of the maritime operations of the hostile parties; and Her Majesty has accordingly commanded me to signify to your Lordships her pleasure that adequate reinforcements should forthwith be sent to Her Majesty's squadron on the North American and West Indian station, so that the Admiral in command may be able duly to provide for the protection of British shipping in any emergency that may occur.

"I need scarcely observe to your Lordships that it might be right to apprise the Admiral that, much as Her Majesty regrets the prospect of civil war breaking out in a country in the happiness and peace of which Her Majesty takes the deepest interest, it is Her Majesty's pleasure that nothing should be done by her naval forces which should indicate any partiality or preference for either party in the contest that may ensue."*

When I say that the foregoing letter is relied on, I must correct myself. It is relied on only in a mutilated form. The third paragraph of the letter which gives the key to its purpose, and supplies the motive of the writer, is, I regret to say, omitted—its place being supplied by asterisks—while the other paragraphs are given at length! † When the letter is before us in its entirety, we see plainly that the purpose Earl Russell had in view was, not to give any advantage to the Insurgents, but to secure protection to British shipping in case the invitation of the Confederate President should have the effect of letting loose a swarm of privateers in the American waters.

There can, however, be no doubt that, prior to the issuing of the Queen's Proclamation of Neutrality, Her Majesty's Ministers, having become acquainted with the relative position of the two parties, and seeing plainly that this was no ordinary revolt, and that insurrection had assumed the form of organized government and of organized warfare, and looking to the dimensions the contest was about to take, had come to the conclusion that it would be impossible to withhold from the Insurgent Government the character and rights of belligerents.

At the time the letter last cited was written, nothing was known beyond the fact that the Confederate Government were preparing to issue letters of marque; but on the ensuing day, the 2nd, came the news that President Lincoln had proclaimed a blockade of all the Southern ports, though the terms of the Proclamation were not yet known. Hereupon the Government, in anticipation of any emergency that might arise, adopted the constitutional course of consulting the Law Officers of the Crown.

"Her Majesty's Government heard the other day," said Lord John Russell in the House of Commons on the 2nd of May,—

"That the Confederated States have issued letters of marque, and to-day we have heard that it is intended there shall be a blockade of all the ports of the Southern States. As to the general provisions of the law of nations on these questions, some of the points are so new as well as so important that they have been referred to the Law Officers of the Crown for their opinion, in order to guide the Government in its instructions both to the English Minister in America and the Commander-in-Chief of the naval squadron. Her Majesty's Government has felt that it was its duty to use every possible means to avoid taking any part in the lamentable contest now raging in the American States. Nothing but the imperative duty of protecting British interests, in case they should be attacked, justifies the Government in at all interfering. We have not been involved in any way in that contest, by any act or giving any advice in the matter, and, for God's sake, let us, if possible, keep out of it."‡

On the 6th of May Lord John Russell stated in the House of Commons that the Law Officers and the Government had come to the conclusion that, according to principles which seemed to them to be just, the Southern Confederacy must be treated as a belligerent.§

A despatch to Lord Lyons of the same day, in which Earl Russell developes his views on the subject, is worthy of a wise and considerate statesman:—

"My Lord,

"Her Majesty's Government are disappointed in not having received from you, by the mail which has just arrived, any report of the state of affairs and of the prospects of the several parties, with reference to the issue of the struggle which appears, unfortunately, to have commenced between them; but the interruption of the communication between Washington and New York sufficiently explains the non-arrival of your despatches.

"The accounts, however, which Her Majesty's Consuls at different ports were enabled to forward by the packet, coincide in showing that, whatever may be the final result of what cannot now be designated otherwise than as the civil war which has broken out between the several States of the late Union, for the present, at least, those States have separated into distinct confederacies, and, as such, are carrying on war against each other.

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* Appendix to British Case, vol. iii, p. 3. † See Case of the United States, p. 51.

‡ Hansard, vol. clxii, p. 1378; United States' Documents, vol. iv, p. 482.

§ Hansard, vol. clxii, p. 1564; United States' Documents, vol. iv, p. 483.

"The question for neutral nations to consider is, what is the character of the war; and whether it should be regarded as a war carried on between parties severally in a position to wage war, and to claim the rights and to perform the obligations attaching to belligerents?

"Her Majesty's Government consider that that question can only be answered in the affirmative. If the Government of the Northern portion of the late Union possesses the advantages inherent in long-established Governments, the Government of the Southern portion has, nevertheless, duly constituted itself, and carries on, in a regular form, the administration of the civil government of the States of which it is composed.

"Her Majesty's Government, therefore, without assuming to pronounce upon the merits of the question on which the respective parties are at issue, can do no less than accept the facts presented to them. They deeply deplore the disruption of a confederacy with which they have at all times sought to cultivate the most friendly relations; they view with the greatest apprehension and concern the misery and desolation in which that disruption threatens to involve the provinces now arrayed in arms against each other; but they feel that they cannot question the right of the Southern States to claim to be recognized as a belligerent, and, as such, invested with all the rights and prerogatives of a belligerent."*

Whether the determination to acknowledge the Confederate States as belligerents was come to a few days too soon or not is a matter on which there may possibly be a difference of opinion. But, that on this account British statesmen, acting under an anxious sense of duty, in furtherance of what they believed to be a just and necessary policy, should be publicly accused of having been influenced by the sinister design of promoting the interests of the one party at the expense of the other, while pretending simply to fulfil the duties incidental to their position towards both parties, is a painful thing. The world must judge between the accusers and the accused.

Whether the resolution was come to too soon or not, it was not acted upon till the events which rapidly supervened could leave no doubt on the minds of Her Majesty's Ministers as to issuing the Proclamation of Neutrality. On the 10th of May, a dispatch was received from Lord Lyons, containing a copy of the Proclamation of President Davis as to issuing letters of marque, and a copy of that of President Lincoln, declaring that Southern privateers should be treated as pirates, and announcing the blockade of the Southern ports.†

The British Government contends, and, as it seems to me, most justly, that when, by declaring the Southern ports blockaded, the President openly acknowledged the existence of a civil war, and thereby recognized the Confederate States as belligerents in the face of the world, he thereby rendered it not only the right, but the duty of the British Government to treat them as such.

That it became the right of Her Majesty's Government so to treat them can admit of no possible doubt: no jurist, I am satisfied, will assert the contrary. The pretension that the Federal Government could treat the contest as a war, so as to declare a blockade, and thereby exclude neutral nations from access to the blockaded ports for the purpose of trade, while neutral Governments, on the other hand, were not entitled to treat the war as one going on between two belligerent Powers, is a proposition which is, I say it with all respect for Mr. Adams, really preposterous.

Applying the principles laid down by the Editor of Wheaton, in the note which I have quoted at length, as well as by the other eminent jurists to whom I have referred, can any one doubt that Her Majesty's Government were fully justified in recognizing the belligerent character of the Confederate States. When the war between the two parties to the contest became extended to the ocean, the interests of maritime nations, and more especially of Great Britain, with its extensive commerce with the ports of both Southern and Northern States, became at once seriously involved. Between Great Britain and the Southern ports there was the constant intercourse of an active and extensive commerce. The British shipowners and merchants had a right to look to the Government for protection to ships and cargoes, if interfered with, in time of peace, in any way not warranted by international law. It was the duty of Her Majesty's ships of war stationed on the neighbouring naval stations, or detached from them, to afford that protection. So long as the war was not acknowledged by Her Majesty as a legitimate war, any interference by either belligerent with a British ship might have proved the occasion of some serious collision.

With the recognition by Her Majesty of the war, all her subjects would know that the blockade must be treated as a lawful one, and that any trade attempted to be carried on with the blockaded ports would be at the peril of the parties attempting it.

Unless the blockaded ports were treated as the ports of a belligerent, there could be no lawful blockade. The blockade of its own ports by a State, to the exclusion of those who have a right to trade with its subjects, is a thing unknown and unheard of.

* United States' Documents, vol. i, p. 37. † British Appendix, vol. iii, p. 6.

The subjects of Great Britain had, by existing Treaties, the right of trading with those of the United States. If the citizens of the Southern States were still to be looked upon as citizens of the United States, British merchant ships had a right of free access to the Southern ports notwithstanding the blockade. Nor could the British Government deprive them of this right, or refuse them its protection if forcibly interfered with.

The effect of a blockade in the disturbance of contracts previously made, makes it of the utmost importance to the commercial world to have the earliest notice of the fact, and of the recognition of it by the Government; the more so as it has been considered that official notice of a blockade to a Government is sufficient notice to its subjects.

All these important considerations appear to me to show, beyond the possibility of dispute, that it becomes the duty of a neutral Government, when it is made aware of the fact of a blockade, to give notice of it to its subjects at the very earliest moment.

The alternative of refusing to acknowledge the war, as a war between two belligerent Powers, was therefore to refuse to acknowledge the blockade. Would the United States have preferred that Great Britain should adopt this alternative?

By establishing the blockade, therefore, the Government of the United States made it, as I have said, not only the right but the duty of Her Majesty's Government to acknowledge the belligerency of the Confederates, and thus to give to the war, so far as British subjects were concerned, the incidents which attach to war, as respects the relative rights and obligations of belligerents and neutrals.

The policy of the Government was explained and justified by Lord Russell in a letter to Mr. Adams, of the 4th May, 1865:—

"Let me remind you that when the civil war in America broke out so suddenly, so violently, and so extensively, that event, in the preparation of which Great Britain had no share, caused nothing but detriment and injury to Her Majesty's subjects; Great Britain had previously carried on a large commerce with the Southern States of the Union, and had procured there the staple which furnished materials for the industry of millions of her people.

"Had there been no war, the existing Treaties with the United States would have secured the continuance of a commerce mutually advantageous and desirable. But what was the first act of the President of the United States? He proclaimed, on the 19th of April, 1861, the blockade of the ports of seven States of the Union. But he could lawfully interrupt the trade of neutrals to the Southern States upon one ground only, namely, that the Southern States were carrying on war against the Government of the United States; in other words, that they were belligerents.

"Her Majesty's Government, on hearing of these events, had only two courses to pursue, namely, that of acknowledging the blockade and proclaiming the neutrality of Her Majesty, or that of refusing to acknowledge the blockade, and insisting upon the rights of Her Majesty's subjects to trade with the ports of the South. Her Majesty's Government pursued the former course as at once the most just and the most friendly to the United States.

"It is obvious, indeed, that the course of treating the vessels of the Southern States as piratical vessels, and their crews as pirates, would have been to renounce the character of neutrals and to take part in the war; nay, it would have been doing more than the United States themselves, who have never treated the prisoners they have made either by land or sea as rebels and pirates, but as prisoners of war, to be detained until regularly exchanged.

"So much as to the step, which you say your Government can never regard 'as otherwise than precipitate,' of acknowledging the Southern States as belligerents. It was, on the contrary, your own Government which, in assuming the belligerent right of blockade, recognized the Southern States as belligerents. Had they not been belligerents, the armed ships of the United States would have had no right to stop a single British ship upon the high seas."*

But it is said that the recognition was premature, because, when it was made, the official announcement of the blockade had not yet been received. What if this had been so? The blockade existed in fact; it was known to the British Government; and it was important to Her Majesty's subjects that it should be made known to them at the earliest possible moment. But this assumption, rashly made in the Case of the United States, turns out to be incorrect. The facts stood thus: The Proclamation of the President with regard to the ports of the seven States was issued on the 19th of April. It was followed by a similar Proclamation of the 27th, as to the ports of North Carolina and Virginia. The blockade was effectually established on the 30th. The issuing of the Proclamations was communicated to Lord Lyons, the Minister of Great Britain at Washington, on the 29th. On the 1st of May, Mr. Seward, the Secretary of State of the United States, writes to him as follows:—

"The so-called Confederate States have waged an insurrectionary war against this Government. They are buying, and even seizing, vessels in several places for the purpose of furnishing themselves

* United States' Documents, vol. i, p. 295.

with a naval force, and they are issuing letters of marque to privateers to be employed in preying on the commerce of this country. You are aware that the President has proclaimed a blockade of the ports included within the insurgent States. All these circumstances are known to the world."*

On the 3rd of May, the proclamation of the blockade, which had appeared in the Boston newspapers, was published in the London newspapers. It turned out afterwards that there were inaccuracies in the version thus given by the Boston newspapers; but the substance of the thing remained the same; there was no doubt that the blockade had been declared.

On the 5th of May, the Government received a letter of the 23rd of April from their Consul at New York, transmitting a copy, correct in all essential particulars, of the proclamation of the blockade, as also a complete copy of that of President Davis inviting applications for letters of marque.† On the 10th of May, complete copies of both proclamations were received from the British Minister at Washington.‡

In the meantime, a copy of the President's Proclamation of the 19th of April having been forwarded by Mr. Secretary Seward to Mr. Dallas, the United States' Minister in England, it was officially communicated by Mr. Dallas to Lord Russell on the 11th of May.§ Her Majesty's Proclamation of Neutrality was not issued till the 14th of May. Thus it was not till three days after the official communication last referred to, and nine days after a copy had been received from the British Consul at New York, that Her Majesty's Proclamation of Neutrality was issued.

But it is said that the expected arrival of Mr. Adams should have been awaited. What difference could it have made? No explanations afforded by that gentleman could have altered the facts—facts which made it the duty of the Government to advise Her Majesty to recognize the validity of the blockade, and, in order so to do, to recognize also the belligerent status of the *de facto* Confederate Government.

But the not waiting for Mr. Adams is put forward as a breach of faith on the part of Earl Russell, his Lordship having, it is said, pledged himself to Mr. Dallas, the predecessor of Mr. Adams, to await the arrival of the latter. Here again we have an entire misconception. No such pledge was given, or intended to be given. What passed between Lord Russell and Mr. Dallas appears from a letter of the latter to Mr. Seward of the 2nd of May:—

"The solicitude felt by Lord John Russell as to the effect of certain measures represented as likely to be adopted by the President induced him to request me to call at his private residence yesterday. I did so. He told me that the three representatives of the Southern Confederacy were here; that he had not seen them, but was not unwilling to do so, *unofficially;* that there existed an understanding between the Government and that of France, which would lead both to take the same course as to recognition, whatever that course might be; and he then referred to the rumour of a meditated blockade of Southern ports and their discontinuance as ports of entry—topics on which I had heard nothing, and could therefore say nothing. But as I informed him that Mr. Adams had apprised me of his intention to be on his way hither, in the steam-ship Niagara, which left Boston on the 1st May, and that he would probably arrive in less than two weeks, by the 12th or 15th instant, his Lordship acquiesced in the expediency of disregarding mere rumour, and waiting the full knowledge to be brought by my successor."‖

It is plain that the motive for waiting the arrival of Mr. Adams was to obtain positive knowledge in the place of "mere rumour"—that is, "rumour of a meditated blockade;" not that there was any intention of discussing with Mr. Adams the question of the Proclamation of Neutrality, if the rumour proved correct. When authentic information came in the copies of the President's Proclamation officially furnished to the Foreign Office, full knowledge took the place of rumour, and the latter became converted into certainty. All motive for delay then ceased, and the time for action had arrived.

Yet this has been magnified into a breach of faith, and that by persons who had this letter before them.

Recognition of belligerency.

The example of Great Britain in acknowledging the Confederate States as belligerents was followed by the Emperor of the French in a Proclamation of the 10th of June; by the King of the Netherlands on the 16th; by the Queen of Spain on the 17th; by the Emperor of Brazil on the 1st of August.

Course pursued by foreign Powers.

The Government of the United States, however, refused to concede to other nations the right of acknowledging the belligerent status of the seceding States. In these they saw only what Mr. Seward termed "a discontented domestic faction." Writing to Mr. Dayton on the 30th of May, 1861, Mr. Seward says:—

* Appendix to British Case, vol. iii, p. 12.
† Appendix to British Case, vol. iii, p. 4. ‡ Ibid., p. 6. § Ibid., p. 7.
‖ United States' Documents, vol. i, p. 34.

"The United States cannot for a moment allow the French Government to rest under the delusive belief that they will be content to have the Confederate States recognized as a belligerent Power by States with which this nation is in amity. No concert of action among foreign States so recognizing the insurgents can reconcile the United States to such a proceeding, whatever may be the consequences of resistance."*

In a despatch from Mr. Seward to Mr. Dayton of the 17th June, 1861, the former writes:—

"The United States, rightly jealous, as we think, of their sovereignty, cannot suffer themselves to debate any abridgement of that sovereignty with France or with any other nation. Much less can it consent that France shall announce to it a conclusion of her own against that sovereignty, which conclusion France has adopted without any previous conference with the United States on the subject. This Government insists that the United States are one whole undivided nation, especially so far as foreign nations are concerned, and that France is, by the law of nations and by Treaties, not a neutral Power between two imaginary parties here, but a friend of the United States.

* * * * * *

"It is erroneous, so far as foreign nations are concerned, to suppose that any war exists in the United States. Certainly there cannot be two belligerent Powers where there is no war. There is here, as there has always been, one political Power, namely, the United States of America, competent to make war and peace, and conduct commerce and alliances with all foreign nations. There is none other either in fact or recognized by foreign nations. There is, indeed, an armed sedition seeking to overthrow the Government, and the Government is employing military and naval forces to repress it. But these facts do not constitute a war presenting two belligerent Powers, and modifying the national character, rights, and responsibilities, or the characters, rights, and responsibilities of foreign nations. It is true that insurrection may ripen into revolution, and that revolution thus ripened may extinguish a previously existing State, or divide it into one or more independent States, and that if such States continue their strife after such division, then there exists a state of war affecting the characters, rights, and duties of all the Parties concerned. But this only happens when the revolution has thus run its successful course.

"The French Government says, in the instruction which has been tendered to us, that certain facts which it assumes confer upon the insurgents of this country, in the eyes of foreign Powers, all the appearances of a Government *de facto*, wherefore, whatever may be its regrets, the French Government must consider the two Contending Parties as employing the forces at their disposal in conformity with the laws of war.

"This statement assumes not only that the law of nations entitles any insurrectionary faction, when it establishes a *de facto* Government, to be treated as belligerent, but also that the fact of the attainment of this status is to be determined by the appearance of it in the eyes of foreign nations. If we should concede both of these positions, we should still insist that the existence of a *de facto* Government, entitled to belligerent rights, is not established in the present case."†

In a despatch of June 19 he writes:—

"What is now seen in this country is the occurrence, by no means peculiar, but frequent in all countries, more frequent even in Great Britain than here, of an armed insurrection engaged in attempting to overthrow the regularly-constituted and established Government. There is, of course, the employment of force by the Government to suppress the insurrection, as every other Government necessarily employs force in such cases. But these incidents by no means constitute a state of war impairing the sovereignty of the Government, creating belligerent sections, and entitling foreign States to intervene or to act as neutrals between them, or in any other way to cast off their lawful obligations to the nation thus for the moment disturbed."‡

Writing to Mr. Adams on the 21st of July, he says:—

"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 position assumed by the United States' Government was plainly untenable, being neither more nor less than this, that when a body of States secede from a former Government and form one of their own, the original Government is to be the sole judge as to when the status of belligerency can be conceded—a proposition wholly at variance with all received principles of International Law.

How Lord Russell viewed the matter appears from a despatch to Lord Lyons of June 21:—

"I have to state to your Lordship that I have every reason to be satisfied with the language and conduct of Mr. Adams since he has arrived in this country.

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* United States' Appendix, vol. i, p. 192.
† Ibid., p. 202.
‡ Ibid., p. 206.
§ Ibid., p. 214.

"The only complaint which he has urged here is, that the Queen's Proclamation announcing her neutrality was hasty and premature.

"I said, in the first place, that our position was of necessity one of neutrality; that we could not take part either for the North against the South, or for the South against the North.

"To this he willingly assented, and said that the United States expected no assistance from us to enable their Government to finish the war.

"I rejoined that if such was the case, as I supposed, it would not have been right either towards our admirals and naval commanders, nor towards our merchants and mercantile marine, to leave them without positive and public orders; that the exercise of belligerent rights of search and capture by a band of adventurers clustered in some small island in the Greek Archipelago or in the Atlantic would subject them to the penalties of piracy; but we could not treat 5,000,000 of men, who had declared their independence, like a band of marauders or filibusters. If we had done so, we should have done more than the United States themselves. Their troops had taken prisoners many of the adherents of the Confederacy, but I could not perceive from the newspapers that in any case they had brought these prisoners to trial for high treason, or shot them as rebels. Had we hung the captain of an armed vessel of the Southern Confederacy as a pirate, we should have done that which a sense of humanity had prohibited on the part of the Government itself."

Question as to Confederate Vessels.

The question soon assumed a practical form. When the Government of the Confederate States had armed certain vessels, and had placed them under the command of officers duly commissioned by it, and those vessels put into ports of the neutral Powers, the Government of the United States protested loudly against their being received as vessels of war, on the ground that the Insurgent States still formed an integral portion of the Union; that they were to be looked upon as rebels; and that commissions from a Government, the independence of which had not been acknowledged, could not give to its ships the character of ships of war. They insisted, therefore, on these vessels being looked upon as pirates, to which all entry into the ports of other nations, and all assistance of every kind should be denied. The Federal Government even went further, and threatened to hold neutral Governments responsible for any assistance or supplies afforded to Confederate ships. But the neutral Governments were unanimous in refusing to accede to these demands, and persisted in conceding to the Confederate ships the same privileges as were afforded to those of the United States.

Discussion with Government of the Netherlands.

The question first arose with the Government of the Netherlands, on the occasion of the visit of the Confederate vessel, the Sumter, to the Dutch Island of Curaçoa, in August 1861, and of her being allowed to replenish her stock of coal and obtain supplies there. The fact having come to the knowledge of Mr. Seward, he forthwith instructed Mr. Pike, the United States' Minister at the Hague, to bring the matter immediately to the notice of the Government:—

"You are instructed to bring this matter immediately to the notice of the Government of the Netherlands. The subject of damages for so great a violation of the rights of the United States will be considered when we shall have properly verified the facts of the case. In the meantime you will ask the Government of the Netherlands for any explanation of the transaction it may be able or see fit to give. You will further say that the United States, if the case thus stated shall prove to be correct, will expect, in view of the Treaties existing between the two countries, and the principles of the law of nations, as well as upon the ground of assurances recently received from the Government of the Netherlands, that it will disown the action of its authorities at Curaçoa, and will adopt efficient means to prevent a recurrence of such proceedings hereafter."*

Mr. Pike accordingly protests against the idea "that aid and countenance could be afforded by a friendly Power to the Sumter, though she did assume the character of a ship of war of the Insurgents. I claimed," he says—

"That were she afforded shelter and supplies on this ground by the Authorities at Curaçoa, and should the Dutch Government approve the act, it would be, substantially, a recognition of the Southern Confederacy, and that, in my judgment, such an act would be regarded by the United States as an unfriendly and even hostile act, which might lead to the gravest consequences. I held that nothing more need be asked by the so-styled Confederate States, as a practical measure of recognition, than that a ship like the Sumter, claiming to be a national vessel of those States, should be permitted to enter the neighbouring ports of foreign nations, and there obtain the necessary means to enable her to depredate upon the commerce of the United States. That such a course on the part of any Power, aggravated by the fact that she was unable to obtain such supplies at home, so far from being neutral conduct, was really to afford the most efficient aid to the men who were in rebellion against their own Government, and plundering and destroying the vessels and property of their fellow-citizens on the high seas. I protested against such a doctrine as tending necessarily to the termination of all friendly relations between our Government and any Government that would tolerate such practices, whether that Govern-

* British Appendix, vol. vi, p. 69.

ment were France, or England, or Spain, or Holland. I remarked that it was not for me to judge of the purposes of European Powers in regard to the existing state of things in the United States; but if there were to be exhibited a disposition anywhere to take advantage of our present situation, I believed it would be found that such a course could not be taken with impunity now, nor without leading to alienation and bitterness in the future."*

A correspondence ensued between Mr. Pike and Baron Van Zuylen, the Netherlands Minister for Foreign Affairs, in which the former denied the right of other nations to accord to the Insurgent States the character of a belligerent Power, and insisted that the vessels of the Confederate Government were but "piratical craft," or at best could only be looked upon as privateers, in which character they would be excluded, except in case of distress, from ports of the Netherlands.

M. Van Zuylen stated the views of his Government in a most able paper, from which, however, owing to its length, I must confine myself to a few extracts:—

"It is not sufficient to dispose of the difficulty by the declaration that the Sumter is, as is stated in your despatches, '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. M. Ortolan ('Diplomatie de la Mer,' i, p. 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, p. 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 cruizing. Thus the Sumter is designated in the extract annexed from 'Harper's Weekly,' under the name of 'rebel ship of war.'"

"Thirdly. It cannot be held, as you propose in your despatch 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 these 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."†

After referring to historical precedents, especially the case of the United States themselves in their struggle for independence, "Is there need," he asks, "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 pretence that the letters of marque which they bore did not emanate from the Sovereign but from revolted subjects? But Great Britain soon had to desist from this pretention, and to accord international treatment to the colonists in arms against the mother-country."

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* British Appendix, vol. vi, p. 70.

† Ibid., pp. 76, 77.

M. Van Zuylen cites also the precedent 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 the 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 despatch 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 2nd of September."*

The subject was resumed in the ensuing October, when the Sumter had again put into a Dutch port, namely, Paramaribo, and, in spite of the remonstrance of the United States' Consul, had been allowed to coal and refit, Mr. Seward immediately directs Mr. Pike to demand explanations. Mr. Pike loses no time in writing in peremptory terms :—

"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 the rebellion against the United States' Government to practise upon the presumed indifference, the expected favour, 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 harbours 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 reply, Baron Van Zuylen repeats the refusal of the royal Government to treat the Sumter as other than a ship of war. He observes, that the commission of the officer in command of her had been duly exhibited to the Governor. At the same time he informs Mr. Pike—

"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 provide themselves with a quantity of coal more than sufficient for a run of twenty-four hours."‡

The offensive tone of Mr. Pike's previous letter does not pass unnoticed :—

"The feeling of distrust which seems to have dictated your last despatch 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 honour 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."§

In the mean time, Mr. Seward had written a despatch to Mr. Pike, of the 17th October, in which he states, in explicit terms, "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

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* British Appendix, vol vi, pp. 76, 77. † Ibid., p. 82. ‡ Ibid., p. 84.
§ Ibid., p. 85.

the Governor 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 any 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 not 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 obtained 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 to, 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."*

Mr. Pike expresses his satisfaction at the restrictions placed by the Government of the Netherlands on the Confederate vessels, but at the same time regrets that the same treatment shonld have been adopted towards the vessels of the United States; to which M. Van Zuylen replies that, the United States' Government having desired that measures should be taken to prevent the prolonged stay in Dutch ports of the Sumter or other vessels in the seceding States, the King's Government had admitted the justice of the claim, but that the measures taken could not reach one of the two parties exclusively: they must be general.

The new regulations led to a singular result. On the 8th of November the United States' steamer Iroquois arrived off the port of Curaçoa; the Governor informed Lieutenant Palmer, who was in command of the vessel, that her stay must be limited to forty-eight hours, and her supply of coal to twenty-four hours consumption, although at the time the United States had more than 1,300 tons of coal at Curaçoa, which, by the way, shows that they had established a depôt there. Lieutenant Palmer declined to enter the port on these terms, and his conduct in so doing was approved by Mr. Seward. Mr. Pike is directed to ask for explanations, with this remark from Mr. Seward:—

"If His Majesty's Government shall approve of the proceedings of the Governor of Curaçoa, it will become an important question what measure of hospitalities will be due by us to the naval vessels and authorities of the Netherlands in similar cases."‡

Thus, while the regulation was received with satisfaction by the United States' Government, as a restriction on Confederate vessels, an attempt to enforce it against one of their own was looked upon as matter of grave offence. It so happened, however, that the Dutch Government had shortly before, on the suggestion of the Governor of Curaçoa, revoked the order.

No sooner had this been done than the Government of the United States desired its restoration. Mr. Pike is instructed to lose no time in "calling the attention of Mr. Stratenus to the subject of the intrusion of insurgent piratical American vessels seeking shelter in the ports of the Netherlands and their colonies. If you cannot obtain a decree excluding them altogether, it is thought that the Government will have no hesitation in restoring the restrictive policy which was adopted by it under the representatives of its foreign affairs by Baron Van Zuylen."‡

Mr. Pike was at the same time instructed to call upon the King's Government to

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* British Appendix, vol. vi, pp. 86, 87 † Ibid., p. 91. ‡ Ibid., p. 95.

reconsider the subject of according to the Confederate States the character of belligerents, and, in the then state of affairs, to revoke the recognition.

Both proposals were declined by the King's Government. The inconsistency of the demand for the restoration of the restrictive order is pointed out by M. de Sombreff, the new Minister of Foreign Affairs:—

"In this regard I permit myself to observe to you that I could not understand how your Government could desire the re-establishment of measures which actually were, and would again be, applicable to both parties, and which were, at the time, the cause why the Union ship Iroquois would not enter the port of Curaçoa under the rule of said restrictive measures.

"It was on that occasion that the last were modified, which was brought to your notice the 30th of December, 1861.

"It follows, from advices which have since reached the Government, that the new Commander of the Iroquois has expressed himself well satisfied to find the precedent restrictive measures withdrawn, and thus to have the privilege of taking as much coal as he might wish. These measures are also favourable to Netherlands commerce with the United States, so that the interests of the two countries are in perfect accord.

"If the instructions given before the month of December 1861 were now returned to, the Government of the Netherlands might not only be taxed, with good reason, with trifling, but would hurt its own interests, as well as those of the Union, considering that the consequence of said instructions would be, as has been remarked in the communication of Baron de Zuylen, dated October 29, 1861, that the vessels-of-war of the United States, also, could no longer be able to sojourn in the Netherlands East Indian ports more than twice twenty-four hours, nor supply themselves with coal for a run of more than twenty-four hours."*

Correspondence with Brazil.

A similar correspondence had, in the meantime, been going on between the United States' Government and that of Brazil, in consequence of the Sumter having, on the 7th of September, 1861, been allowed to enter the Brazilian port of Maranham, and to take in a supply of coal there, notwithstanding the protest of the United States' Consul. Mr. Webb, the United States' Minister at the Court of the Emperor, is instructed to "lose no time in calling the attention of the Emperor's Government to the affair."

"You will ask explanations thereof, and, unless satisfactory explanations are rendered, you will then inform His Majesty's Government that the shelter and supplying of pirates, as the Sumter is sheltered and supplied, in the ports of Brazil, are deemed an unfriendly act by this Government, and will ask that such measures shall be taken in regard to the case as will make the Governor of Maranham sensible of His Majesty's displeasure, and will prevent a recurrence of such injuries to the United States hereafter.

"I hardly need say that the proceeding at Maranham is an occurrence of great surprise and deep disquiet to the United States. That we have supposed that Brazil and every other State on the American continent have an interest second only to our own in the stability of the American Union, the downfall of which would, in our belief, inevitably be followed sooner or later by the decline and fall of every independent nation on this continent, which must in that case become once more a theatre for the ambition of European Powers.

"Such respect for the sovereignty of the United States as one great nation owes to another is an indispensable condition of friendly relations with foreign Powers in the present emergency. You will therefore take care not, for one moment, to admit into debate any question of claim on the part of the insurgents to any rights, whether as a sovereign or a belligerent."†

Mr. Webb thereupon addresses to Senhor Taques, the Secretary of State for Foreign Affairs, a despatch of prodigious length, but which ends with the pertinent inquiry:—

"Whether it is or is not the intention of the Brazilian Government to permit the piratical letters of marque and privateers of the rebels of the United States to enter into the ports of Brazil, and there find succour and material aid—'provisions and coal—to continue their voyages' against the commerce of the United States?" ‡

Senhor Taques replied, as the Baron van Zuylen had done before him, in a most able paper, in which he reminded Mr. Webb of the numerous instances in which Governments *de facto* had been admitted to the status of belligerents, although their sovereign character had not been acknowledged, pointing out that the recognition of belligerency carried with it the consequence that the commissioned vessels of the acknowledged belligerent could not be treated as pirates, but must receive the same treatment as those of the opponent.

The correspondence continued, and, owing to the exceeding fertility of Mr. Webb's pen, assumes very formidable proportions. It led to the regulations which I have already mentioned; which regulations the Presidents of the provinces were ordered to enforce.

Mr. Seward reviews the correspondence with evident dissatisfaction:—

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* British Appendix, vol. vi, p. 99. † Ibid., p. 4. ‡ Ibid., p. 10.

"We cannot admit, and we are not likely to admit, that anything has occurred to relieve Brazil, or any other Power holding Treaty relations with us, from fulfilling the obligations of friendship towards us which it has heretofore voluntarily assumed; much less can we admit that any such nation has a right, by adopting a character of neutrality, to give hospitality, shelter, and supplies to pirates engaged in destroying our commerce, whether they affect to be public vessels of war, or are content to sail under cover of pretended letters of marque granted by the chief of their treasonable faction.

"At the same time we are not looking out for causes of conflict with maritime Powers. We state our complaints whenever grievances are committed by them, and we ask the redress due to us from friendly States. Unwilling to drag such Powers into our own domestic strife, we are content with a practical respect for our flag, and we engage in no discussions with them about the unjust or unfriendly manifestations with which that practical respect is sometimes attended. Acting on this principle, we have brought to the notice of the Brazilian Government the grievance committed against us by the Governor of Maranham. That Government, instead of giving us redress, or taking any measures to prevent a repetition of the grievance, has avowed and sanctioned it."*

"In the position thus assumed, the Brazilian Government stands single and alone. We cannot, with self-respect, further remonstrate nor debate. I confess that the attitude assumed by Brazil embarrasses us, because it tends to encourage our internal enemies. We trust, however, that we possess the ability to maintain and preserve our Government against all enemies at home, however much aid and encouragement they may receive from abroad.

"It is not needful that you state to the Brazilian Government any part of the contents of this despatch except its conclusions, which are these: 1st. We stand upon the position heretofore assumed, that the proceedings of the Governor of Maranham are intolerable. 2nd. We cannot further debate at Rio, nor can we change the field of the discussion from that capital to Washington. 3rd. Conscious of our ability to protect all our national rights, we neither importune nor menace any foreign State which may deem it fit to do us wrong. But so fast as every such case matures we determine, with what prudence and firmness we can, the course which the emergency requires."†

Mr. Webb re-echoes:—

"We cannot go to war with all the world; and while circumstances compel us to acquiesce in the conduct of England, Spain, and Holland, we cannot insist upon reparation from Brazil for having adopted the same line of policy towards us."‡

The Marquis d'Abrantes having succeeded Senhor Taques as Minister of Foreign Affairs, in reference to Mr. Seward's last despatches writes, on the 16th of June, to Mr. Webb:—

"In view of the conclusions of the last of the despatches referred to from the Government of the Union, the Government of His Majesty the Emperor judges convenient to regard at an end the discussion of the subject it treats, it being flattering to observe that from it nothing has resulted in the least altering the relations of friendship and good understanding between the two countries which it so much interests both to maintain."

Hereupon Mr. Webb breaks out. After repeating verbatim the complaints set out in his letter of the 18th of March, he continues:—

"Here, as your Excellency will perceive, is not only grave cause for complaint set forth, but a mode is pointed out in which the friendly relations heretofore existing between the two countries can be restored, viz., by a simple act of justice, reversing the decision which Brazil has hastily made. If Brazil cannot meet the reasonable expectation of the Government of the United States, then the Secretary of State, speaking in the name of the President and the Government, claims, at least, as a concession to the past friendly relations of the two countries, that Brazil will no longer occupy towards the United States a more unfriendly position than any other Power; but, by following the example of other nations, place herself 'on the same ground in relation to the United States which is occupied by other maritime powers, and thus mitigate the discontent' which it is made my duty to report to this Government.

"But this is not all. In a despatch from Washington, dated the 3rd April, the Undersigned is instructed to say to the Government of His Imperial Majesty that the Government of the United States, standing 'upon the position heretofore assumed,' declare 'that the proceedings of the Governor of Maranham *are intolerable;* and we cannot further debate at Rio, nor can we change the field of the discussion from that capital to Washington.'

"And how are these complaints, remonstrances, and friendly intimations to Brazil, from the Government of the United States, received by the Imperial Government? Why, the Undersigned is called upon to apprise his Government that Brazil has 'put an end to this discussion upon the aforesaid subject,' and is happy to perceive that 'not the least alteration will result from it in the relations of friendship and good understanding between the countries.'

"Most assuredly these are not the results which the Government of the United States promised itself when it ordered the Undersigned to place before the Government of Brazil the despatches of the 18th of March, and the very significant extract from that of the 3rd of April; and while it is the duty of the Undersigned to convey to his Government an answer so very different from what he anticipated, self-respect demands that he should not act as a mere automaton in the matter; and an earnest desire to restore and perpetuate the friendly relations which formerly existed between the two countries

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* British Appendix, vol. vi, p. 33. † Ibid., p. 35. ‡ Ibid., p. 39.

compels him to remind your Excellency that so desirable a result cannot be obtained by utterly ignoring our complaints, by treating them as alike groundless and unmeaning, and by assuming that nothing has occurred to interrupt the good *feelings* or disturb the friendly relations between the two countries. The Undersigned is grateful to a kind Providence that in what has occurred the existing friendly relations between the two Governments have *not* been disturbed; but he is not unmindful that the good feelings upon which those friendly relations were based, and which is ever the best safeguard for their continuance, have been trifled with by the conduct of the Governor of Maranham, and which conduct has been defended, sustained, and approved by your immediate predecessor, speaking in the name of the Imperial Government of Brazil.

"The Government of the United States, for more than a year, has been actively engaged in putting down the greatest rebellion recorded in the history of the world. A civil war, which has called into the field more than a million of soldiers, and which imposed upon the Government of the United States the raising and equipping of an army of seven hundred thousand men, and a fleet of nearly five hundred vessels to do battle for our national existence, has called forth the energies and exhibited the resources of a mighty people; and yet, in the hour of greatest peril, our Government has not hesitated to tell the nations of the world which have done her wrong, when resistance to such wrong was impossible, that 'the United States will not debate with other States a question vital to its own existence,' but content herself with pointing out the wrong done her, leaving for the present the expiation of such wrong and injury solely to the sense of justice and magnanimity of those who once styled themselves friends. Hence, as our Secretary of State justly says, 'acting on this principle we have brought to the notice of the Brazilian Government the grievance committed against us by the President of Maranham. That Government, instead of giving us redress, or taking measures to prevent a repetition of the grievance, has avowed and sustained it.

"Hence the Undersigned is instructed to say to the Brazilian Government 'that while the United States cannot ask Brazil for less than the absolute exclusion of pirates from her harbours, yet, standing as she does alone among nations, in the extent of her unfriendly attitude, if she would but place herself upon the same ground in relation to the United States which is occupied by other maritime Powers, it would *mitigate* the discontent which you are authorized to express;' and as if foreseeing the failure of this appeal to the friendship and justice of Brazil, the Undersigned is ordered to say, in conclusion, that, 'conscious of our ability to protect all our national rights, we neither importune nor menace any foreign State which may deem it fit to do us wrong; but so fast as every such case matures we determine, with what prudence and firmness we can, the course which the emergency requires.'

"Inasmuch as the Government of the United States has definitively closed all further discussion of the affair of the pirate Sumter, either here or at Washington, nothing of the kind is intended in this despatch; its sole object being to point out to your Excellency that, so far from nothing having occurred to disturb the good *feeling* upon which is based the friendly relations between the United States and Brazil, the whole course of your predecessor in relation to the visit of the pirate Sumter to Maranham, and the present attitude of Brazil towards the piratical vessels belonging to the rebel States and to our national vessels, is considered by the Government of Washington untenable, unjust, and '*intolerable.*'

"It is quite unnecessary for the Undersigned to repeat his ardent desire to draw closer and render more permanent the relations between the United States and Brazil, and the establishment by them of an 'American policy,' in contradistinction to what is the recognized policy of Europe, as is being developed by interference with the internal affairs of *Mexico;* and he is pained to see all his efforts in this regard, and all the wishes of his Government, set at naught by the perseverance of Brazil in a course declared by the Government of Washington to be *more unfriendly* than that of any other foreign Power; and by ignoring every fact, sentiment, and position taken in the Washington despatches of the 18th March and 3rd of April, and utterly refusing to perceive or admit that the United States feels aggrieved by the conduct of Brazil, and confidently expects that she will not persevere in maintaining a position more unfriendly than that of any other maritime Power. Adherence by Brazil to her present unfriendly attitude is deprecated by the Undersigned, not because he believes such a course calculated to cause a disruption of the peaceful relations existing between the two countries; there exists no such danger. The Government of the United States has demonstrated to the world that while struggling for its national existence against a gigantic rebellion, it can submit with grace and a not unbecoming humility to the irritating assaults made upon it in the hour of adversity, whether they emanate from ancient enemies or professed friends. But nations, like individuals, while they frequently *forgive* injuries, do not always *forget* them. And it is because perseverance in her present course by Brazil may induce the people of the United States to forget the friendly feelings upon which the existing peaceful relations between the two countries are based that the policy of your predecessor is deprecated."*

The discussion on this subject was revived in the ensuing year by the arrival of the Alabama, and shortly afterwards the Florida and Georgia, in Brazilian ports. The first-named ship took two American vessels within Brazilian waters and burned them there. Notwithstanding which her commander was allowed to go on shore at the island of Fernando Noronha, and there to obtain supplies for the vessel and to land the prisoners. For this the officer commanding at Fernando de Noronha was displaced. The Florida was allowed to enter the port of Pernambuco, and there to refit and coal, in despite of the protest of the United States' Consul that the Florida was a pirate and the consort of the Alabama, which had just before violated the neutrality of Brazilian waters.

* British Appendix, vol. vi, pp. 40, 41.

"Nevertheless," says Mr. Webb in writing to the Marquis d'Abrantes on the 21st of May, 1863—

"Because her commander represented that the ship required repairs to her engine which could not be done within the twenty-four hours, the Governor, in a communication to the pirate, now before the Undersigned, dated the 9th of May, informed the applicant that, inasmuch as he represented to him that a compliance with his order to leave in twenty-four hours will compel him to do so in a distressed condition, because the repairs to his engine, necessary to his safety, cannot be completed in that time, and would be illiberal and inhuman, and expose him to danger, and Brazil to the consequences; and inasmuch as he, the Governor, does not wish to be inhuman or illiberal, or endanger the safety of the pirate, or to lessen his means of defence, or to expose him to imminent risks, therefore, believing the representation to have been made in good faith, and that he cannot in safety continue his cruize (against American commerce bound to Brazil) unless given time to repair his engine, the said Governor, representing the sovereignty of Brazil, and recognizing the traitors in rebellion against the United States as belligerents, does accord to the commander of the pirate bearing their flag all the time he asks for repairs, and privilege of taking in such coals and provisions as may place him in a condition to continue his depredations upon the commerce of a friendly Power. A grosser breach of neutrality has never come to the knowledge of the Undersigned."*

He adds:—

"At this moment the ports of Brazil are made harbours of refuge and places of resort and departure for three piratical vessels, avowedly designed to prey upon the commerce of the United States. The waters of Brazil are violated with impunity in this piratical work, and after the Imperial Government had admitted and declared its indignation at such violation of sovereignty, the guilty party is received with hospitality and friendship by the Governor of Bahia, and instead of being captured and imprisoned, and his vessel detained, he is fêted, and supplied with the necessary provisions and coal, to enable him to continue his depredations upon American commerce. The wharves and streets of Bahia and Pernambuco have been, for weeks past, swarmed with American sailors and passengers from merchantmen trading with Brazil which have been captured, and the persons on board robbed, by the pirates of the Alabama, Florida, and Georgia, and they have been compelled, in the ports of a friendly nation, to witness their clothing and jewellery, and even family relics, sold on the wharves and in the streets of Bahia and Pernambuco, by their piratical captors, at a tenth of their value; while the piratical vessels and all on board were received and treated as friends, and supplied with the necessary materials to continue their nefarious practices. The scenes which history informs us were rife in the seventeenth century, in the islands of the West Indies, are now being enacted in this nineteenth century in the ports of Brazil, and that through no fault of the Imperial Government—which has already done its whole duty as rapidly as circumstances have permitted—but because the Governors of Pernambuco and Bahia, in their sympathy with piracy and pirates, have neglected their duty to Brazil, and brought discredit upon the civilization of the age."†

As regards the Alabama, which at this time had come into the port of Bahia Mr. Webb insists that she should have been seized by the Governor for her violation of Brazilian neutrality:—

"Your Excellency will not for a moment deny that, having by your official acts, and those of the Governor of Pernambuco, recognized the fact that this pirate has violated the waters and outraged the sovereignty of Brazil, it is your duty, when opportunity offers, to vindicate your violated sovereignty, and by his capture, if possible, remunerate the injury done to American commerce within your waters. And should the pirate come into this port when the ability of Brazil to capture and detain him admits of no question, beyond all doubt the neglect to do so would be not only an unfriendly act towards the United States, but would render Brazil responsible for all and every aggression which he might commit on American commerce after leaving this port.‡ . . . . At this moment, the ports of Brazil are made harbours of refuge and places of resort and departure for three piratical vessels, avowedly designed to prey upon the commerce of the United States. The waters of Brazil are violated with impunity in this piratical work, and after the Imperial Government had admitted and declared its indignation at such violation of sovereignty, the guilty party is received with hospitality and friendship by the Governor of Bahia, and instead of being captured and imprisoned, and his vessel detained, he is *fêted*, and supplied with the necessary provisions and coal, to enable him to continue his depredations upon American commerce."§

The Marquis d'Abrantes answers, as to the non-seizure of the Alabama, that the Governor of Bahia had not sufficient information to warrant him in taking such a measure: as to the Florida and Georgia, by going over the same topics as his predecessor had done, and with equal ability.

The Government of Brazil did not seize the Alabama; but it did exclude that vessel from its ports for the future, for having made prizes in Brazilian waters, and applied the same rule to the Tuscaloosa as being a tender of the delinquent vessel.

It was immediately after this troublesome correspondence that the Imperial Government promulgated the rules contained in the Circular of June 23, 1863 (set out in the 7th Volume of American Documents, p. 110), which, in point of stringency, far exceed what any other nation had ever thought it necessary to enact. The United

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* British Appendix, vol. vi, p. 49. † Ibid., p. 51. ‡ Ibid., p. 50. § Ibid., p. 51.

States have never adopted any such rules, nor can it for a moment be said that Great Britain ought to be bound by them.

This is the country of which, in the Argument of the United States it is stated, I presume in compliment to our distinguished Brazilian colleague:—

"In the American Case, and the documents to which it refers, there is sufficient indication of the loyalty and efficiency with which the Brazilian Government maintained its sovereignty against the aggressive efforts of the Confederates."*

Correspondence with Spain.

A similar question arose with the Spanish Government on the entry of the Sumter into Cadiz, with a requisition to have repairs done and to coal. After difficulties raised by the United States' Representatives, permission was given, though the repairs were limited to what was absolutely necessary.†

Correspondence with French Government.

The same question arose with the French Government when the Sumter put into St. Pierre, in the Island of Martinique, in November 1861, and was permitted by the Governor to coal, which permission was afterwards approved of by the French Government.‡ It arose in a still more striking form when the Florida put into Brest to repair and coal; as we shall see more fully hereafter when I come to the case of that vessel. Mr. Dayton, the United States' Minister at the Court of France, objected to her being received or being allowed to have repairs done to her machinery, but his protest is in the more moderate tone of a statesman and a man of the world; we hear no more about "pirates;" his objection is that, being possessed of sailing power, the vessel did not require the aid of steam—an argument which was, however, overruled by the Imperial Council.§

Correspondence with British Government.

This question was raised between the United States and Her Majesty's Government on the arrival of the Sumter, on the 30th July, 1861, at Trinidad, where she was allowed to coal and to remain six days in port. This was, in due course, complained of to Her Majesty's Government, Mr. Seward declaring that "the armament, the insurgent flag, and the spurious commission should have told the Governor, as they sufficiently prove to Her Majesty's Government, that the Sumter is and can be nothing else than a piratical vessel."‖ Of course this argument did not prevail with Her Majesty's Government any more than it did with those of the Netherlands, France, or Brazil.

It was obvious that the Confederates having once been acknowledged as belligerents, the admission of their ships of war to the neutral ports and harbours followed as the necessary consequence.

The objection to the reception of these vessels took a somewhat different and more telling form in the case of the Confederate ship the Nashville, which, having left the Confederate port of Charleston, had been allowed to coal at Bermuda on her voyage to England.

On that voyage the Nashville committed one of those acts which stained this hateful warfare with eternal opprobrium—that of setting fire to a harmless trading vessel and making her crew prisoners of war. This proceeding was made a ground by Mr. Adams, on the arrival of the Nashville, for claiming that the vessel should not be received into a British port. In terms of just and honest indignation he writes to Earl Russell:—

"The act of wilfully burning a private merchant-ship whilst pursuing its way quietly to its destination in its own country seems in itself little to harmonize with the general sentiment among civilized and commercial nations, even when it is committed under the authority of a recognized belligerent; but when voluntarily undertaken by individuals not vested with the powers generally acknowledged to be necessary to justify aggressive warfare, it approximates too closely within the definition of piracy to receive the smallest countenance from any Christian people. The Undersigned cannot permit himself to doubt that Her Majesty's Government, which has voluntarily renounced the authority to wage private war at sea, would not fail to visit with its utmost indignation any attempt to seek shelter under its jurisdiction from the consequences of indulging a purely partizan malice in unauthorized acts of violence on the ocean."¶

Mr. Morse, the United States' Consul at London, only expressed the public feeling when he wrote to Mr. Seward:—

"The leading event of the current week has been the appearance of the corsair Nashville from Charleston in European waters, and her wanton and malicious destruction of an American ship by

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* Page 67. † British Appendix, vol. vi, pp. 117–119.
‡ See British Case, p. 17, and letter of British Consul Lawless to Earl Russell, British Appendix, vol. i, p. 257.
§ British Appendix, vol. vi, pp. 132, 133. ‖ United States' Documents, vol. vi, p. 193.
¶ British Appendix, vol. ii, p. 92.

burning about seventy-five miles west of Cape Clear, off the southern coast of Ireland, and her bold entrance into a British port for coal and repairs the day following the committal of the barbarous act, It has, as a matter of course, created much comment, and no little excitement here.

"So far as I can learn and judge, the public voice here is very strong and outspoken in condemning and denouncing the act as malicious and piratical. It has taken the English people by surprise, and is doing much to enlighten them as to the character of the enemy with whom we are dealing."*

But such an act could not be held to be sufficient ground of exclusion. However, revolting such a system of warfare, it was still within the stern principle of international law, relative to war, which justifies both the seizure and the destruction of enemy's ships and goods at sea, on the principle that whatever tends to impoverish the enemy is allowable. The practice had been sanctioned by the conduct of the United States themselves, in their last war with Great Britain.

When the civil war was over, it occurred to the United States' Government that, though Captain Semmes had been admitted to parole as a prisoner of war, and could not therefore be proceeded against criminally under the law relating to treason, he might, nevertheless, be made amenable to the penal law for the destruction of ships and cargoes belonging to citizens of the United States. But the idea was abandoned, and Mr. John A. Bolles, Solicitor to the Navy Department of the United States, in an article, bearing his name, in the July number of the "Atlantic Monthly,"† under the title of "Why Semmes, of the Alabama, was not tried," has fully explained the reasons, and among them has made us acquainted with the course pursued by the United States' Government in the war with England in 1812 and 1813. The question whether Semmes should be prosecuted or not seems to have been referred by the President to Mr. Bolles and the Law Officer of the Department, who appear to have entered upon and conducted the inquiry with a discrimination, ability, and sense of justice which do them infinite honour. In the article referred to Mr. Bolles, in the first place, observes 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 guerillas, 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."‡

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This premised, Mr. Bolles writes:—

"Without consulting publicist or jurisconsult, it was easily possible to see and show that we, as a Government, could not afford to prosecute and punish as a criminal any naval officer for capturing and destroying the enemy's trading vessels, as fast as possible, not only without any attempt to send them in for adjudication, but with a determined purpose and policy not to do so.

"This conclusion was the result of a careful study of our own naval history, and of a thoughtful examination of future possibilities in the event of war between the United States and some great commercial nation.

"I will not dwell upon this last division of the topic, but content myself with a reference to that past theory and practice of our naval warfare which rendered it impossible to punish Semmes for having learned and practised so successfully the lesson taught by our own instruction and example in the Revolutionary War, when we were rebels, and in the last war (1812) with Great Britain.

"The earlier records are imperfect; but enough can be gathered from our naval historian, Cooper, to show that many of the vessels captured in the war of the Revolution were destroyed at sea.

"Of the history and policy of the later period we have abundant proofs. Not less than seventy-four British merchantmen were captured, and destroyed as soon as captured, under express instructions from the Navy Department, and in pursuance of a deliberate purpose and plan, without any attempt or intent to send or bring them in as prizes for adjudication. The orders of the Department upon this subject are numerous, emphatic, and carefully prepared. They deserve to be studied and remembered; and they effectually silence all American right or disposition to complain of Semmes for having imitated our example in obedience to similar orders from the Secretary of the Confederate Navy.

"The instructions to which I refer were addressed to Captains David Porter and O. H. Perry, each in command of a squadron; to Captain Charles Stewart, of the Constitution, twice; to Captain

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* "United States" Documents, vol. ii, p. 549. † Page 89.

‡ "The reluctance with which this recognition was granted does not affect its validity. After having refused, again and again, President Davis's offers of exchange, the Federal Executive, being at last notified that fourteen Union prisoners—six colonels, two lieutenant-colonels, three majors, and three captains—had been shut up in felons' cells, to be hung whenever the Confederate privateers were executed, concluded to regard those "pirates" as lawful belligerents entitled to exchange."

Charles Morris, of the Congress; Commandant Lewis Warrington, of the Peacock; Commandant Johnstone Blakely, of the Wasp; Master Commandant Joseph Bainbridge, of the Frolic; Master Commandant George Parker, of the Siren; Master Commandant John O. Creighton, of the Rattlesnake; Lieutenant William H. Allen, of the Argus; Lieutenant James Renshaw, of the Enterprise; and Master Ridgely, of the Erie.

"Extracts from the instructions of the Department which led to these immediate burnings of captured vessels will best show the precise purpose and deliberate policy of the Government. I will, therefore, quote brief passages from some five or six different orders as samples of all.

"'The great object' says one of them, 'is the destruction of the commerce of the enemy, and the bringing into port the prisoners, in order to exchange against our unfortunate countrymen who may fall into his hands.' 'You will therefore man no prize, unless the value, place of capture, and other favourable circumstances, shall render safe arrival morally certain.' 'You will not agree to the ransoming of any prize.' 'Grant no cartel nor liberate any prisoners except under circumstances of extreme and unavoidable necessity.'

"In another it is said, 'You will, therefore, unless in some extraordinary cases that shall clearly warrant an exception, destroy all you capture; and by thus retaining your crew and continuing your cruize, your services may be enhanced tenfold.'

"'I have it in command from the President strictly to prohibit the giving or accepting, directly or indirectly, a challenge to combat ship to ship.'

"Again: 'Your own sound judgment and observation will sufficiently demonstrate to you how extremely precarious and injurious is the attempt to send in a prize, unless taken very near a friendly port, and under the most favourable circumstances. . . . . Policy, interest, and duty combine to dictate the destruction of all captures, with the above exceptions.'

"Another: 'The commerce of the enemy is the most vulnerable point of the enemy we can attack, and its destruction the main object; and to this end all your efforts should be directed. Therefore, unless your prizes should be very valuable and near a friendly port, it will be imprudent and worse than useless to attempt to send them in; the chances of recapture are excessively great; the crew, the safety of the ship under your command, would be diminished and endangered, as well as your own fame and the national honour, by hazarding a battle after the reduction of your officers and crew by manning prizes. In every point of view, then, it will be proper to destroy what you capture, except valuable and compact articles, that may be transhipped. This system gives to one ship the force of many.'

"Another order says that 'a single cruizer, if ever so successful, can man but a few prizes, and every prize is a serious diminution of her force; but a single cruizer destroying every captured vessel has the capacity of continuing, in full vigour, her destructive power, so long as her provisions and stores can be replenished, either from friendly ports or from the vessels captured. . . . . Thus has a single cruizer, upon *the destructive plan*, the power, perhaps, of twenty acting upon pecuniary views alone; . . . . and thus may the employment of our small force in some degree compensate for the great inequality [of our force] compared with that of the enemy.'

"Such were the policy and the orders of President Madison and of the Secretary of the Navy in 1812, 1813, 1814; and such, beyond question, would be the plan and the instructions of any Administration under the circumstances."*

In conclusion, Mr. Bolles says:—

"It is evident that, after it had been, as it soon was, resolved that neither treason or 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 offences 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 cruizer 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 towards Captain Winslow and the Power he represented."

The two questions thus left are dealt with by Mr. Bolles in the following number of the same Review, in a most interesting paper; the result being wholly to exculpate Semmes of every charge of ill-treatment or cruelty to prisoners; to acquit him of any charge of perfidy during the engagement with the Kearsarge; but to maintain that he was guilty of a violation of military honour in not surrendering himself as a prisoner of war after being taken off by the Deerhound.

The British Government having thus decided on acknowledging the Confederate States as a belligerent Power, and, as a necessary consequence, on the admission of Confederate ships of war into British ports on the same footing as those of the United States, it only remains to be seen whether the same treatment was afforded to both which impartial neutrality would require.

Regulations of 31st of January, 1861.

On the 1st of June, 1861, Her Majesty's Order was issued prohibiting, as has not been unusual in the case of modern maritime wars, and has been general with reference to privateers, the introduction of prizes by the ships of either belligerent into

* Page 97.

British ports.* Whatever may, generally speaking, be the motive of such a regulation, it was, in the present instance, obviously a measure the effect of which was to place the Confederate vessels in a position of considerable disadvantage, seeing that, their own ports being strictly blockaded, they were thus left without any port into which to take their prizes. Accordingly, as reported in a despatch from Lord Lyons to Earl Russell of the 17th June, 1861, it was hailed by Mr. Seward as "likely to prove a deathblow to Southern privateering." As it was clearly at the discretion of Her Majesty's Government to adopt this regulation or not, it must be admitted that thus far there was no manifestation of the partiality by which that Government has been said to have been animated.

Regulations of 31st January, 1872.

In January 1862, after the war had been going on for some months, circumstances arose which made further regulations as to the admission of the armed vessels of the two belligerents into British ports necessary. Instructions, bearing date the 31st January, 1862, were accordingly issued by the Government.* One of these had reference to the ports of the Bahamas in particular, the others to the ports and waters of Her Majesty's dominions in general.

As to Nassau.

The following state of things had arisen at Nassau. As has been so often repeated, the port of Nassau had been made the entrepôt for the blockade-running trade, the natural consequence of which had been that the waters of the colony were watched by, and their immediate vicinity made, the cruizing ground of Federal ships.

In October 1861, Mr. Adams forwarded to Lord Russell an intercepted letter from a Mr. Baldwin, whom he stated to be in the service of the Insurgents, addressed to a Mr. Adderley, of Nassau, from which he said that it appeared that Nassau had been made, to some extent an entrepôt for the transmission of contraband of war from Great Britain to the blockaded ports.† The matter was referred by Lord Russell to the Colonial office, and by that Department to the Governor of the Colony, and the latter forwarded, in reply, on the 20th November, 1861, a report from the Receiver-General at Nassau, stating that no warlike stores had been received at that port either from the United Kingdom or elsewhere, nor had any munitions of war been shipped from Nassau to the Confederate States.‡ This report, received by Lord Russell on the 31st of December, was communicated to Mr. Adams on the 8th of January, 1862.§

Upon this the Case of the United States makes the following remark:—

"The United States with confidence assert, in view of what has been already shown, that, had Earl Russell seriously inquired into the complaints of Mr. Adams, a state of facts would have been disclosed entirely at variance with this report—one which would have impelled Her Majesty's Government to suppress what was going on at Nassau. The foregoing facts were all within the reach of Her Majesty's Government, although at that time not within the reach of the Government of the United States. The failure to discover them after Mr. Adams had called attention to them, was a neglect of the diligence in the preservation of its neutrality, which was 'due' from Great Britain to the United States; and it taints all the subsequent conduct of Great Britain toward the United States during the struggle."‖

Further on, Lord Russell's communication is described as the "announcement of an imaginary condition of affairs;"¶ thus making it appear that, at the date of Lord Russell's communication, the report received from Nassau and transmitted by him was an unfaithful one; whereas the fact was that, at the date of the report, no vessel laden with munitions of war had arrived at Nassau.

It was not till the 8th of December that a vessel, the Gladiator, with a cargo of arms, suspected of being intended for the Confederate States, arrived at Nassau. The United States' Consul at once sent a message to the Commander of the United States' naval forces at Key West to request the presence of a cruizer.** On the 13th of December he reports the "most opportune" arrival of the United States' war-steamer Flambeau from New York, and adds that her commander "is watching intently the movements of the rebel steamers."†† From a letter addressed by the Governor to the British Naval Officer on the station it appears that the Flambeau kept her steam up ready for instant movement, causing considerable alarm among the shipping in the port; and that a rumour prevailed that her commander meant to cut out the Gladiator, or, at all events, to seize that vessel immediately on her leaving.‡‡

The dispatches reporting this state of affairs were received in London on the 16th of January, and the attention of the British Government was necessarily called to the

* British Appendix, vol. iii, p. 18. † United States' Documents, vol. i, p. 520.
‡ British Appendix, vol. v, p. 26. § United States' Documents, vol. vi, p. 57.
‖ Case of the United States, p. 232. ¶ Ibid., p. 234.
** United States' Documents, vol. vi, p. 44. †† Ibid., p. 47. ‡‡ British Appendix, vol. v, p. 27.

peculiar position of the Bahama Archipelago. On the one hand, it was obvious that it would form a convenient place of resort for Confederate privateers; while, on the other, it seemed likely that its ports and waters would be used by the United States' war-vessels for the purpose of watching and pursuing Confederate vessels or others engaged in trade with the blockaded ports, so that collisions in the waters of the Colony or in their immediate neighbourhood would be almost certain to result. To prevent this it was necessary to provide some special regulation.

About the same time, the Nashville Confederate war-steamer having put into the port of Southampton for repairs and coal, the United States' war-steamer Tuscarora, which had coaled at the same port, was found to be closely watching her for the avowed purpose of intercepting and seizing her on her again putting to sea. By keeping his steam up and keeping slips on his cable, the Commander of the Tuscarora was virtually keeping the Nashville blockaded, thus plainly making the waters of the Solent the base of naval operations.*

Upon this M. Calvo, in the second volume of his well-known work, "Le Droit International," after stating the facts relative to the two vessels, says: "La corvette Fédérale la Tuscarora entra dans le même port pour surveiller son ennemi, et l'attaquer dès qu'il reprendrait la mer. Devant cette attitude hostile les autorités locales intervinrent, et la Tuscarora, abandonnant son poste d'observation sans toutefois renoncer à ses projets, resta près d'un mois dans les eaux Anglaises au mépris des règles les moins contestées du droit international."†

In the preceding November, after the reception of the Sumter at Trinidad, Mr. Seward had, through Lord Lyons, pressed upon the British Government, the propriety of adopting the rule laid down, as he said, by the other Powers of Europe, not to allow privateers to remain for more than twenty-four hours in their ports.‡

Such a rule, relating exclusively to privateers, was not one which Her Majesty's Government were at all called upon to apply to commissioned ships of war such as the Sumter, any more than the other maritime Powers had done—Mr. Seward being, in this respect, altogether mistaken, as was shown by the readiness with which the other maritime Powers received Confederate vessels of war into their ports and allowed them to stay there. Still, when to prevent the possibility of hostile collisions in their own ports, the British Government found it expedient to apply this rule to vessels of war indiscriminately, they might be assured that in doing so they would give cause of satisfaction rather than of complaint to the United States' Government.

The instructions issued were to the following effect:—1. No ship of war or privateer of either belligerent was to be permitted to enter any port, roadstead, or water in the Bahamas except by special leave of the Lieutenant-Governor, or in case of stress of weather; and in case such permission should be given, the vessel was, nevertheless, to be required to go to sea as soon as possible, and with no supplies except such as might be necessary for immediate use. 2. No ship of war or privateer of either belligerent was to be permitted to use British ports or waters as a station or place of resort for any warlike purpose, or for the purpose of obtaining any facilities of warlike equipment. 3. Such ships or privateers entering British waters were to be required to depart within twenty-four hours after entrance, except in case of stress of weather, or requiring provisions or things for the crew or repairs; in which cases they were to go to sea as soon as possible after the expiration of the twenty-four hours, taking only the supplies necessary for immediate use: they were not to remain in port more than twenty-four hours after the completion of necessary repairs. 4. Supplies to such ships or privateers were to be limited to what might be necessary for the subsistence of the crew, and to sufficient coal to take the vessel to the nearest port of its own country, or to some nearer destination; and a vessel that had been supplied with coal in British waters, could not be again supplied with it within British jurisdiction, until after the expiration of three months from the date of the last supply taken from a British port.

With reference to the regulation concerning Nassau, the Case of the United States has the following remark:—

"An order more unfriendly to the United States, more directly in the interest of the insurgents could not have been made, even if founded upon Heyliger's friendly intimations to the Colonial authorities. Under the construction practically put upon it, the vessels of war of the United States were excluded from this harbour for any purpose, while it was open for free ingress and egress to vessels of the insurgents, purchased or built and owned by the authorities at Richmond, bringing their

* British Appendix, vol. ii, p. 120. † Vol. ii, p. 423.
‡ United States' Documents, vol. i, p. 342.

cotton to be transhipped in British bottoms to Fraser, Trenholm, and Co., in Liverpool, and taking on board the cargoes of arms and munitions of war which have been dispatched thither from Liverpool."*

And in another place it is observed:—

"The instructions of January 31, 1862, forbade both belligerents alike to enter the port of Nassau except by permission of the Governor, or in stress of weather. That permission was lavishly given to every insurgent cruizer, but was granted churlishly, if at all, to the vessels of the United States."†

How devoid of all foundation are these complaints will appear from the facts stated in the British Counter-Case, where it is observed:—

"It will perhaps be a matter of some little surprise to the Tribunal to learn, that whereas on two occasions only did vessels visit the port of Nassau as Confederate cruizers, there are no less than thirty-four visits of United States' ships of war to the Bahama Islands recorded during the time that the regulation was in force. On four occasions, at least, vessels of the United States exceeded the twenty-four hours limit, and took in coal by permission; one of them also received permission to repair; several were engaged in pursuit of vessels suspected of being blockade-runners, and did not in every instance relinquish the chase within British limits. Two prizes appear, indeed, to have been captured by them, one within a mile of the shore, the other almost in port."‡

The tabular statement of visits of United States' vessels to the Bahamas during the civil war, which is printed in the British Appendix, abundantly bears out the answer thus given.§

The general regulations applicable to all Her Majesty's ports, which, as we have seen, were in conformity with the wishes of the United States' Government, though not intended by the British Government to have any operation more favourable to one belligerent than the other, nevertheless could not fail to prove very prejudicial to the Confederates, the strict blockade of whose ports left their ships of war without any ports to which they could resort for repairs or supplies, or into which they could take their prizes. The rule forbidding them a greater supply of coal than would suffice to take them to their nearest port, and prohibiting also a renewal of the supply within three months, was obviously calculated to place them at the greatest possible disadvantage. Compelled, from having no ports of their own, to keep the sea, their means of doing so were necessarily lessened, and the regulation, in itself so unfavourable to the Confederate vessels, was rendered still more so by the strict construction put on it by Her Majesty's Government, by whom the Governors of the different Colonies were instructed that, in case of any special application for leave to coal at a British port within the three months, if it appeared that any part of the former supply had been consumed otherwise than in gaining the nearest port, not even stress of weather should form a ground of exception.‖ As no Confederate vessel could seek its nearest port, this was practically to prevent the possibility of a renewed supply under any circumstances within the three months.

The attempts on the part of the United States to show that any favour was extended to Confederate cruizers which was withheld from their own vessels, appear to me signally to fail.

The only specific instances in which any complaint has been made (and if there had been any others we may be quite sure we should have heard of them) are the cases of the Keystone State, Quaker City, and the Dacotah. As to the two first, the answer given in the British Counter-Case on the authority of a letter from the Governor of Bermuda to the Secretary of State for the Colonies, and which is further borne out by the letters of the commanding officers of the vessels themselves, is as follows:—

"An allusion is made in a foot-note at page 324 of the Case of the United States, to the failure of the United States' vessels Keystone State and Quaker City to obtain coal at Bermuda in December 1861. At that time there was no restriction on the coaling of belligerent vessels. All that happened was, that the British Admiral declined to supply the two vessels mentioned from the Government stores, not having a sufficient stock for his own vessels. A similar answer had, in the foregoing October, been returned to the Commander of the Nashville, who had supplied himself from private sources, but this, on account either of the scarcity or the high price of coal in the Colony, the United States' officers did not do."¶

As regards the Dacotah, which was allowed to supply herself with coal at Nassau, but only on an engagement from her commander that his vessel should not, within ten days after leaving the port, be found cruizing within five miles of any of the Bahama Islands, Governor Bayley, in a letter to the Secretary of State for the Colonies of the 2nd May, 1863, states:—

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* Page 228. † Page 316. ‡ Pages 109, 110.

§ British Appendix, vol. v, p. 224. ‖ Ibid., vol. iii, p. 19.

¶ British Counter-Case, pp. 115, 116; British Appendix, vol. v, p. 7; United States' Documents, vol. vi, p. 52.

"I have no distinct recollection of the special reasons which induced me to impose the restrictions mentioned by the Consul in the Dacotah's coaling; I can only suppose that I did this in consequence of the pertinacity with which Federal vessels about that time resorted to the harbour on pretence of coaling, but really with the object of watching the arrival and departure of English merchant-vessels, supposed to be freighted with cargoes for the Southern ports. Had not such prohibition been issued, the harbour would have become a mere convenience for Federal men-of-war running in and out to intercept British shipping. And that such conditions as I thought it my duty to impose were tempered by a proper feeling of courtesy and humanity will, I think, be made evident by the accompanying letters from the American Consul on the subject of the Federal man-of-war, the R. Cuyler, and the memoranda of my replies endorsed upon them by myself.

"On the whole I am satisfied that I have acted with perfect impartiality in all my dealings with Federal and Confederate men-of-war. But I am not surprised that my conduct should have been misrepresented by so hot-headed a partizan as the late American Consul, Mr. Whiting, whose ingenuity in misconstruction is well illustrated by his reply to my letter of the 29th of September, of both of which papers I inclose copies, with the endorsation of the draft of my replies to his last communication.

"I think that these inclosures will be sufficient to prove that, in my demeanour to the Federal men-of-war, I have generally preserved an attitude of fairness and impartiality. And that if, at any time I have appeared to assume an unfriendly or inhospitable mien, the charge can be fully explained and defended by my desire to maintain the security of a British possession and the rights of British subjects."

Alleged partiality as to coaling.

Another subject of complaint is that partiality, inconsistent with neutrality, was exhibited towards Confederate vessels by reason that these, as in the case of the Sumter, were permitted to coal, while liberty to form a depôt of coal at Bermuda, for the supply of their ships of war was denied to the United States. I cannot suppose that any member of this Tribunal could be misled by such a contention. It is obvious that to allow one belligerent to have a supply always stored up and ready, and to leave the other to take his chance of the public market, are things essentially different, and that, far from the refusal of such an advantage to the United States being a violation of neutrality, the concession would have been so in the opposite direction. Moreover, such an act involves a forgetfulness of one of the elementary principles of international law. A neutral is only justified in allowing to a belligerent vessel the use of his ports and access to his shores to obtain the things which the belligerent may lawfully procure. He has no right to allow the belligerent the use of his territory on shore for belligerent purposes, which the permission to form a depôt would necessarily involve.

The practical answer to all these complaints is to be found in the striking facts stated in the British Counter-Case, with reference to the number of visits to British ports by the ships of war of the two belligerents, and to the quantity of coal received by them respectively. The statement in question is as follows:—

"During the course of the Civil War ten Confederate cruizers visited British ports. The total number of such visits was twenty-five, eleven of which were made for the purpose of effecting repairs. Coal was taken in at sixteen of these visits, and on sixteen occasions the limit of stay fixed by the regulations was exceeded. In one of these cases, however, the excess was no more than two hours, and in another, the delay was enforced in order to allow twenty-four hours to elapse between the departure of a United States' merchant-vessel and that of the Confederate cruizer. On the other hand, the returns which have been procured of visits of United States' vessels of war to ports of Great Britain and the Colonies, though necessarily imperfect, show an aggregate total of 228 such visits. On thirteen of these repairs were effected; on forty-five occasions supplies of coal were obtained; and the twenty-four hours' limit of stay was forty-four times exceeded. The total amount of coal obtained by Confederate cruizers in British ports during the whole course of the Civil War, though it cannot be ascertained with accuracy, may be estimated to have amounted to about 2,800 tons. The aggregate amount similarly supplied to vessels of the United States cannot be estimated, from the want of data as to the supplies in many cases, but those cases alone in which the quantities are recorded show a total of over 5,000 tons; and this, notwithstanding the United States' navy had free access to their own coaling depôts, often close at hand. In one case a vessel of war of the United States, the Vanderbilt, alone received 2,000 tons of coal at different British ports within the space of less than two months, being more than two-thirds of the whole amount obtained from first to last by Confederate vessels."†

Supplies of arms obtained from Great Britain.

The second head of complaint has assumed a more sensational and effective form in representing Great Britain as "the arsenal, the navy yard, and the treasury of the insurgents." Again and again has this highly coloured representation been paraded. Let us see what, when stripped of rhetorical flourish, it really amounts to.

Having determined to support their effort to establish their independence by war, the Confederates of course required arms and munitions of war. Both were to be had

* British Appendix, vol. i, p. 79.

† Page 118.

in Great Britain in abundance. The commercial relations of the Southern States had been principally with Great Britain. It was natural that in Great Britain they should seek the arms which were so essentially necessary to them. But arms and munitions of war are not to be had for nothing. It was, necessary, therefore, that arrangements should be made for the deposit of funds in England to pay for the articles bought there. To carry on these operations—to purchase the articles required—to pay for them—to ship them—agents were, of course, necessary. Agents were accordingly established in England and provided with the necessary funds. Thus far, no one can say that there was anything contrary to the law of nations, or to the municipal law, or to obligations morally incumbent on a neutral Government or a neutral people. As Jefferson said, more than three-quarters of a century ago:—

"Our citizens have been always free to make, vend, and export arms. It is the constant occupation and livelihood of some of them. To suppress their callings, the only means perhaps of their subsistence, because a war exists in foreign and distant countries, in which we have no concern, would scarcely be expected. It would be hard in principle, and impossible in practice. The law of nations, therefore, respecting the rights of those at peace, does not require from them such an internal 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 any of the belligerent Powers on their way to the ports of their enemies. To this penalty our citizens are warned that they will be abandoned, and that even private contraventions may work no inequality between the parties at war, the benefit of them will be left equally free and open to all."

Substitute Her Majesty's Proclamation and Her Majesty's subjects for the American phraseology, and the cases are identically the same.

But had the United States no arsenal in Great Britain? As we have seen, arms and munitions of war were purchased by the United States in Great Britain to the amount of 2,000,000*l.* sterling. Several agents, Colonel Thomas, Colonel Schuyler, Mr. J. R. Schuyler, Mr. Tomes, were sent over to order and select the arms, and forward them to the United States.

It appears from the British Counter-Case, and the documents therein referred to, that—

"Colonel Thomas, of the United States' army, was in England during the war, and came over to England to superintend the purchases of military stores. Colonel G. L. Schuyler was, in July 1861, appointed by the President of the United States 'a duly authorized agent to purchase arms in Europe for the War Department.' He received his instructions from the Secretary of War with a Memorandum from General J. W. Ripley, of the Ordnance Department at Washington, specifying the arms to be purchased, viz., 100,000 rifle muskets with bayonets, 10,000 cavalry carbines, 10,000 revolvers, and 20,000 sabres. The financial arrangements for these purchases were to be made by the Secretary to the Treasury with Messrs. Baring, financial agents for the United States in London, and a credit of 2,000,000 dollars was appropriated for the purpose.

"In the summer or autumn of 1861, Mr. J. R. Schuyler and Mr. Tomes, of the firm of Schuyler, Hartley, and Graham, of New York, visited Birmingham, and, after communicating with the principal rifle, bayonet, and sword manufacturers there, gave orders for as many of those articles as their respective manufactories were capable of supplying, the goods to be paid for on delivery to them at a place to be subsequently named, or on shipment, Messrs. Schuyler and Tomes made no concealment of the fact that these arms were destined for the American Government, and they intimated their intention of continuing unlimited orders for a period of two years. They took warehouses in Birmingham for the receipt of arms when completed, and shipped them through the agency of Messrs. Baring Brothers, and Messrs. Brown, Shipley, and Co., of Liverpool. It appears from the Returns made to Congress of arms purchased by the United States' War Department up to December 1862, that 8,650 rifles and 232 revolvers of English manufacture had at that time been supplied by Messrs. Schuyler, Hartley, and Graham; but Mr. Schuyler is also believed to have acted as agent for the purchase of arms for the State of New York. Messrs. Schuyler and Tomes were soon followed to Birmingham by a Mr. Lockwood of New York, who had entered into a contract for the supply of rifles, bayonets, and swords to the War Department at Washington. He also gave unlimited orders for such articles, acting, however, to some extent, in concert with Messrs. Schuyler and Tomes, and shipping the goods through the agency of the same houses at Liverpool. The effect of these orders was to raise the prices in the Birmingham gun trade to the extent of 20 per cent.; indeed, the price of rifles rose from 52*s.* to 75*s.* each."

A Mr. Laumont Dupont also came to England, furnished with a credit of 82,800*l.* on Messrs. Baring, and purchased and shipped saltpetre to the amount of very nearly 80,000*l.*

Messrs. Naylor, Vickers, and Co., of New York, Liverpool, and London, bought and shipped to the United States large quantities of small arms. They were supplied from Birmingham alone with 156,000 rifles between June 1862 and July 1863. They acted very extensively as agents of the United States' Government, and submitted to that Government large proposals from the Birmingham Small Arms Company. The Assistant Secretary of War at Washington, in a letter addressed to them on the 20th October, 1862, directly sanctioned an arrangement for the supply of 100,000 rifles, and

the acceptance of this order was duly notified to the Secretary of War by a letter from Birmingham, dated November 4, 1862. The arms were sent to Liverpool for shipment. In December 1863, fifty 68-pounder guns were proved at the Royal Arsenal at Woolwich, at the request of Messrs. T. and C. Hood, and, after proof, were taken away by Messrs. Naylor and Co., and shipped to New York. Mr. Marcellus Hartley, of the firm of Schuyler, Hartley, and Graham, already mentioned, was also a large purchaser of small arms in London during the latter half of the year 1862.*

Warehouses were openly taken at Birmingham for the reception of arms when completed, after which they were shipped through the agency of Messrs. Barings and of Brown, Shipley, and Co., and Wright and Co., of Liverpool.

Had the United States no treasury in Great Britain? No less a one than the great house of Baring Brothers, with whom large credits were opened. The house appears to have been energetic in its efforts in furthering the United States' armaments. "You will please express my acknowledgments," writes the United States' Secretary of War to Mr. Schuyler, "to Messrs. Baring Brothers and Co., for their prompt and patriotic action in facilitating your operations. The terms offered by Messrs. Baring Brothers and Co., namely, 1 per cent. commission and 5 per cent. interest per annum, as agreed upon by them with the Navy Department, are approved." †

Of course the "prompt and *patriotic* action" of Baring Brothers and Co. was in perfect conformity with neutral duties. But, what would have been said, if that great and wealthy house, its leading member having an influential voice in the House of Commons, had undertaken and exhibited equally "prompt and patriotic action" in facilitating Confederate operations on the terms of 1 per cent. commission and 5 per cent. interest? or, was there to be one law for the United States and another for the Confederates? Her Majesty's Government did not think so, and Great Britain remained an arsenal for the latter as well as for the former.

Next as to Great Britain having been, as it is said, "the navy yard of the insurgents."

Ships obtained from Great Britain.

It was of course impossible to prevent the Confederate Government, reduced to desperate straits by the blockade, and in want of ships of war, from resorting to the ship-builders' yards of Great Britain. It was impossible to prevent the ship-builders, who looked upon the furnishing of such vessels as purely commercial transactions—the Messrs. Laird who built the Alabama having been perfectly willing, as appears from their correspondence with a Mr. Howard, who professed to have authority to enter into a contract with them to build vessels for the Federal Government, to supply ships to the latter as well as to the insurgents—and who appear to have thought that, so long as the ships were not armed in British waters, such transaction would not be within the Foreign Enlistment Act—from entering into such contracts. All the Government could do was to use reasonable care to see that the Act was not violated.

Two vessels of war, and two only, the Florida and the Alabama, equipped in British waters, found their way into the hands of the Confederates. Whether, in respect of them, the British authorities were wanting in due diligence will be matter for future consideration, when these vessels come specifically under review. The most unjustifiable charge that the Government were wilfully wanting in the discharge of their duty from motives of partiality has, I hope, been already disposed of. Every other vessel built or equipped in British waters for the war service of the Confederate Government was prevented by the act of the British Government from coming into their hands. Immediate and untiring attention was paid to the frequent applications of Mr. Adams, which for the most part turned out to have proceeded on erroneous information. It may have been that, in the cases of the Florida and the Alabama, the local officers may have been somewhat too much disposed to leave it to the United States' officers to make out the case against the vessels. But such, as we have seen, had been the traditional view of the matter, not only in England but in the United States. These officers may have attached too much importance to the fact that the vessels, though equipped for receiving arms, were not actually armed before leaving the port. In that they only shared the opinion of two distinguished judges in the Court of Exchequer. But when the Authorities had become thoroughly alive to what was going on, no vessel of war to which the notice of the Government was

Steps taken by the British Government.

* British Counter-Case, pp. 52-54; British Appendix, vol. vi, pp. 153-160, 173, 188-193.
† British Appendix, vol. vi, p. 154.

called, and which proved to be intended for war, was suffered to escape. An enumeration of the instances on which inquiry was instituted by Her Majesty's Government, with the results, will set this part of the case in its true light, and show the flagrant injustice of the wholesale accusations which have been so unwarrantably made.

The Bermuda.

The first case in which a representation was made by Mr. Adams as to a vessel supposed to be fitting out in England for warlike purposes against the United States, in violation of the Foreign Enlistment Act, was that of the Bermuda. Mr. Adams's letter was dated the 15th of August, 1861. The principal grounds of suspicion alleged against the vessel were that she was "ostensibly owned by the commercial house of Fraser, Trenholm, and Co., of Liverpool, well known to consist in part of Americans in sympathy with the insurgents in the United States;" that she was armed with guns, and had been for some time taking in crates, cases, and barrels, believed to contain arms and ammunition of all kinds ordinarily used in carrying on war. Mr. Adams continues:—

"This cargo is nominally entered as destined to Havana in the Island of Cuba, but her armament and cargo are of such a nature as to render it morally certain that the merchants who claim to be the owners can have no intention of dispatching her on any errand of mercy or of peace.

"I am informed that this vessel will sail in a day or two; I therefore feel under the highest obligation to submit the information I have obtained as the ground for application for a prompt and effective investigation of the truth of the allegations whilst there is time. Not doubting the earnest disposition of Her Majesty's Government faithfully to adhere to the principles of neutrality to which it has pledged itself, I ask, on the part of the United States, for no more than a simple enforcement of the law, in case it shall appear that evil-minded persons are seeking to set it at naught."*

Mr. Adams, it would seem, entertained none of those notions of the duty or the necessity of having recourse to prerogative force in order efficiently to observe the obligations of neutrality, of which we hear so much in the Argument of the United States.

Inquiry was at once made by the Government. The Collector of Customs at West Hartlepool, where the vessel was, reported the next day as follows:—

"Finding, from a communication which I had seen from the American Consul at Leeds to his broker here, that the steamer in question was suspected to be fitting out at this port for the purpose of being used as a privateer for the Confederate States, I have been keeping an eye on her, but I see nothing to indicate such to be her object, either as regards her external equipments, or the character of her crew, or anything in her case more than usual to give ground for remark, unless it be the circumstance that a large portion of her cargo consists of arms and ammunition; and it is possible that, although the destination of the vessel ostensibly is Havana, it may be the design eventually to run some, if not the whole of the goods on board into the States referred to."†

The rest of the information collected pointed to a similar conclusion, and Mr. Adams was accordingly informed, on the advice of the Attorney-General, that the vessel did not come within the terms of the Foreign Enlistment Act (to which, in his letter, he had referred), and that there was no ground for any interference with the clearance or departure.

The Bermuda turned out, in fact, to be a blockade-runner. She sailed from Liverpool with cargo for Savannah, and succeeded in entering that port and returning to Liverpool. On her second voyage she was captured by a United States' ship, and condemned as prize.

The next cases in order of time to which Mr. Adams called the attention of the British Government, were those of the Oreto or Florida, and of the Alabama, originally known as No. 290. As I shall have to enter in detail into the facts connected with these vessels further on, I will not here allude to them more particularly.

The Georgiana.

On the 16th January, 1863, Mr. Adams made a representation to Earl Russell respecting the Georgiana, a vessel built at Glasgow, and then fitting out at Liverpool, which he stated he "had reason to believe was intended to pursue a similar course with that formerly called No. 290—to wit, the destruction of the commerce of the United States." Mr. Adams inclosed a letter from the United States' Consul in London, "giving," as he said, the "particulars based upon credible information received by

* British Appendix, vol. ii, p. 133. † Ibid., p, 134.

him, the authority for which it is not in his power to disclose," and he thus concludes his letter :—

"I therefore solicit the interposition of Her Majesty's Government, at least, so far as to enable me to procure further evidence to establish the proof of the allegations here made, in season for the prevention of this nefarious enterprise."*

Lord Russell informed Mr. Adams on the following day, the 17th, that he had communicated copies of his letter and its inclosure to the Board of Treasury, and to the Secretary of State for the Home Department without delay, and had requested that orders might be sent by telegraph to the proper authorities at Liverpool, enjoining them to take such steps in the matter as might legally be taken. He added :—

"I think it right, however, to observe that Her Majesty's Government cannot be answerable for any difficulty which may be experienced in carrying out those orders, in consequence of the evidence on which the statement of the United States' Consul is made being withheld from them."†

Inquiries were accordingly made, both by the Customs officers and by the detective police at Liverpool, but it was found that the vessel was not in any way adapted for warlike purposes, and that, from the nature of her build, her cargo, and other attendant circumstances, she seemed to be intended to run the blockade; and such, in fact, proved to be the case.

On the 21st of March, 1863, Lord Russell wrote to Mr. Adams "with reference to a report that vessels of war were being built at Glasgow for the so-styled Confederate States; that it appeared from information collected by the Commissioner of Customs that there were only two large steamers in course of construction at the yard of Messrs. Thompson and Co.; that one of them had the appearance of being constructed to receive armour plates, but that the bottom was not more than half plated, and that the planking of her top sides had only just commenced." The other, Lord Russell wrote, was a screw-steamer intended to be employed in the Mediterranean trade, but neither of these vessels could be completed for several months.‡ Vessels at Glasgow.

In forwarding this letter to Mr. Seward, Mr. Adams stated—

"It is proper to mention that the investigation appears to have been initiated by his Lordship upon information not furnished from this Legation, and that Lord Russell's communication to me was perfectly spontaneous."§

Mr. Adams' letter of acknowledgment to Earl Russell is as follows :—

"My Lord,

"I had the honour to receive your Lordship's note of the 21st instant, apprising me of the preparations making in the yard of Messrs. Thompson and Co. of a vessel evidently constructed for hostile purposes.

"Information of the same nature received from other sources has led me to a belief that this is one of a number intended to carry on the piratical species of warfare practised by the insurgents against the commerce of the United States, in accordance with the plans laid down in the intercepted correspondence which I had the honour some time since to lay before you. It is a source of much gratification to me to learn that this proceeding is exciting the attention of Her Majesty's Government."‖

The intercepted correspondence alluded to by Mr. Adams had been forwarded by him to Earl Russell on the 9th February, 1863.¶ It related to arrangements for the issue of a loan in England, on account of the Confederate Government, for the export of munitions of war to the Confederate States, and also to a supposed contract made by the Confederate Navy Department with a Mr. Sanders, for the construction in England of six iron-clad steamers, combining the capacities of freighting and fighting ships, in a manner which could enable them to force the blockade. A correspondence ensued in which Lord Russell denied that the papers proved any overt acts against the law which warranted a criminal prosecution of the parties concerned. He added, however, in a note of the 2nd of April, 1863, that—

"In view of the statements contained in the intercepted correspondence, Her Majesty's Government have renewed the instructions already given to the Custom-house authorities of the several British ports where ships of war may be constructed, and by the Secretary of State for the Home Department to various authorities with whom he is in communication, to endeavour to discover and obtain legal evidence of any violation of the Foreign Enlistment Act with a view to the strict enforcement of that Statute whenever it can really be shown to be infringed, and Her Majesty's Government would be obliged to you to communicate to them, or to the local authorities at the several ports, any evidence of illegal acts which may from time to time become known to you."**

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* British Appendix, vol. ii, p. 147. † Ibid., p. 148. ‡ United States' Documents, vol. ii, p. 203.
§ Ibid., p. 704. ‖ Ibid., p. 703. ¶ Ibid., vol. i, pp. 562–574. ** Ibid., p. 590.

The Phantom and Southerner.

On the 26th of March, 1863, Mr. Adams wrote to Earl Russell forwarding an extract of a letter from Mr. Dudley, the United States' Consul at Liverpool, on the subject of two vessels, the Phantom and the Southerner, which the Consul believed to be intended for Confederate cruizers.* The principal reason for Mr. Dudley's suspicions seems to have been the connection of the firms of Fraser, Trenholm, and Co., and Fawcett, Preston, and Co., with these vessels. He says at the end of the letter: "I suppose it will be impossible for me to obtain legal evidence against these two vessels, and nothing short of this will satisfy this Government." Even of the information furnished by Mr. Dudley, part—namely, that the last-named of these two vessels, the Southerner, had arrived at Liverpool—was erroneous, and was corrected by Mr. Adams in his note, according to later advices received from Liverpool.

Mr. Adams was informed on the following day that immediate inquiry would be made on the subject, and inquiries were accordingly at once made, as in the case of the Georgiana, both through the Customs authorities at Liverpool and by means of detective police officers, as to these two vessels. They failed to produce any evidence against them, and indeed one of them turned out to be a blockade-runner, and the other was afterwards engaged in trade in the Mediterranean. In acknowledgment of the steps which had been taken, Mr. Adams wrote as follows to Earl Russell on the 6th of April, 1863:—

"It is a source of great satisfaction to me to recognize the readiness which Her Majesty's Government has thus manifested to make the investigations desired, as well as to receive the assurances of its determination to maintain a close observation of future movements of an unusual character that justify suspicions of any evil intent."†

The Alexandra.

On the 28th March, 1863, Mr. Dudley, the United States' Consul at Liverpool, wrote to the Collector of Customs at that port, forwarding six depositions relative to a vessel called the Alexandra, and applying for her seizure. Copies of these depositions were also forwarded to Earl Russell by Mr. Adams on the 31st of March; and after further inquiry by the authorities, the ship was seized on the 5th of April. Mr. Adams, being informed of this step, wrote on the 6th of April to Earl Russell to express his "lively satisfaction."‡

The history of this vessel is well known. The proceedings, which were instituted by the Government in the proper Court, failed, under the direction of the Lord Chief Baron to the jury that, to establish the intention that the vessel had been equipped for the purpose of war, it was necessary that she should have been armed as well as fitted for the reception of guns. The jury having given a verdict against the Crown, the application to the Court of Exchequer for a new trial, on the ground of misdirection of the Judge in so directing the jury, failed by reason of the Judges of that Court being equally divided in opinion. Writing to Mr. Adams after the verdict had been given, Mr. Seward says:—

"You are authorized and expected to assure Earl Russell that this Government is entirely satisfied that Her Majesty's Government have conducted the proceedings in that case with perfect good faith and honour, and that they are well disposed to prevent the fitting out of armed vessels in British ports to depredate upon American commerce and to make war against the United States,

"This Government is satisfied that the Law Officers of the Crown have performed their duties in regard to the case of the Alexandra with a sincere conviction of the adequacy of the law of Great Britain, and a sincere desire to give it effect."§

An appeal was made to the Court of Exchequer Chamber but it turned out that, owing to an omission in the Act constituting the latter, no provision had been made for such a case.

After a detention of a year, pending the trial and appeal, the Alexandra was liberated.

She went first to Bermuda, then to Halifax, and from thence to Nassau, where, after repeated investigations, she was again seized, in December 1864, on a fresh charge of an intention to employ her as a ship of war in the Confederate service, and though the proceedings in the Vice-Admiralty Court there ended in an acquittal, the decision did not take place till the end of May 1865 when the civil war was at an end. The costs and damages incurred by the Government on account of the two seizures amounted to over 4,000*l.*

The South Carolina.

On the 6th of April, 1863, a despatch was received from the British Consul at

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* British Appendix, vol. ii, p. 167. † Ibid., p. 171.
‡ Ibid., p. 231. § United States' Documents, vol. ii, p. 291.

New York, in which allusion was made to a report which had appeared in the newspapers of that city, that the Georgiana, which, as I have already said, was no more than a blockade-runner, and which is so denominated in the United States' documents,* was intended to be armed as a Confederate cruizer, and that a similar vessel, called the South Carolina, was building in the Clyde. The matter was referred to the Commissioners of Customs, and the latter reported, on the 13th of April, as follows:—

"On the receipt of the said letter, we referred the same to our Collector at Glasgow for his inquiry respecting the South Carolina; and it appears from the report of the Measuring Surveyor of Shipping at that port, which has been forwarded to us by the Collector, that there are about forty ships building at the present time in the port, and it may be intended to give one of them that name; that the only ship apparently designed for a ship of war is the one building in the yard of Messrs. Thomson, referred to in our report to your Lordships of the 11th ultimo, and that she is still in a very unfinished state. The Measuring Surveyor adds that he is giving his closest attention to this vessel, and will take care to keep the Collector fully informed of her progress from time to time."†

The Gibraltar or Sumter.

A report having appeared in the "Daily News," on the 17th of March, 1863, that the Gibraltar, which, after acting as a Confederate ship of war under the name of the Sumter, had been sold to private owners, and had arrived at Liverpool in the previous month, was fitting out at Birkenhead as a vessel of war, Lord Russell at once requested that inquiries might be made on the subject, and communicated the result to Mr. Adams. I shall have subsequently to go fully into the case of this vessel also, which was an object of constant vigilance during her stay at Liverpool, and which was not permitted to leave until the Authorities were satisfied that there was no intention of again equipping her as a Confederate cruizer.

Iron-clads at Birkenhead.

On the 7th of July, 1863, Mr. Dudley fowarded to the Collector of Customs at Liverpool several depositions relative to two iron-clad steam-ships building in Messrs. Laird's yard at Birkenhead, which were alleged to be intended for the service of the Confederate States, one only of which had at the time been launched, the other being still in process of construction. Representations were also made on the subject by Mr. Adams, and a lengthened correspondence ensued. A strict watch was from the first kept upon the vessels, and inquiries made as to their character and destination. It was at first reported that they were built for the Government of France. Subsequently, they were claimed by a M. Bravay, of Paris, who produced a legal instrument, from which it appeared that the vessels had, in fact, been built to the order of Captain Bullock (the Confederate agent who had been instrumental in obtaining the Florida and Alabama for the Confederate Government), but that Bullock had transferred his interest in them to Bravay. M. Bravay stated that he had purchased them for the Viceroy of Egypt, but the Viceroy, on inquiry, disclaimed any intention of acquiring them.

On the 9th of September, 1863, a letter was addressed to the builders, Messrs. Laird, informing them that the Government could not permit the vessels to leave the Mersey until satisfactory evidence could be given of their destination, or until the inquiries then being prosecuted on the subject should be brought to a conclusion; and, on the 9th of October following, both vessels were seized and given over into the care of the Captain of Her Majesty's ship Majestic, then stationed at Liverpool. A Commission was sent to Egypt for the purpose of procuring evidence with a view to their condemnation, but the result appearing doubtful, it was decided by the Government to purchase them, though it was not in want of them, rather than run the risk of their passing directly or indirectly into the hands of a belligerent. They were accordingly purchased in May 1864 for the sum of 220,000*l.*‡

The Canton or Pampero.

Mention has already been made of the inquiries instituted by the Government as to vessels supposed to be building for the Confederate States at Glasgow. On the 17th of October, 1863, Mr. Adams wrote to Earl Russell, stating that, in addition to a formidable steam-ram in process of construction at that port, there was also another steamer ready to be launched, called the Canton, having all the characteristics of a war-vessel, which was about to be fitted out and dispatched with the same intent from the same place. Mr. Adams inclosed some extracts from a letter from the United States' Consul at Glasgow, who, he said, entertained no doubt as to the destination of the vessel, although, from the secrecy used in the process of construction and preparation, he had been slow in gaining evidence on which to base a representation.§

* Vol. i, p. 772.

† British Appendix, vol. ii, p. 163.

‡ Ibid., pp. 457–459.

§ Ibid., p. 467.

Directions were at once given to the proper authorities to make inquiries and to take any measures which might legally be possible. The investigations remained for some time without any definite result. The vessel was carefully examined. It appeared that though in course of being fitted as a passenger ship, she possessed some peculiarities of construction which rendered her capable of being converted into a vessel serviceable for warlike use. The builders, however, and the firm through whom she had been contracted for, disclaimed any knowledge of such an intention, and declared their belief that she was intended for the merchant service. The evidence as to her being intended for the Confederate service, which was supplied by the United States' Consul, did not go beyond vague rumour and hearsay.

The vessel was launched on the 29th of October, 1863. On the 16th of November the Collector of Customs at Glasgow reported that, as she was being rapidly got ready for sea, he had arranged with the Captain of Her Majesty's ship Hogue, then stationed in the Clyde, to prevent the possibility of a departure pending the decision of the Authorities;* and a week later a gun-boat was moored alongside of her to prevent any chance of her leaving surreptitiously.†

By the end of November the inquiries of the Government led to the production of evidence showing who were the real owners of the vessel, and that they had contracted to sell her to one Sinclair, calling himself a citizen of the Confederate States. A letter from Sinclair was produced, dated in the previous September, in which he said that "the determination of the Government to prevent the sailing of any vessel that might be suspected of being the property of a citizen of the Confederate States was made so manifest, that he had concluded it would be better for him to endeavour to close the contract and go where he could have more liberal action;" ‡ and it appeared from the further correspondence that he had agreed to do this, even on condition of forfeiting the cotton certificates which he had already deposited as security.

The Pampero was seized on the 10th of December and legal proceedings were instituted, a verdict was entered against her by default, and she remained under seizure until some months after the termination of the cival war.

Iron-clad ram at Glasgow.

As regards the other vessel building in Messrs. Thompson's yard at Glasgow, on which the Authorities, as has been mentioned, were keeping watch, Mr. Adams, writing respecting the seizure of the Pampero, reports as follows (January 28, 1864):—

"One good effect of these various proceedings has been to remove all further anxiety respecting the destination of the formidable iron-clad ram in process of construction at the same place. That she was ordered in the first instance by the rebels, I have no manner of doubt; she has now been purchased by the Danish Government, as I learn from the Minister, M. de Bille."§

The Rappahannock.

In September 1863, an old gun-boat named the Victor, being considered as rotten and unserviceable, was sold by the British Government to a private firm. The firm having afterwards applied for the masts and sails of the vessel, the question of granting the application was referred to Earl Russell, who advised, as a measure of precaution, that the masts and sails should for the present be reserved.‖ On the 24th November, 1863, she suddenly left Sheerness, where she was being prepared for sea, at midnight, and crossed over to Calais.¶ She was still in a condition quite unfit to go to sea, her rigging being incomplete and her crew deficient. At Calais her Commander declared her to be a Confederate vessel of war, though she was neither equipped, manned, nor armed. She was allowed to remain, and to make such repairs as were necessary to render her seaworthy, but the precautions taken by the Authorities to prevent her being made more serviceable for warlike purposes rendered her practically useless for the Confederate service. It having been discovered that large additions had been made to her crew, the French Government refused to permit her departure, and she was eventually abandoned by her officers.**

"Contrast, again," says the Case of the United States triumphantly, "the course of the French Government with that of the British Government in like cases. What vessel bearing a commission was ever disturbed by a British gun-boat, no matter how flagrant might have been her violations of British sovereignty?" Had those who ask this question forgotten the case of a certain vessel called the Canton, or Pampero, which was served exactly in the same manner, having first had a gun-boat placed alongside of her and having been afterwards seized?

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* British Appendix, vol. ii, p. 499. † Ibid., p. 508. ‡ Ibid., p. 511.
§ United States' Documents, vol. ii, p. 225. ‖ British Appendix, vol. ii, p. 615. ¶ Ibid., p. 619.
** Ibid., p. 672; United States' Documents, vol. vi, p. 174.

No information had been received by the Government tending to throw any suspicion on the Victor before her departure. Evidence having subsequently been furnished by Mr. Adams to Lord Russell tending to implicate various persons in the fitting-out of this vessel and the obtaining a crew for her, prosecutions were instituted against such of them as seemed to have rendered themselves liable to punishment, and several of them were convicted or pleaded guilty. Among others, proceedings were taken against Mr. Rumble, an officer in the Government dockyard at Sheerness, and, though he was acquitted, the Government marked their displeasure at his conduct by dismissing him from his appointment and placing him upon half-pay as an officer in whom they could no longer put any confidence.*

In consequence of the events connected with the Rappahannock, the British Government at once gave orders that no more ships should be sold out of the navy during the continuance of the war.

An advantageous offer having been made to the Admiralty, in December 1863, for two vessels (the Reynard and Alacrity), which it was thought desirable to dispose of, the matter was referred to Earl Russell, who gave as his opinion that "it would be much better at the present time not to sell any vessels to private firms, as it is impossible to obtain any sufficient assurance in regard to what may be done with vessels when sold out of the navy."†

The Amphion.

It was also thought right to keep careful watch on another vessel, the Amphion, which had already been sold to a private firm, and the police authorities were directed to make inquiries on the subject in January 1864.‡ The vessel was at that time lying dismantled and dismasted. In March following Mr. Adams wrote to call Lord Russell's attention to the subject, and a constant watch was kept on her by the police. She seems to have been in a state quite unfitted for war purposes, and her destination was stated to be Copenhagen. She was eventually stranded on the British coast a few months later, and broken up.§

The Hawk.

On the 1st April, 1864, the suspicions of the Customs Collector at Glasgow having been excited by certain peculiarities of construction in a vessel recently built at Renfrew, and named the Hawk, he referred the matter to the Authorities in London. Pending their decision, he refused the application made for a pass to enable her to leave for the latter port.‖ On the 16th of the same month, Mr. Adams addressed a representation to Lord Russell on the same subject. The Hawk shortly afterwards left for London, as was at first believed, without a clearance, and the owner was called upon for explanations. The vessel was also subjected to strict examination by the police and Customs Authorities. The explanations of the owner proving satisfactory, and no evidence appearing to justify further measures, she was allowed to depart, went to the West Indies, and returned, and was never employed for any warlike purpose.

The Ajax, the Hercules, the Virginia, the Louisa Ann Fanny.

Four other vessels formed the subject of representations by Mr. Adams at the commencement of the year 1865—the Ajax, the Hercules, the Virginia, and the Louisa Ann Fanny. As to the first of these vessels, investigations had already been made by the Customs Authorities at Dublin, while she was lying in Kingston Harbour. In each case inquiries were made not only by the Home Authorities but by the Governors of Bermuda and Nassau. None of the vessels in question were ever used for other than commercial purposes.

Anglo-Chinese fleet.

I have only further to mention the case of the flotilla of gun-boats procured for the Chinese Government by Mr. Lay, which it was intended should be manned and officered by British sailors under the command of Captain Sherard Osborn.

On the 28th of February, 1863, a letter was addressed to Mr. Lay, by Earl Russell's directions, requesting him to give the particulars of the vessels obtained by him for that purpose, and the information given by Mr. Lay was communicated to Mr. Adams, to whom it was likely to be of service in distinguishing the vessels really destined for the service of the Emperor of China from those reported to be so as a pretext for other purposes connected with the Confederate service.

On the arrival of the fleet in China, a difference arose with the Chinese Government as to the terms on which the command of the fleet should be held, and Captain Osborn eventually declined the appointment.

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* British Appendix, vol. ii, p, 674. † Ibid., vol. v, p. 201. ‡ Ibid., vol. ii, p. 566.
§ Ibid., pp. 568, 571, and 572. ‖ Ibid., pp. 539–541.

Under these circumstances the British Minister at Peking was of opinion—an opinion which was shared by his American colleagues, that if the fleet was allowed to remain in the hands of the Chinese Government, there was great danger of the vessels being bought for employment as Confederate cruizers. It was therefore arranged that Captain Osborne should take back part of the fleet to Bombay and part to England, and there dispose of them for the Chinese Government; and the vessels were brought back accordingly.

On hearing of this arrangement, the British Government gave orders that every precaution should be taken to prevent their passing into the hands of any belligerent Power. The sale of one of the vessels at Bombay was stopped: but as she was merely an unarmed dispatch-boat, the prohibition was subsequently removed. The other ships were held in the custody of the Government, and the Law Officers having advised that the sale within the British dominions of armed ships of war, already equipped for a different purpose, was not contrary to the Foreign Enlistment Act, the Government determined upon taking upon themselves the responsibility of detaining them unsold. A committee was accordingly appointed to assess the values of the vessels, and the Chinese Government were assured that they should not ultimately lose by any delay in the sale. Several overtures for the purchase of one or other of the ships fell through in consequence of the stringent nature of the guarantees required against their employment by belligerents, or from other causes; and they were in consequence not disposed of till after the close of the war. The delay and consequent deterioration of the vessels caused a loss of over 100,000*l.*, which was made good by the British Government to that of China.

General result.

It thus appears that, during the whole course of the civil war, two ships only were built in Great Britain for, and actually employed in, the service of the Confederates. Four others were intended to be built and equipped, but were arrested while in the course of construction. Four merchant-vessels, though not adapted for warlike purposes, were converted into vessels of war by having guns put on board, but out of the jurisdiction of the British Government—two of them in Confederate ports—and this by reason of the impossibility of getting ships of war built, owing to the active vigilance of the Authorities. And it is upon this foundation that Great Britain is represented as having been "the navy-yard of the insurgent States," and that men who must be supposed to have a conscientious appreciation of what is just and right, accuse Earl Russell and Her Majesty's Government of "a consistent course of partiality towards the insurgents," and of "a want of diligence bordering upon wilful negligence!"

Proceedings of other Governments.

In the United States' Argument, the proceedings of other Governments are compared with those of Great Britain, to the disparagement of the latter. Thus, of Brazil it, is said:—

Brazil.

"We beg leave to refer this high Tribunal to the administrative regulations of the Brazilian Empire for the enforcement of neutrality in all the ports of the Empire, in the amplest manner, by efficient action on the part of the Imperial Ministers, and of the Provincial Presidents.

"In the American Case, and the documents to which it refers, there is sufficient indication of the loyalty and efficiency with which the Brazilian Government maintained its sovereignty against the aggressive efforts of the Confederates."

After the correspondence which I have already inserted, I may very well say that not even with Her Majesty's Government or officers did the correspondence of the United States' Government assume so angry a tone as that which pervades the letters between the American Minister and the Brazilian Government.*

Portugal.

Portugal is referred to in the American Argument in these terms:—

"As to Portugal, we refer to the correspondence annexed to the American Counter-Case, to show that she also never pretended that her neutral duty was confined to the execution of the provisions of her Penal Code. She also put forth the executive power of the Crown to prevent, repress, or repel aggressive acts of the Confederates in violation of her hospitality, or in derogation of her sovereignty. Nay more, the Government of Portugal, finding its own naval force inadequate to prevent the Confederates from abusing the right of asylum in the Western Islands, expressly authorized the American Government to send a naval force there for the purpose of defending the sovereignty and executing the law of Portugal."†

On turning to the documents referred to, I find that Portugal did what, as a

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* United States' Argument, p. 66.

† Ibid., p. 67.

neutral Power, it was bound to do, namely, interfere to prevent the Azores from being made a depôt of munitions of war, or coal, for Confederate cruizers.

With reference to the authority given to the United States' Government to send a naval force to the Azores, all that appears is that, when Mr. Hervey, the United States' Minister, informed the Viscount Sá da Bandeira, the Minister for War, then acting as Minister for Foreign Affairs, what was going on at the Azores, the Minister said, "that the islands in question had been used and abused by corsairs and pirates during centuries; that they were exposed and unprotected, and therefore might be so employed again, and that the best plan would be to send a sufficient force there to protect American ships against threatened depredations, and to punish criminal offenders." In other words, the Americans were to take care of themselves. This is dignified by the name of "defending the sovereignty and executing the law of Portugal." I may add that, when the Confederate steam-ship Stonewall was at Lisbon, she was allowed to supply herself with coal, notwithstanding the remonstrances of the American Consul. In conformity with the general rule she was required to leave in twenty-four hours.

The American Argument informs us that—

France. "When attempts were made by the Confederates to construct and equip cruizers in the ports of France, on complaint being made by the Minister of the United States, the construction of these vessels was arrested; and when a builder professed that vessels under construction, with suspicion of being intended for the Confederates, were in fact intended for a neutral Government, the French Ministers required proof of such professed honest intention, and carefully watched these vessels to make sure that they should not go into the service of the Confederates. On this point we quote the language of the Minister of Marine, as follows:—

"'The vessels of war, to which you have called our attention, shall not leave the ports of France, until it shall have been positively demonstrated that their destination does not affect the principles of neutrality, which the French Government wishes to rigidly observe towards both belligerents.'"*

The documents annexed to the Counter Case of the United States do not contain more than a small selection of the correspondence relating to this subject, which is given in greater detail in the Mémoire and documents submitted by the United States to the French courts of justice in the "Affaire Arman,"—documents which, to quote the words of the Mémoire itself, "show most clearly the dangers to which M. Arman and his associates exposed the maintenance of peace between France and the United States."†

The suit in question was instituted, in November 1867, on the part of the United States against MM. Arman, Voruz, and others, for the recovery of moneys disbursed by Bullock, acting as agent of the Confederate States, for the construction of six vessels of war in France.

After explaining that the measures taken by the British Government in respect of the seizure of both the Alexandra and Pampero, and the detention of the Birkenhead rams had compelled the Confederates "to seek in France the market they were losing on the other side of the Channel,"‡ the Mémoire proceeds to relate that their choice fell on M. Lucien Arman (member for Bordeaux in the French Legislative Assembly), "whose official position seemed calculated to secure greater freedom and certain impunity for the execution of these orders." An agreement was accordingly entered into with Arman by Bullock, who stated in the contract that, "with a view to establish regular communications by steam between Shanghae, Osaka, Yedo, and San Francisco, he wished to procure in France four steamers of great speed, fitted to carry from ten to twelve guns, for their protection in those distant parts."§

Arman undertook to build two of these steamers in his own yards at Bordeaux, and sublet the building of the other two to "another deputy of the Corps Législatif," M. Voruz, of Nantes. Besides these four steamers he further entered, on the 16th July, 1863, into a fresh agreement with Bullock, "for two iron-clad steam-rams."

One difficulty had to be removed before the final ratification of these contracts, and that was the restriction placed by the Royal Ordinance of 1847 on the exportation of arms and munitions of war.

It has been already shown that this enactment had no reference to the special subject of neutrality, and simply formed part of that general legislation by which the State in France has frequently sought, in its own interest, to place restraints upon private commerce in articles of a warlike character. In the present instance, however, its practical effect was to interfere with the arming of the vessels. Accordingly,

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* United States' Argument, page 63.

† Mémoire pour les Etats Unis d'Amérique, p. 54. ‡ Page 4. § Ibid., p. 6.

M. Arman applied to the Government for permission to arm the four vessels, which were building ostensibly for service in the China Seas, and this was readily granted, on the faith of his assurance, by the Marquis de Chasseloup-Laubat, the Minister of Marine.

In the following September the knowledge of these facts was betrayed to Mr. Bigelow, then United States' Consul at Paris, by a clerk of M. Arman, who furnished him, at the same time, with the originals of the deeds drawn up between his employer and the Confederate agent, Bullock, as well as of the correspondence exchanged between the parties, and other papers, which placed beyond possibility of doubt the existence of an intention on the part of Arman to violate the neutrality of France.

Mr. Dayton at once brought the matter under the notice of M. Drouyn de Lhuys, then Minister for Foreign Affairs, and followed up his first representations with a formal demand, on the 22nd September, that "the permission to arm the vessels should be withdrawn, the manufacture of the guns and shot suspended, and if already completed, that the delivery should be prevented." He called on the French Government to "take such steps as it might deem best calculated to stop the building or departure of the above-mentioned vessels."

Writing, on the 9th October, to express his approval of the course adopted by Mr. Dayton, Mr. Secretary Seward says—

"It is hardly necessary to inform you that the President awaits with much solicitude the decision of His Imperial Majesty's Government upon the application you have made, and cannot but regard an adverse decision as pregnant with very serious consequences."

On the 1st of November Mr. Seward writes again to Mr. Dayton, expressing his disappointment at the indirect and inconclusive answer received from the French Government, and relying on Mr. Dayton's endeavours to obtain a more satisfactory reply.

The Minister of Marine withdrew the permission to arm the vessels, but justified the course he had taken in granting it "on the builder's declaration." This measure, however, the memorial informs us, "did not put a stop to the construction or fitting out of the vessels," which Arman continued, possibly in the hope of disposing of them to the Confederates; but this the measures taken by the French Government prevented, except in the case of one of the steam-rams, building at Bordeaux.

The Stonewall.

The history of this vessel, originally known as the Sphinx, may be thus summed up from the Mémoire and correspondence annexed thereto.

On the 4th February, 1864, M. Drouyn de Lhuys informed Mr. Dayton that Arman had given him the most positive assurance that he had sold the two iron-clads, viz., the Sphinx and her sister-vessel, the Cheops, to the Danish Government.† Mr. Dayton made inquiries at Copenhagen, which resulted in a formal contradiction of the fact by the Danish Minister for Foreign Affairs. M. Arman next represented to M. Drouyn de Lhuys that he had sold them to Sweden, and M. Drouyn de Lhuys repeated to Mr. Dayton, on the 7th of April, this new statement of Arman (which, however, was almost immediately afterwards contradicted by the Swedish Foreign Minister), declaring himself "satisfied that the sale had been completed."* Mr. Dayton did not place the same confidence in Arman's assertions, and continued, in obedience to the instructions of his Government, to make serious representations to M. Drouyn de Lhuys on the subject of the rams. On the 8th June he writes to Mr. Seward:—

"I had already informed M. Drouyn de Lhuys of the very serious character of these questions, and the probable consequences which would result from the completion and delivery of these vessels to the Confederates. I have, on all occasions, used strong language when applied to these questions. I told him to-day that, in expressing the views of the President on this subject, I could scarcely speak with the necessary earnestness and directness, without trenching on that respectful forbearance of language to which I desired at all times to limit myself in our official intercourse. I told him that, should these vessels pass into the hands of the Confederates, become armed and commence a system of depredation on our commerce, the exasperation would be such that the Government, if so disposed (which I did not intimate that it would be) could scarcely keep the peace between the two countries."

In the meantime, Arman had succeeded in defeating the vigilance of the French Authorities in the following manner:—In March 1864, he had concluded a contract of sale with the Danish Government, then at war with the German Confederation, but the conditions of the contract not having been observed, the Danish officer, to whom the

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* Mémoire, p. 28.

† Mr. Dayton to Mr. Seward, April 7, 1864.

Sphinx was to have been handed over at Bordeaux, refused to receive her. Arman, however, took advantage of this contract to get the vessel out of French waters under the name of the Stoerkodder, and sent her to Copenhagen under the pretence of again submitting her to inspection there. The Danish Government having persisted in their refusal to purchase the vessel, he obtained permission to bring her back, rechristened as the Olinde, under Danish colours to Bordeaux. On arriving in French waters, off the Island of Houat, on the coast of Brittany, she stopped to receive from another steamer, by a pre-concerted arrangement, a crew, with an armament of artillery and munitions of war, hoisted the Confederate flag, and, changing her name for the third time to that of the Stonewall, left the French waters for Ferrol, in Spain, where she obtained permission to remain and make some necessary repairs.

These proceedings were the subject of energetic remonstrances at Paris and Madrid, and would, in all probability, have given rise to much more, had not the close of the civil war deprived the question of any practical interest it might otherwise have had, the Stonewall having been unable to commit any acts of warfare. The American Government wisely preferred to drop its grievances, as Mr. Seward explains in a letter to Mr. Bigelow, United States' Minister at Paris, dated 13th March, 1865 :—

"Le Gouvernement a déjà, contre les puissances maritimes impliquées dans cette affaire, des causes de plainte assez nombreuses et assez graves. Il préfère néanmoins entretenir la paix, l'harmonie, et l'amitié avec ces puissances, plutôt que de rechercher de nouvelles occasions de querelle, et il s'estimera très-heureux si les appréhensions que l'affaire actuelle a soulevées ne sont pas justifiées. Les circonstances semblent d'ailleurs favoriser les vœux du Gouvernement à cet endroit. Nos derniers avis télégraphiques nous affirment que le Stonewall est absolument hors d'état de tenir la mer, et que, pour cette raison et pour d'autres, les criminels qui le possèdent cherchent à s'en débarrasser."

From this narrative it will be seen how very different was the view taken of these circumstances by the Government of the United States, at the time when they occurred, from the colour now sought to be put upon them by the American Argument.

Complaints of blockade-running.

The running of the blockade, as it is termed, by British vessels, and the use of the Bahamas and Bermuda and other islands, as places by means of which the blockade-running might be facilitated, were, throughout the war, the cause of unceasing and loud complaint on the part of the United States' Government. No doubt it was a very great annoyance to the United States; but it in reality afforded no legitimate cause of grievance.

That, when the arms and munitions of war necessary to the Confederates had been purchased in Europe, means should be sought to convey them to the purchasers was in the nature of things. That the high rates of freight which, owing to the vital importance of obtaining these supplies, the Confederate Government were willing to pay, should have induced shipowners to run the risk of capture and confiscation, and that the high premiums for insurance which the owners of ships and cargoes engaged in this traffic were willing to pay, should have tempted insurers to undertake the risk of insuring them, cannot, knowing as we do the boldness of mercantile speculation and enterprize, at all surprise us. Accordingly, from a very early period of the war, vessels were employed to run the blockade with cargoes of articles of warlike use. Before long a systematic traffic of this description became regularly established. As the nature of the Southern coast and the local peculiarities of its ports made it extremely difficult for ocean-going vessels to avoid pursuit and capture in endeavouring to enter them, advantage was taken of the proximity of the Bahama Islands and Bermuda to the Southern ports to tranship the cargoes sent from England, at these places, into fast steamers of light draught, which, taking advantage of shallow waters into which they could not easily be pursued, could thus find means of eluding the hostile cruizers. By these means, though ships and cargoes to the value, it is said, of 8,000,000*l.* sterling fell into the hands of the Federals, a very large quantity of arms and articles contraband of war found their way to the Confederate Government.

The first question which presents itself is, Was the traffic unlawful? So far unlawful undoubtedly, by the law of nations, as between the trader and the blockading belligerent, that if the belligerent could catch the vessel in the act of breaking the blockade, vessel and cargo would become lawful prize; but by the law of nations involving no ulterior liability. By the municipal law not prohibited, and therefore not unlawful—not even sufficiently so, as has been lately held by Lord Westbury in the case of *ex parte* Chavasse *in re* Grazebrook,* and by Dr. Lushington in that of the Helen,† to avoid a

* 11 Juris. N. S., p. 400.

† 1 Law Rep., Adm. and Eccl. 1.

contract made in contemplation of such a transaction. How as between the blockading belligerent and the country of the blockade-running trader? Clearly and indisputably without consequence of any sort.

It has never been contended by any one that a neutral State incurred any responsibility by the general law of nations by reason of any violation of neutrality by its subjects, in carrying on trade with a blockaded port. It is therefore clear that a neutral Government is not bound to prohibit such trade by its municipal law. With the single exception of Denmark, if my memory does not deceive me, no European State has prohibited it. The United States have no law which does so.

Such being the state of the international law of the civilized world and the municipal law of Great Britain on the breaking out of the war, not only was it not incumbent on Great Britain as a duty to alter its law, with a view to prohibiting its subjects from trading with the blockaded ports, but to have done so would have been, as it seems to me, in direct contravention of a fundamental principle of neutrality, namely, that a neutral Power shall not, with a view to a pending war, except so far as may be necessary for the fulfilment of its own obligations as a neutral, alter its law, or make new regulations, having the object or effect of favouring one belligerent at the expense of the other. But that such would have been the effect of an alteration of the law, as desired by the United States, by passing an Act to make blockade-running penal, is manifest. The United States, as between them and their adversaries, were masters of the seas, and had their ports open, and could therefore freely receive the cargoes of arms and munitions of war which were being daily supplied to them. To the Confederate Government, the blockade-runner afforded the only means of obtaining the arms with which he was to fight for independence. An alteration of the law would have been to place him helpless in the power of his enemy. Would it have been consistent with neutrality to alter the law at such a time, and with the certainty of such a result? The right of a belligerent to exclude the commerce of a neutral from a blockaded port is too well established to be shaken; but it is the most odious and arbitrary form in which the freedom of the neutral can be interfered with, and I can see, therefore, no reason why a Government should interfere to make the exercise of the power more productive of detriment to the commerce of its subjects than it necessarily carries with it at present. But if any alteration of the law is to take place, it should be in time of peace; not when the change would prove fatal to one of the combatants, and insure victory to the other.

Earl Russell put the matter on the right footing when, in answer to a remonstrance of Mr. Adams, on the 17th of May, 1862, he replied:—

"If the British Government, by virtue of the prerogative of the Crown, or by authority of Parliament, had prohibited and could have prevented the conveyance in British merchant-ships of arms and ammunition to the Confederate States, and had allowed the transport of such contraband of war to New York and to other Federal ports, Her Majesty's Government would have departed from the neutral position they have assumed and maintained.

"If, on the other hand, Her Majesty's Government had prohibited and could have prevented the transport of arms and ammunition to both the contending parties, they would have deprived the United States of a great part of the means by which they have carried on the war. The arms and ammunition received from Great Britain, as well as from other neutral countries, have enabled the United States to fit out the formidable armies now engaged in carrying on the war against the Southern States, while by means of the blockade established by the Federal Government the Southern States have been deprived of similar advantages.

"The impartial observance of neutral obligations by Her Majesty's Government has thus been exceedingly advantageous to the cause of the more powerful of the two contending parties."*

The same reason applies to the frequent use of the ports of the Bahamas and Bermuda as entrepôts for the blockade-running cargoes, and the transhipment of the latter into lighter craft. There was nothing in all this in any way contrary to law. Vessels with cargoes of arms intended for the Southern ports had a perfect right to enter, remain, and quit, when and as they thought proper. If this traffic, suddenly springing up, soon assumed such large dimensions, the cause was to be found in the forced interruption of the trade with the Southern ports through the blockade. Here again a neutral Goverument could not be called upon to make new laws to prevent the neutral trader from availing himself of such means, not inconsistent with law, as circumstances placed at his disposal in seeking to compensate himself for the restraints imposed on his commercial freedom. When the ordinary course of things is disturbed by intervening force, the tendency is always, in some shape or other, to a restoration

* United States' Documents, vol. i, pp. 536, 537.

of the equilibrium. Unfortunately, instead of seeing in all this only the natural effect of commercial speculation and enterprize, the United States' Government, in the excitement of the time, saw in it nothing but hostility to the cause of the Union. Impressed with this idea, Mr. Seward writes to Mr. Adams on the 11th of March, 1862:—

"Information derived from our Consul at Liverpool confirms reports which have reached us that insurance companies in England are insuring vessels engaged in running our blockade, and even vessels carrying contraband of war. This is, in effect, a combination of British capitalists, under legal authority, to levy war against the United States. It is entirely inconsistent with the relations of friendship, which we, on our part, maintain towards Great Britain; and we cannot believe that Her Britannic Majesty's Government will regard it as compatible with the attitude of neutrality proclaimed by that Government. Its effect is to prolong this struggle, destroy legitimate commerce of British subjects, and excite in this country feelings of deep alienation.

"Pray bring this subject to the notice of Earl Russell, and ask for intervention in some form which will be efficient.

"Our Consuls in London and Liverpool can furnish you with all the information you will require."*

Mr. Adams, in a letter to Lord Russell of the 30th of December, 1862, complains in earnest language:—

"It is a fact that few persons in England will now be bold enough to deny, first, that vessels have been built in British ports, as well as manned by Her Majesty's subjects, with the design and intent to carry on war against the United States; secondly, that other vessels owned by British subjects have been and are yet in the constant practice of departing from British ports, laden with contraband of war, and many other commodities, with the intent to break the blockade and to procrastinate the war; thirdly, that such vessels have been and are insured by British merchants in the commercial towns of this kingdom, with the understanding that they are dispatched for that illegal purpose. It is believed to be beyond denial that British subjects have been, and continue to be, enlisted in this kingdom in the service of the insurgents, with the intent to make war on the United States, or to break the blockade legitimately established, and to a proportionate extent to annul its purpose. It is believed that persons high in social position and in fortune contribute their aid directly and indirectly, in building and equipping ships of war as well as other vessels, and furnishing money as well as goods with the hope of sustaining the insurgents in their resistance to the Government. To that end the port of Nassau, a colonial dependency of Great Britain, has been made, and still continues to be, the great entrepôt for the storing of supplies which are conveyed from thence with the greater facility in evading the blockade. In short, so far as the acts of these numerous and influential parties can involve them, the British people may be considered as actually carrying on war against the United States. Already British property, valued at eight millions of pounds sterling, is reported to have been captured by the vessels of the United States, for attempts to violate the blockade, and property of far greater value has either been successfully introduced or is now stored at Nassau awaiting favourable opportunities."†

But that these were commercial speculations, and had no reference to any political sympathies, is plain from the following letter from Mr. Morse, the United States' Consul-General, to Mr. Adams, of the 24th of the same month. After mentioning the different steamers engaged in the blockade-running, he says:—

"The ownership of these steamers, the cargoes they carry out, and the manner of conducting the trade, is a question of much interest to Americans. During the early stages of the war the trade was carried on principally by agents sent over from the Confederate States, aided by a few mercantile houses and active sympathizers in this country. These agents, with their friends here, purchased the supplies, and procured steamers, mostly by charter, and forwarded the goods.

"But by far the largest portion of the trade, with perhaps the exception of that in small-arms, is *now*, and for a long time has been, under the management and control of British merchants. It is carried on principally by British capital, in British ships, and crosses the Atlantic under the protection of the British flag.

"Parties come from Richmond with contracts made with the Rebel Government by which they are to receive a very large per-centage above the cost in Confederate ports of the articles specified. British merchants become interested in these contracts, and participate in their profits or loss. I have seen the particulars of one such contract drawn out in detail, and have heard of others.

"There are good reasons for believing that a large portion of the supplies more recently sent to the aid of the insurgents has been sent by merchants on their own account. Several will join together to charter a steamer and make up a cargo independent of all contractors, each investing as much in the enterprise as he may deem expedient, according to his zeal in the rebel cause, or his hope of realizing profit from the speculation.

Again: some one will put up a steamer to carry cargo to a rebel port at an enormous rate of freight, or to ports on the Atlantic or Gulf coast, such as Bermuda, Nassau, Havana, Matamoras, &c., at a less freight, to be from there reshipped to such Southern ports as appears to afford the best opportunities for gaining an entrance. Ships bound on these voyages are, of course, not advertised, or their destination made known to the public. Their cargoes are made up of individual shipments, on account and

* United States' Documents, vol. i, p. 720. † Ibid., p. 729.

risk of the shippers, or go into a joint stock concern, on account and risk of the company, each member thereof realizing profit or suffering loss in proportion to the amount he invested in the adventure. Both steamers and cargoes are often, if not generally, insured in England "to go to America *with liberty to run the blockade.*"*

The views of Her Majesty's Government were set forth in a letter from Earl Russell to Mr. Adams:—

"With regard to the 'systematic plan' which you say has been pursued by Her Majesty's subjects 'to violate the blockade by steady efforts,' there are some reflections which I am surprised have not occurred to you.

"The United States' Government, on the allegation of a rebellion pervading from nine to eleven States of the Union, have now for more than twelve months endeavoured to maintain a blockade of three thousand miles of coast. This blockade, kept up irregularly, but when enforced, enforced severely, has seriously injured the trade and manufactures of the United Kingdom. Thousands of persons are now obliged to resort to the poor-rate for subsistence, owing to this blockade. Yet Her Majesty's Government have never sought to take advantage of the obvious imperfections of this blockade, in order to declare it ineffective. They have, to the loss and detriment of the British nation, scrupulously observed the duties of Great Britain towards a friendly State. But when Her Majesty's Government are asked to go beyond this, and to overstep the existing powers given to them by municipal and international law for the purpose of imposing arbitrary restrictions on the trade of Her Majesty's subjects, it is impossible to listen to such suggestions. The ingenuity of persons engaged in commerce will always, in some degree, defeat attempts to starve or debar from commercial intercourse an extensive coast inhabited by a large and industrious population.

"If, therefore, the Government of the United States consider it for their interest to inflict this great injury on other nations, the utmost they can expect is that European Powers shall respect those acts of the United States which are within the limits of the law. The United States' Government cannot expect that Great Britain should frame new statutes to aid the Federal blockade, and to carry into effect the restrictions on commerce which the United States, for their own purposes, have thought fit to institute, and the application of which it is their duty to confine within the legitimate limits of international law."†

It is hardly worth while to dwell on the attempts made to show partiality and unfair conduct on the part of the authorities at Nassau. A Mr. Heyliger appears to have been sent there as the Agent of the Confederates, and a letter from him to the Confederate Government of December 27, 1861, is quoted in the Case of the United States,‡ in which it is said, "We have succeeded in obtaining a very important modification of the existing laws, viz., the privilege of breaking bulk and transhipment." It is said in the Case of the United States—

"That modification was all that the insurgents wanted. That privilege converted the port of Nassau into an insurgent port, which could not be blockaded by the naval forces of the United States. Further stay of the United States' vessels of war was therefore useless. The United States ask the Tribunal to find that this act, being a permission from the British authorities at Nassau, enabling a vessel chartered by the insurgents, and freighted with articles contraband of war, to diverge from its voyage, and to tranship its cargo in a British port when not made necessary by distress, was a violation of the duties of a neutral."

I pass by the admission contained in this passage that Nassau was being used by the United States' vessels of war as a post of observation for the detection and pursuit of vessels carrying contraband of war to the South; in other words, as a base of naval operations.

The explanation of the passage in Mr. Heyliger's letter, which I find in the British Counter-Case and Appendix, is simple enough. The Customs Regulations of the Colony forbade the transhipment of goods in its ports or waters, unless they were landed for examination by the Customs officers. There was nothing however to prevent their being at once re-shipped in other vessels after being so landed and examined, and the Receiver-General of the Colony had power to grant permission for dispensing with the landing of the goods if he thought fit. It would seem that this permission had been customarily granted, as a matter of course, in the case of goods in transit. In conformity with this practice Messrs. Adderley and Co., of Nassau, applied to the Receiver-General, shortly before the date of Mr. Heyliger's letter, for permission to tranship the cargo of the Eliza Bonsell, stated to consist of assorted merchandize, to another vessel, the Ella Warley, bound ostensibly for St. John's, New Brunswick.

The Receiver-General, having regard probably to the destination of the Ella Warley, St. John's being the port for which blockade-running vessels were in the habit of taking clearances, refused to give the usual permission unless authorized by the Governor. Thereupon Messrs. Adderley wrote to the Governor explaining that all they asked for was to be dispensed from the formality of landing the goods on the wharf, and

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* United States' Documents, vol. i, p. 731. † Ibid., p. 723. ‡ Page 226.

then reshipping them, a requisition which had on previous occasions been done away with by the Customs Authorities; and stating that the Receiver-General admitted that he had no ground for his objection, "being fully of opinion that the object of the law could be carried out, and the cargo as easily checked from one vessel to another as if landed."*

The Governor, with the consent of his Council, granted the permission, and indeed there seems no sufficient reason why he should have refused it. He could not in any case have prevented the goods being put on board the Ella Warley, he could only insist on their being landed on the wharf *in transitu*. Mr. Heyliger, who had but just arrived in the Colony, probably misunderstood the nature of the concession, and may not have been sorry to exaggerate it to his superiors. The permission, having been granted in the case of the Eliza Bonsell, may possibly have also been given in other cases, but it is difficult to understand on what principle it can be alleged to constitute a "violation of the duties of a neutral."

Complaint is made that the vessels engaged in running the blockade, and leaving Nassau for that purpose, were allowed to clear out for St. John's, New Brunswick, though it was well known that their destination was a southern port. But there is no means of controlling vessels in this respect. The nature and operation of a clearance is explained in the British Case:—

"Clearance signifies the final official act by which the proper officer of Customs notifies that all has been done which the law requires to be done before the departure of ship and cargo. It is purely for Customs purposes, the main objects being to protect the revenue, and to secure statistics as to the number of ships and quantity of merchandize entering and leaving British ports. As there are in ordinary times no restrictions or duties on the export of articles of any kind from the United Kingdom, no rigid inspection is exercised by the Customs authorities over the general nature of the goods shipped on board vessels in British ports. The attention of the authorities is mainly directed to the shipment of those articles on which an exemption from import duties otherwise payable, or a remission of import duties already paid, is claimed on the ground of their exportation abroad. The object of the inspection is to ascertain that the goods of this nature stated to be thus exported are really shipped and carried away on board the vessel. The agents who ship such goods furnish the Customs Department with statements in the form of shipping-bills, of the amount and nature thereof, and it is the duty of the examining officer to ascertain that the packages placed on board the vessel correspond with these statements. Before starting on his voyage the master of the vessel is bound to produce a paper called a Content, giving the number and description of any packages of merchandize shipped on board, on which exemption from, or remission of duty is claimed, but merely specifying any other articles as 'sundry packages of free goods.' The master has also to produce a Victualling Bill, enumerating the amount of stores liable to duty (such as tea, spirits, tobacco, and the like), which he has shipped for the use of his crew. These papers are compared with the shipping bills and certificates already in the possession of the Customs authorities, and if they are found to tally, a label signed and sealed by the examining officer and Collector, is affixed to the Victualling Bill and certificates, and these papers are delivered to the master as his Clearance.

"It is true that, for statistical purposes, the agents to the master of the vessel are required to furnish to the Customs Department a list, called a Manifest, giving the number and description of all packages of goods, whether liable to duty or not, shipped on board the vessel, and the shipping agents or exporters are also required to furnish specifications of all goods, described by the master on his Content as 'sundry packages of free goods,' and subsequently further described in his Manifest; but the law does not require that these particulars should be given before the vessel sails; it is complied with provided they be furnished within six days after she has cleared.

"Previously to the year 1867, no penalty was attached by law to the departure of a vessel for foreign ports without a clearance provided she was in ballast, and had on board no stores except such as were free or had paid duty. Since that date, however, clearance has been required in these as well as in other cases.

"A clearance may not be granted until the master of the ship has declared the nation to which he affirms that she belongs; and a ship attempting to proceed to sea without a clearance may be detained until such a declaration has been made. The officer, however, cannot question, or require proof of, the truth of the declaration. As to the destination of ships sailing from the United Kingdom, the officers of Customs have little or no means of ascertaining this beyond the information which the master or owner gives on entering outwards. It frequently happens that a vessel entered outwards for a specified destination changes her course when at sea, and proceeds to a different destination. There are no means of preventing this."*

If these vessels had cleared out for a Confederate port, they must equally have been allowed to leave. It has been argued that the vessels employed in conveying contraband of war for the use of the Confederate Government should have been considered as transports, and therefore as contravening the Foreign Enlistment Act; and therefore that they should have been stopped. If this is meant to be said figuratively, it comes to nothing. If it is meant that the vessels were actually built

* British Appendix, vol. v, p. 30.

or fitted out for, and made over to, the Confederate Government, to be used by them as transports—in which case only they would come within the Foreign Enlistment Act—the answer is, that there is not only no evidence of anything of the kind, but there is every reason to believe that the contrary is the case, and that they remained the property of the original owners, who found the employment of them in this trade profitable, notwithstanding that many of them fell into the hands of the blockading ships. It is plain, from the letter before cited, that this is the view that Mr. Consul Morse took of the matter.

Sympathy in the Colonies.

Angry complaints are made in the American documents of the sympathy exhibited at Nassau, and in several other British Colonies, towards the Confederate cause.

When it is asserted, in particular instances, that this favourable feeling towards the insurgent States led to partiality, inconsistent with a due observance of neutrality on the part of the Authorities, it will be better to deal with these charges when I come to the particular cases in which it is alleged to have occurred. As regards the inhabitants of these places generally, it seems to me that it was quite natural that, at the Bahamas and Bermuda, and possibly in the other West India Islands, the tide of public feeling should run strongly in favour of the Confederates. These Colonies lay more or less contiguous to the Southern coast. What trade they had had before with the United States was principally with the South. But what was more likely to operate in favour of the latter was the active trade which the transmission of ships and cargoes to the Southern ports suddenly brought to them. Human nature is pretty much the same at Nassau as it would be under similar circumstances at London or New York. We are apt to look with favour on those who bring us business or promote our wealth, or who in any way cause the sun of prosperity to shine upon us. No Government can control, or ought to endeavour to control, or to interfere with, public feeling in such cases, if leading to no violation of the law.

Independently, however, of any influence exercised by local interest, I cannot doubt that, as the great contest went on, and while the inferiority of the means of upholding it on the part of the South became more and more manifest, their gallantry and courage shone out the more brightly in continuing the unequal struggle, there did arise the sympathy which enduring courage struggling with adversity never fails to inspire. And I can not help thinking that the haughty and offensive tone assumed by many of the Representatives of the United States helped greatly to turn the tide of public feeling in favour of their opponents. Men refused to see in the leaders of the South the "rebels" and the "pirates" held up by the United States to public reprobation, and thus the effect which a more generous appreciation of the position and qualities of their adversaries might have had in neutralizing the feeling in their favour, tended only to increase it.

Be this as it may, I assert that, whatever individual persons may have thought or felt, Great Britain as a nation was throughout the contest between the Northern and Southern States honestly desirous that perfect neutrality should be maintained, and that the Queen's Government, from the beginning to the end, were animated by the honest desire faithfully to discharge the duty which their position as the Ministers and servants of a great Sovereign, pledged to neutrality in the face of the world, imposed upon them.

Application to particular vessels.

Having thus passed in review the general heads of complaint put forward in the pleadings of the United States, for the purpose of vindicating the British Government and British authorities from what appear to me unfounded and unjust aspersions, I proceed to the cases of the individual ships, as to the equipment of which it is alleged that the British Government were wanting in diligence.

But it is here, when we proceed to apply, practically, the test of due diligence to the conduct of the Government, that the anomaly of the present position, to which I adverted in the outset, makes itself sensibly felt. As I have shown upon abundant authority, the equipping of a ship for sale to a belligerent, in the way of trade, was at the time in question no offence against the law of nations, or a violation of neutrality, though it was an offence against the municipal law of Great Britain. The Government, of Her Majesty though, like every other Government, it was bound to prevent any known violation of the law, was under no obligation to a belligerent to enforce the law for his benefit, and incurred no liability to such belligerent for not doing so, so

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* British Case, p. 57.

long as the law was not enforced against the latter any more than against his enemy. Any hostile expedition permitted to leave the shores of Great Britain, which the Government by the exercise of reasonable diligence could have prevented, would have amounted to a breach of neutrality, for which it might have been held responsible. But for the mere equipping of a vessel, by ship-builders in the way of trade, though intended for a belligerent, the Government would not be responsible; and though every Government is no doubt bound to prevent infractions of the law, so far as it knows of them and can prevent them, still this general duty which it owes to its own country, is obviously a very different thing from the responsibility it incurs as representing the State, in relation to a foreign Power. In the one case, the maintenance of the law is left to the ordinary Authorities, and to the individuals who have occasion to seek protection or redress from its operation: in the other, the action of the Government by its immediate officers becomes necessary for its own protection. No doubt, as a matter of comity, and from a sense of justice, a Government would pay ready attention to the Representatives of a belligerent Power complaining of an infraction of the municipal law in a matter in which the interests of the belligerent were affected —more especially in a matter lying as it were on the confines of municipal and international law—and would call into action the preventive powers it possessed, to keep the law from being broken. But, under such circumstances, it might fairly leave to the Representative of the belligerent to make out a case for the application of the law, just as it is left so to do to an ordinary individual who desires to put the law in motion in order to obtain redress on his own behalf. Hence, no doubt, had arisen the practice, common to the Governments both of the United States and Great Britain, of requiring the Representative of a belligerent Power, invoking the aid of the Government, to produce evidence by which the action of the Executive, when brought to the test of judicial inquiry, can be justified and upheld.

It is obvious that the degree of active diligence which could reasonably be expected from a Government under such circumstances, is very different from what it would be bound to exercise in order to prevent a violation of neutrality according to the law of nations, for which as a Government it would be properly responsible to a belligerent State.

It seems to me that though, by the Treaty of Washington it must be taken that Great Britain was bound to use due diligence to prevent the equipping of ships as a matter of neutral obligation, and not as a mere matter of municipal law, yet, that in determining whether due diligence was then applied or not, we must look to the relative position of the parties at the time, and insist on no more than would have satisfied the exigency of obligations then existing. Morally, in judging the conduct of the Government of that time, we are assuredly bound to do so.

Case of the Florida.

The following are the facts relating to the Florida as they are to be gathered from the Cases, Counter-Cases, Arguments, and printed Evidence supplied to the Tribunal:—

This vessel, originally named the Oreto, was no doubt built for war. The contract for her construction was made by Bullock, who, it has since become known (though at the time the fact was altogether unknown to Her Majesty's Government) was an agent of the Confederate States, with Fawcett, Preston, and Co., of Liverpool, by whom the contract for the construction of the hull was again sublet to Miller and Sons, shipbuilders at that port. The attention of Mr. Dudley, the United States' Consul at Liverpool, was attracted to the vessel as early as the end of January 1862. In despatches to Mr. Seward, of the 24th of January and 4th of February, he calls attention to this steamer under the name of the Oritis, or Oretis. In the letter of the 24th of January he says: "She is reported for the Italian Government, but the fact of the machinery being supplied by Fawcett and Preston, and other circumstances connected with it, make me suspicious, and cause me to believe she is intended for the South."*

On the 4th of February he writes to Mr. Seward as follows:—

"In my last two despatches I called attention to the iron screw steam gun-boat Oreto, or Oritis, being built at Liverpool, and fitted out by Fawcett, Preston, and Co. She is now taking in her coal, and appearances indicate that she will leave here the latter part of this week without her armament. The probabilities are she will run into some small port, and take it and ammunition on board. This of itself is somewhat suspicious. They pretend she is built for the Italian Government; but the Italian Consul here informs us that he knows nothing about it, has no knowledge whatever of any vessels being built for his Government. There is much secrecy observed about her, and I have been unable to get anything definite, but my impressions are strong that she is intended for the Southern Confederacy. I have communicated my impressions and all the facts to Mr. Adams, our Minister at London. She has one funnel, three masts, barque-rigged, eight portholes for guns on each side, and is to carry sixteen guns."†

It thus appears that, by the 4th of February, Mr. Dudley had put Mr. Adams in possession of such information as he possessed concerning this vessel. The letter of Mr. Dudley to Mr. Adams has not been published among the American documents; but it is evident that Mr. Adams did not consider the information communicated to him sufficient to warrant any application to Her Majesty's Government, for none was made by him on the subject of this vessel till the receipt of another letter from Mr. Dudley, a fortnight later. Indeed, Mr. Dudley expressly states that he was unable to get anything definite about the vessel. He speaks only of suspicions and impressions. He had nothing to communicate beyond reports and rumours.

Amongst other things stated by Mr. Dudley, he mentions that he had made inquiry of the Italian Consul at Liverpool, who had told him that he knew nothing of the vessel. But if, as was stated by the builders, the order for the vessel had been given by Thomas Brothers, of Palermo, the Italian Consul at Liverpool might have remained without information on the subject; and Mr. Dudley, while mentioning what had passed between him and the Italian Consul to Mr. Seward, does not appear to have mentioned it to Mr. Adams. The fact was unknown to Her Majesty's Government.

On the 17th of February, Mr. Dudley again writes to Mr. Adams about the Oreto as follows:—

"The gun-boat Oreto is still at this port. She is making a trial trip in the river to-day. No armament as yet on board. She has put up a second smoke-stack since I wrote you. She therefore has two funnels, three masts, and is barque-rigged. I am now informed that she is to carry eight rifled cannon, and two long swivel-guns on pivots so arranged as to rake both fore and aft. No pains or expense has been spared in her construction, and when fully armed she will be a formidable and dangerous craft. In strength and armament quite equal to the Tuscarora, so I should judge from what I learn.

"Mr. Miller, who built the hull, says he was employed by Fawcett, Preston, and Co., and that they

* United States' Documents, vol. vi, p. 214.

† Ibid., p. 215.

own the vessel. I have obtained information from many different sources, all of which goes to show that she is intended for the Southern Confederacy. I am satisfied that this is the case. She is ready to take her arms on board. I cannot learn whether they are to be shipped here or at some other port. Of course she is intended as a privateer. When she sails, it will be to burn and destroy whatever she meets with bearing the American flag."*

In a postscript he adds, "The gun carriages for the Oreto, I have just learned, were taken on board on Friday night last, in a rough state, and taken down in the hold. Fraser, Trenholm, and Co. have made advances to Fawcett, Preston, and Co., and Miller the builder."

This statement as to the gun carriages was wholly incorrect.

Having received the letter of Mr. Dudley, Mr. Adams writes, inclosing it to Lord Russell, as follows:—

"My Lord, "*Legation of the United States, London, February* 18, 1862.

"I have the honour to submit to your consideration the copy of an extract of a letter addressed to me by the Consul of the United States at Liverpool, going to show the preparation at that port of an armed steamer evidently intended for hostile operations on the ocean. From the evidence furnished in the names of the persons stated to be concerned in her construction and outfit, I entertain little doubt that the intention is precisely that indicated in the letter of the Consul, the carrying on war against the United States. The parties are the same which dispatched the Bermuda, laden with contraband of war at the time, in August last, when I had the honour of calling your Lordship's attention to her position, which vessel then succeeded in running the blockade, and which now appears to be about again to depart on a like errand.

"Should further evidence to sustain the allegations respecting the Oreto be held necessary to effect the object of securing the interposition of Her Majesty's Government, I will make an effort to procure it in a more formal manner.

"I have, &c.

(Signed) "CHARLES FRANCIS ADAMS."*

It is clear that, in the information thus conveyed to Lord Russell, there was, so far, nothing that could justify the seizure of the vessel. Whether Mr. Dudley communicated to Mr. Adams the details of the information, to which he refers in general terms in his letter of the 17th, or not, it is certain that no details were communicated to Her Majesty's Government. Nothing was specifically stated beyond the names of the parties for whom and by whom the vessel had been built, and that the former were the same as had, in the preceding August, dispatched the Bermuda laden with munitions of war, with which she had succeeded in running the blockade. Beyond this, all is suspicion, or, at best, the belief of two zealous servants of the United States' Government, with only a general reference to information received by one of them from "many different sources," no details of which are given, or means afforded of testing its accuracy or trustworthiness. It is obvious that, if upon such a representation the Government had proceeded to seize the vessel, no Court could have condemned her: she must inevitably have been released. Indeed, Mr. Adams himself seems to have been conscious that his representation was not one on which the Government could act without further materials; for he ends his letter by saying, "Should further evidence to sustain the allegations respecting the Oreto be held necessary to effect the object of securing the interposition of Her Majesty's Government, I will make an effort to procure it in a more formal manner."

It is plain from this that, as late as the 18th of February, Mr. Adams was not in possession of evidence on which he felt he had a right to call for the interposition of the Government.

Nor does Mr. Dudley appear to have succeeded in obtaining any more reliable information. On the 19th he writes again to Mr. Seward:—

"I do not think there is any doubt but what she (the Florida) is intended for the so-called Southern Confederacy. Information from many different sources all confirm it, and some of the Southern Agents have admitted it. On Friday night last, her gun carriages, in pieces, and some in a rough state, were taken on board and put down in the hold. It is understood that her guns are at the foundry of Fawcett, Preston, and Co. It is probable they may be taken on in boxes, and mounted after they get out to sea; but I have nothing to warrant this supposition, except the fact of the gun-carriages being taken on board in the night time and in the manner they were. She will be quite equal in strength and armament to the Tuscarora when completed. She made a trial trip of twenty miles yesterday. I have made this vessel the subject of two despatches to Minister Adams, and communicated to him all the particulars."†

Here again, when Mr. Dudley professes to be in possession of the important fact that some of the Southern Agents had admitted that the Oreto was intended for the

* British Appendix, vol. i, p. 1: United States' Documents, vol. vi, p. 216.
† United States' Documents, vol. vi, p. 218.

Southern Confederacy, he communicated the fact only to Mr. Seward. No such information is given to Mr. Adams, still less to the Government or to the local Authorities, by whom, had it been imparted to them, the information might have been followed up.

Both in this and his former letter Mr. Dudley's information as to the gun-carriages having been conveyed on board the Oreto, with the additionally suspicious circumstance of this having been done by night, proved altogether mistaken. The report made by the Custom-house Officers of Liverpool of the 21st of February shows that the vessel had no gun-carriages on board. It further appears by reports made at a later period that she had no gun-carriages on board when she finally left Liverpool. She had none on board when she arrived at Nassau.

All that under the circumstances could possibly be asked for, on the information conveyed to the Government by Mr. Adams, was inquiry; and this Her Majesty's Government at once proceeded to institute.

Immediately on the receipt of Mr. Adams' letter, Earl Russell took the necessary steps for causing local inquiries as to the Oreto to be made by the officers to whose Department it appertained to investigate such a matter. No clue having been given to the secret sources of information which Mr. Dudley may have possessed, these officers could only apply in the first instance to the builders of the vessel. The result of their inquiries, as shown in the reports made by them, appeared perfectly satisfactory. The Commissioners of Customs, on the 22nd of February, report to the Treasury as follows:—

"On receipt of your Lordship's reference, we forthwith instructed our Collector at Liverpool to make inquiries in regard to the vessel Oreto, and it appears from his report that she has been built by Messrs. Miller and Sons for Messrs. Fawcett, Preston, and Co., engineers, of Liverpool, and is intended for the use of Messrs. Thomas, Brothers, of Palermo, one of that firm having frequently visited the vessel during the process of building.

"The Oreto is pierced for four guns; but she has, as yet, taken nothing on board but coals and ballast. She is not, at present, fitted for the reception of guns, nor are the builders aware that she is to be supplied with guns whilst she remains in this country. The expense of her construction has been paid, and she has been handed over to Messrs. Fawcett and Preston. Messrs. Miller and Sons state their belief that her destination is Palermo, as they have been requested to recommend a master to take her to that port, and our Collector at Liverpool states that he has every reason to believe that the vessel is for the Italian Government.

"We beg further to add, that special directions have been given to the officers at Liverpool to watch the movements of the vessel, and that we will not fail to report forthwith any circumstance which may occur worthy of your Lordship's cognizance.

(Signed) "THO. F. FREMANTLE.
"GRENVILLE C. L. BERKELEY."*

The statement of the Commissioners was based on the following reports which they had received from their officers at Liverpool:—

Mr. Edwards to the Commissioners of Customs.

"Honourable Sirs, "*Liverpool, February* 21, 1862.

"The builders of the vessel Oreto are Messrs. Miller and Sons. Mr. Miller is the chief surveyor for tonnage. By their note inclosed the vessel is correctly described, and I have every reason to believe that she is for the Italian Government, and not for the Confederates.

"It will be seen by the note of the Surveyor, Mr. Morgan, which I annex, that, as yet, she has nothing in her, so that the information furnished to the Government is, so far, incorrect.

"Special directions have been given to the officers to observe the movements of the vessel, so that whatever takes place can be made known to the Board at any time.

"Respectfully, &c.
(Signed) "S. PRICE EDWARDS."

Mr. Miller to Mr. Edwards.

"Sir, "*Liverpool, February* 21, 1862.

"We have built the dispatch-vessel Oreto for Messrs. Fawcett, Preston, and Co., engineers, of this town, who are the agents of Messrs. Thomas, Brothers, of Palermo, for whose use the vessel, we understand, has been built. She is pierced for four guns; she has taken nothing whatever on board except coals and ballast; she is in no way fitted for the reception of guns, as yet; nor do we know that she is to have guns whilst in England. Mr. Thomas, of the firm at Palermo, frequently visited the ship whilst she was being built.

"We have handed her over to the engineers, and have been paid for her. According to the best of my information the present destination of the vessel is Palermo; and we have been asked to recommend a master to take her out to Palermo.

"I remain, &c.
(Signed) "T. MILLER."

* British Appendix, vol. i, p. 2.

Mr. Morgan to Mr. Edwards.

The Florida.

At Liverpool.

"Sir, "*February* 21, 1862.

"I beg to state that I have inspected the Oreto, now lying in Toxteth Dock, agreeably with your directions issued to-day.

"She is a splendid steamer, suitable for a dispatch-boat; pierced for guns, but has not any on board, nor are there any gun-carriages. Coals and ballast are all that the holds contain.

"Respectfully, &c.

(Signed) "C. MORGAN, *Collector*."*

Here, therefore, was the assurance of a respectable firm of shipbuilders, by whom the vessel had been built, that it was understood by them to have been built for Thomas Brothers of Palermo, whose agents Fawcett and Co. were, and that Mr. Thomas, a member of the Palermo firm, had frequently visited the ship whilst she was in the course of construction. There was the statement of Mr. Edwards, an officer possessing the confidence of the Government, that he had every reason to believe that the vessel was built for the Italian Government, and not for the Confederates. And from the report of Mr. Morgan, another Government officer, as well as from the statement of Mr. Miller, it further appeared that the representation of Mr. Dudley, that the vessel "had received her gun-carriages and was ready to take her arms on board," was altogether incorrect, there being no gun-carriages on board, or preparation of any sort for the reception of guns.

If, prior to the receipt of these reports, the evidence was insufficient to justify the seizure or detention of the vessel, assuredly after them Her Majesty's Government would have acted most improperly if they had directed their officers to adopt so arbitrary and unwarranted a proceeding.

It may be said that further inquiries should have been instituted. But of whom? Mr. Dudley, to whom every one who had conceived any suspicions about the vessel, or heard any rumours respecting her, appears to have run, and who of course was naturally disposed to listen to any statements of the kind, made a point of not giving up the names of his informants. No facts were ever communicated by Mr. Dudley, either to the officers of the port or to the police of Liverpool.

The reports received from the Commissioners of Customs by the Government were at once communicated to Mr. Adams. I cannot help thinking that then was the time for putting Her Majesty's Government in possession of any information which had been obtained by Mr. Dudley from so "many different sources," if that information could have been made available, and for procuring the evidence which Mr. Adams had expressed himself willing to make an effort to obtain. But nothing further was heard from that gentleman till the 26th of March (upwards of a month later), when the vessel had actually sailed. Either Mr. Adams felt, after the reports made to the Government by its officers, that the zeal of Mr. Dudley had led him to form hasty conclusions; or the information, though derived from "many different sources," turned out to be such as could not be relied on; or the evidence was found not to be forthcoming. Even Mr. Dudley, whose untiring industry and zeal in the discharge of his duty is certainly entitled to admiration, does not appear to have supplied Mr. Adams during the whole of this period with any evidence of importance, or to have been required by Mr. Adams to procure evidence upon which the Government could be called upon to act. It appears to me, under these circumstances, singularly inconsistent and unjust to impute as matter of blame to Earl Russell, as is done in the Case of the United States, that he did not call upon Mr. Adams to furnish further evidence. The Government were satisfied with the reports of their officers, having received which they might reasonably, and without being liable to any imputation of want of due care, be of opinion that they ought to rest content, at all events till something more should be brought forward. There was no reason why they should doubt the written statement of Messrs. Miller, a firm of known respectability, and one of the members of which was a Government officer at the port. All the firms mentioned had carried on business at Liverpool previously to the war, and it neither is, nor can be, suggested that after the war had begun they had no business dealings or transactions except with the Confederate States. At the same time, as there was no doubt that the vessel was one which was capable of being adapted to the purpose of war, it was right at such a conjuncture that a watchful eye should be kept on her. Directions to this effect were accordingly given by the Commissioners of Customs, and the vessel was diligently

* British Appendix, vol. i, p. 159.

The Florida.
At Liverpool.

watched until the hour of her departure. If evidence had been forthcoming to show that the Government officers were deceived, it was for Mr. Dudley, who professed to know where it was to be found, to produce it. He would have been wholly wanting in his duty if, being possessed of, or enabled to obtain such evidence, he had failed to produce it. The fact that neither Mr. Dudley nor Mr. Adams made any communication to the Government till after the vessel had sailed is, as it seems to me, very strong to show that no such evidence was to be had.

If Mr. Dudley, to whom everybody appears to have resorted who had anything to communicate, could find nothing on which his superior, Mr. Adams, ever ready to address requisitions or remonstrances to Earl Russell, could call for the intervention of Her Majesty's Government, it seems unreasonable to reproach the Government with want of due diligence in not making inquiries which, there is every reason to think, could have led to no profitable result.

That the Government were sincerely desirous of ascertaining the true character of this vessel lest, possibly, any violation of neutrality should be contemplated, is shown by this, that instead of resting satisfied with the inquiries of the local officers, a belief having been expressed that the vessel was being built for the Italian Government, Lord Russell, on the 26th of February, telegraphed to Sir James Hudson, the British Minister at Turin, desiring him to "ascertain and report whether a vessel called the Oreto, now fitting out at Liverpool, is intended for the use of the Italian Government."* Sir James Hudson having referred to Signor Ricasoli, the Minister for Foreign Affairs, telegraphs, in answer: "Ricasoli tells me he has no knowledge whatever of the ship Oreto, but will cause inquiry to be made."† As the construction of such a vessel would belong to the Department of the Marine, the fact of Signor Ricasoli being unaware of any order having been given for its construction would, of course, not be conclusive. Indeed, Signor Ricasoli would not take upon himself to negative the fact, but promised to make inquiry on the subject. Unfortunately the result of the inquiry, which was that the vessel had not been built for the Italian Government, was not communicated to Sir James Hudson till the 25th of March, by which time the Oreto had actually sailed.‡ The delay is believed to have been owing to a change in the Italian Ministry, which occurred about the period in question; for the answer to Sir James Hudson was given not by Signor Ricasoli, but by Signor Ratazzi, who had succeeded him as Minister for Foreign Affairs. The delay is certainly not one for which Her Majesty's Government can in any way be held responsible. Until the final answer to Sir James Hudson's inquiry had been given, the uncertain answer of Signor Ricasoli could not, for the reason already given—namely, that the matter was not one belonging to his department—suffice to warrant the seizure or detention of the vessel. The ignorance of the Italian Consul at Liverpool, who would not necessarily be informed of an order given by the Italian Government, especially if the order had been given to Thomas Brothers of Palermo, could not make it unnecessary to wait for Signor Ratazzi's answer. But the alleged ignorance of the Italian Consul was never communicated to the Government or to the local authorities. The information was given by Mr. Dudley to Mr. Seward alone; in other words, was thrown away.

Mr. Dudley continued to keep a watchful eye on the Oreto. On the 27th of February he writes to Mr. Seward:—

"I have positive evidence that the Oreto gun-boat is intended for the Southern Confederacy. She is to carry sixteen guns, is intended as a privateer, and, from present appearances, looks as if she would start on her cruize direct from this port. She has taken on board, this morning, seventy barrels of pork and beef, sixty sacks of navy and six barrels of cabin bread, together with other provisions. The guns are to be shipped at some other port in England."§

Again on the 1st of March:—

"The day before yesterday I wrote the Department that I had obtained evidence that the gun-boat Oreto was intended as a privateer, and that she was taking on her provisions, &c. Since then she has been quite busy in taking on provisions. She has a very large quantity, enough for a long cruise. They are getting as many Southern sailors as they can. They want 130 men if they can procure them. The pilot has been told they would leave to-day; they are only waiting for the arrival of the West India boat at Southampton. The captain who is to command her is to come by this boat. A man by the name of Duguid, a Scotchman, is to take her out of this port as an English vessel. Her transfer will be made outside. The pilot thinks she will not come back to Liverpool after her trial trip. He is given to understand that she will go to the Isle of Man, then to Holyhead, and some other ports, in one of which her guns will be placed on board, and then she will enter at once on her cruize, and sail

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* British Appendix, vol. i, p. 3. † Ibid.
‡ Ibid., p. 6. § United States' Documents, vol. vi, p. 220.

The Florida, At Liverpool.

to the Mediterranean. I have made arrangements by which I think intelligence of her movements will be communicated to me. Yesterday I addressed letters to the Consuls on the Mediterranean, and seaports of Spain, Portugal, and some others, advising them of this vessel, and requesting them to report her if she should visit the port. The programme, as laid down to the pilot, may not be carried out, but it looks very probable when taken in connection with the large supplies of provisions she has received on board."*

The programme was not carried out. The Oreto neither went to the Isle of Man, nor Holyhead, nor the Mediterranean; nor did she get any Southern sailors.

In the foregoing letters Mr. Dudley says he has "positive evidence" that the gun-boat Oreto was intended as a privateer, and for the Southern Confederacy. If so, one is naturally induced to ask how it was that this evidence was not communicated to Mr. Adams, by whom it might immediately have been made available, instead of being only spoken of, and that only in general terms, to Mr. Seward, who, being on the other side of the Atlantic, could not, of course, make use of it to stop the vessel. Is not the fair inference to be drawn from this and the other letters of this gentleman, when we see how little resulted from them, that anxious to show his zeal in the best light, he was more disposed to address himself to the Secretary of State than to the Minister in London, and was somewhat apt to boast of possessing evidence, when, in fact, he had nothing more than reports and conjectures, which, though not inconsistent with probability, possessed no substantial or available reality? Or was it that his information was obtained by secret means which would have stamped it with discredit if produced?

On the 5th of March Mr. Dudley again writes to Mr. Seward:—

"Owing, as it is alleged, to the authorities here, the Oreto has been compelled to register as an English vessel, and be regularly entered, &c. She entered on Saturday last for Palermo, in Sicily, and Jamaica, in the West Indies, W. C. Miller as owner, and Duguid as commander. Her guns are not on board. She shipped her crew on Monday last. Inclosed find a copy of an agreement given by the captain to one of the men. By it you will see that, while Miller is the owner, Fawcett, Preston, and Co. pay the men. I have this document temporarily in my possession. The transfer of the vessel to the Southern Confederacy will not be made here, but at some place outside; it may be at Palermo or Bermuda, but most likely at some place in the Mediterranean, as the pilot and all the men are now given to understand that they are first to go there. The foreman in Fawcett, Preston, and Co.'s told a young man formerly in the employ of that company that the guns for the Oreto were to be shipped to Palermo, and put on board at that place; while another person in their foundry told one of my men that the guns had been sent on in the steamer Bermuda, and were to be landed at Bermuda, and that the Oreto was to call there for them. Which of these, or whether either of them, is true, I cannot tell; but what gives some strength to the latter statement is the fact that on Saturday morning last, while the Bermuda was in the river, and just before she sailed, several large cannon were placed on board of her. Both of these persons in the employ of Fawcett, Preston, and Co. stated that she was intended for the Confederates. The report is that she is to stop at Holyhead. I have sent a man there to watch her, and made arrangements with one of the crew to give information from time to time; made her the subject of a number of communications to Mr. Adams, and on Friday addressed a circular to all our Consuls in the Mediterranean, requesting them to look after and report to the Department in case she should visit the port. The provisions of the Oreto are of the very best kind, and very ample (the pilot says enough to last a year,) with abundance of wines and liquors for the officers. She sailed from here last evening—the bill of entry says for Palermo and Jamaica in ballast. Her crew shipped consists of fifty-two men."†

The conflicting statements set forth in this letter show how uncertain and unreliable were the reports which were conveyed to Mr. Dudley by persons who gave their conjectures as facts, as well as how little reliance can be placed on the information of Mr. Dudley, and how readily that gentleman accepted unauthentic rumours and reports as the foundation of his statements. Mr. Miller was not registered as owner, but, as we shall see in a moment, Mr. John Henry Thomas, a merchant connected with Palermo. In the agreement with the crew, printed in the British Appendix, the firm of Fawcett, Preston, and Co., are mentioned as "managing owners;" no mention is made of Mr. Miller, either as registered or managing owner.

The guns for the Oreto, which it was asserted were to go out in the Bermuda, did not go out in that vessel.

Here, again, I cannot but repeat the observation that while facts, which, if true, were no doubt of importance, are communicated to Mr. Seward, no information respecting them is given to Mr. Adams, by whom they might have been turned to good account, or to the local Authorities, to whom they might have afforded a clue to get at the truth. The statements made by the foreman and workmen of

* United States' Documents, vol. vi, p. 220.

† Ibid., p. 221.

The Florida.
At Liverpool.

Fawcett, Preston, and Co., if mentioned in the proper quarter, might have led to important revelations.

The attention of the local Authorities at Liverpool had not been withdrawn from the vessel. They insisted, as appears from Mr. Dudley's letter to Mr. Seward, of the 5th of March, that the ship should be registered, no doubt as the condition of her clearance, and on the 3rd of March she was registered accordingly, in the name of "John Henry Thomas, of Liverpool, in the County of Lancaster, merchant," apparently either a member of, or connected with, the Palermo firm—the said John Henry Thomas then making the following declaration, according to the usual form:—

"I, the undersigned John Henry Thomas, of Liverpool, county of Lancaster, merchant, declare as follows:—I am a natural-born British subject, born at Palermo, in the Island of Sicily, of British parents, and have never taken the oath of allegiance to any foreign State. The above general description of the ship is correct. James Alexander Duguid, whose certificate of competency or service is No. 4,073, is the master of said ship. I am entitled to be registered as owner of sixty-four shares of the said ship. To the best of my knowledge and belief no person or body of persons other than such persons or bodies of persons as are by the Merchant Shipping Act, 1854, qualified to be owners of British ships is entitled, as owner, to any interest whatever, either legal or beneficial, in the said ship. And I make this solemn declaration, conscientiously believing the same to be true.

(Signed) "JOHN H. THOMAS.

"Made and subscribed the 1st day of March, 1862, by the above-named John Henry Thomas, in the presence of—

(Signed) "J. C. JOHNSTONE, Jun., *Registrar of Shipping,*
*"Port of Liverpool."**

The fact of Mr. Thomas, who thus declared himself to be a native of Palermo, being registered as the owner, and his declaration that no person or body of persons, other than such as were by the Merchant Shipping Act qualified to be owners of British ships, was entitled, as owner, to any interest, legal or beneficial, in the vessel, were of course calculated to give support to the statement that the vessel was intended for the firm of Thomas Brothers of that place.

On the ensuing day, the 4th, the Oreto cleared out for Palermo and Jamaica.

Attention is called in the Case of the United States to the fact that, "notwithstanding the alleged belief of the Liverpool officers that the vessel was intended for the King of Italy, she was allowed to clear for *Jamaica* in ballast." In fact, she cleared for *Palermo* and Jamaica; not, as would appear to be thus represented, for Jamaica alone. And it is to be observed that the belief of Mr. Edwards, the Collector, on this head, had been expressed as much as a month before, without, as it would appear, any definite grounds; and that, on the other hand, Messrs. Miller had stated that she had been built for the Palermo firm, and that this statement had received confirmation from the registration of Thomas as her owner.

Though represented as destined to be handed over to the Italian Government, as a dispatch boat, yet if built in the first instance for a private firm, it was not impossible that it might be intended that she should make a voyage to the West Indies before being parted with. Even if her being cleared for Jamaica, as well as Palermo, had been deemed a circumstance of suspicion, it would not have justified a seizure of the vessel, unless there was something to show that the clearance was fictitious and fraudulent. It was only by subsequent events that this was made to appear.

Attention is invited in the Case of the United States to what is called the "easy credulity" of these officials, "who to the first charges of Mr. Adams replied by putting forward the belief of the builders as to the destination of the vessel, and who met his subsequent complaints by extracting from the Custom-house records the false clearance which Bullock, and Fraser, Trenholm, and Co., had caused to be entered there."†

This representation appears to me very unfair. These officers, on receiving instructions from the Commissioners of Customs to make inquiry, had no one to resort to on the first occasion but the builders. They could report no other than what the builders stated, which was that "to the best of their information" the present destination of the vessel was Palermo, as it had been built for the firm of Thomas, Brothers, of that place, and they had been asked to recommend a master to take her out to Palermo. When it is said that on the second occasion the officers extracted from the Custom-house records the false clearance which Bullock, and Fraser, Trenholm, and Co., had caused to be entered there, it is again to be borne in mind that it was their duty to communicate the entry of the ship's clearance to their superiors, according as it stood on the register: besides, there is no evidence of the entry having been made by

* British Appendix, vol. i, p. 10.

† Case of the United States, p. 337.

Bullock or by Fraser, Trenholm, and Co. Indeed, that Bullock can have been a party to the clearance is impossible. The recklessness of the assertion is apparent from the fact that the clearance was effected, and the entry of it made, on the 3rd of March; whereas Bullock did not arrive at Liverpool in the Annie Childs till the 11th.* If Fraser and Co. were parties to the clearance, the fact appears to have been unknown to Mr. Dudley: no suggestion of the kind is anywhere made by him. Still less is there any ground whatever for supposing that the officers had any knowledge or reason to suspect that the entry had been made by these parties, or was in any respect false. The slur attempted to be cast on these officers, who are said to have been deceived only "because they wished to be deceived," appears to me, I must say, wholly unfounded, and one cannot but regret to see imputations of this kind introduced into a Case stated on the part of the American Government.

But the question, it must never be forgotten, is not whether these officers were unduly credulous; the question on which the liability of the British Government must depend is whether there were facts, ascertained, or capable of being ascertained, upon which they would have been justified in taking possession of this vessel. It seems to me that there were not.

Upon what evidence could Her Majesty's Government have supported the seizure, or asked for the confiscation of this vessel in an English Court of law?

It is here all essential to keep in mind what it was which in a Court of Law it would have been incumbent on the Public Prosecutor to establish, in order to the condemnation of the vessel under the Foreign Enlistment Act. He would have had in the first place to show that the vessel was equipped for war. As to this, it is true there would have been no difficulty. The vessel was pierced for guns, and had the necessary fittings for war: she was represented as a dispatch-boat, which means a vessel capable of being armed, and therefore of being used for war. But it would have been further necessary to prove that the vessel was intended to be used against a belligerent with whom Great Britain was at peace. Here lay the difficulty. For on this head the evidence totally failed. Beyond surmises, suspicion, rumour, there was nothing, at least nothing tangible or that could be made practicably available. According to the safe and sound rules of evidence, which happily prevail in an English Court of Justice, as also in those of America (for the procedure is the same in both) the suspicions and impressions of Mr. Dudley would have been wholly inadmissible; the reports received by him from persons who could not be brought forward would have been rejected as mere hearsay; the gossip of the docks or the shipwrights' yards would have been at once excluded; insinuations, imputing to respectable officers abandonment of duty and complicity in crime, recklessly made and unsupported by proof, would have been treated with proper disregard. But, beyond this, what was there to show that this vessel was intended for the service of the Confederate States? Positively nothing: while, on the other hand, there was the fact that an apparently respectable merchant, a native of Palermo, had registered himself as the owner; that the vessel had cleared for Palermo and Jamaica, and that her crew had signed articles for a voyage to those places.

A circumstance to which the officers at Liverpool appear to have attached considerable importance, was that the vessel, though pierced for guns, had not even gun-carriages on board, and was wholly unarmed and destitute of munitions of war. It might indeed be surmised by Mr. Dudley that the vessel would receive her armament elsewhere, and the sequel proved that his suspicions were well founded; but on his own showing he was wholly without evidence to prove that such was to be the case. Nor must it be forgotten that the Florida was the first vessel of war built in England for the Confederate States, and that the artifices and tricks, to which the unscrupulous cunning of the Confederate Agents did not hesitate to resort in violation of British neutrality, had not till then been brought into play. The officers therefore finding, after having unceasingly watched the vessel, that no attempt was made to arm her, may not unreasonably have been satisfied that she was leaving on an innocent voyage; or, at all events, without there being any intention of arming her in British waters. To some minds this may seem "easy credulity." To others, less astute, it may seem natural enough, and not to be justly imputable to want of proper diligence or to intentional neglect of duty.

If, indeed, the officers had become aware that another vessel had been at that time taking on board gun-carriages and guns capable of being put on board the Oreto after

* United States' Documents, vol. vi, p. 223.

The Florida. At Liverpool.

she had left the port, such a circumstance would have been well calculated to excite suspicion that the professed voyage to Palermo and Jamaica was but the pretended destination of the vessel.

But nothing of the kind existed. M. Staempfli, who has insisted on such a fact as one of the main grounds of a decision against the British Government, has here fallen into a very serious error. Instead of the guns and their carriages being brought, as he has imagined, from Hartlepool to Liverpool and there shipped, they were, in fact, in order to avoid suspicion, transmitted by railway, unknown to the authorities, from Liverpool to Hartlepool, a port on the opposite coast of England, and there shipped; so that, while the officers at Liverpool knew nothing of the shipment of the guns, the officers at Hartlepool knew nothing of the sailing of the Oreto. To this it may be added that, though Mr. Dudley was aware of the sailing of both the ships, and also of the transport of guns and munitions of war from Liverpool to Hartlepool by Fawcett and Co. to form part of the cargo of the Bahama, it never occurred to him to imagine that there was any connection between the two vessels. While he believed that the Oreto was about to proceed to the Mediterranean, his letters show that he believed that the guns and munitions of war sent to the Bahama were intended to run the blockade or be taken to Bermuda or Nassau, to be there transhipped for that purpose.

On the 7th of March he writes to Mr. Seward:—

"Some three weeks ago I was credibly informed that the same parties who had purchased the Herald had bought the steamer Bahama; that they would load her with munitions of war for the so-called Southern Confederacy, and either run the blockade or else land her cargo at Bermuda and run it into Charleston on smaller vessels. I made inquiries to find her, and wrote to different Consulates without obtaining any information about her, or any vessel of that name. Yesterday, we discovered that Fawcett, Preston, and Co. were shipping, by rail, cases containing shells and shot, also cases supposed to contain cannon and rifles, directed to 'Pickford and Co., West Hartlepool, for shipment per steamer Bahama, for Hamburgh.' This Hartlepool is the same place where the Bermuda, on her first trip, received a portion of her cargo. I have written to the Consuls at Leeds and London, and will endeavour to learn something more about this business."*

On the 12th of March:—

"The Vice-Consul at Newcastle writes me that there is a steamer, called the Bahama, loading at West Hartlepool. He no doubt will advise the department and give all the particulars in reference to her. Fawcett, Preston, and Co. are sending large quantities of munitions of war to this vessel; they have already sent from Liverpool 500 cases of shot and shells, upwards of 20 tons of cannon, and about 4 tons of gun-carriages. This vessel will either run the blockade or land her cargo at Bermuda or Nassau, and have it ferried over in smaller vessels."†

When Mr. Dudley himself had not the shadow of a suspicion that the guns sent over to Hartlepool to be loaded in the Bahama were intended for the Oreto, it would be unreasonable, even independently of the mistake I have adverted to, to expect that the Liverpool officers should have seen through the contrivance.

Now, indeed, we are enabled to see these things by the light of subsequent events and since-acquired knowledge. We now know that the Oreto was ordered by Bullock for the Confederate States, and that Bullock was an agent of those States. But at that time these facts were entirely unknown to Her Majesty's Government, and the first of them, at least, equally so to Mr. Dudley himself. Subsequent events have shown that the suspicions entertained by Mr. Dudley and others were well founded; but though these suspicions may have had more or less of probability, they were but suspicions, and were, therefore, incapable of being made practically available. It is easy to be wise after the event,—"Eventus stultorum magister," says the adage. The Tribunal must be on its guard against the impression likely to be produced by the adroit way in which, in the United States' pleadings, the story of these vessels is told without distinguishing what was formerly known, and what is now known about them. But, obviously, nothing can be more irrational or unjust than to say that Her Majesty's Government were bound to have seen things then as we see them now, or to seek the condemnation of the Oreto on such evidence as was then forthcoming, because subsequent events have made manifest what was then incapable of being proved.

The inability of Mr. Dudley to obtain any evidence as to the destination of the vessel becomes the more remarkable from the fact that, owing to an accident, an additional three weeks from the clearing out of the Oreto was afforded him for discovery. The vessel in going out, after she had cleared, sustained some injury, and

* United States' Documents, vol. vi, p. 222. † Ibid., p. 223.

The Florida.
At Liverpool.

had to put back for repairs, and was detained till the 22nd of March, when she finally sailed. Notwithstanding this favourable circumstance Mr. Dudley appears to have been unable to obtain any proof of the vessel being intended for the Confederate service.

On the 12th of March he writes to Mr. Seward :—

"The steam gun-boat Oreto put back into the river yesterday again. This is the third time she has come back. She is now anchored in the stream. I am quite unable to account for her conduct. She, no doubt, is either waiting for her guns or some person. I was told, some two weeks ago, that a Southern naval officer was to come over to take command after they transferred her; it is possible they are waiting for his arrival."*

Again, on the 15th he writes :—

"The Oreto is still in the river, lying off Eggmont. She is evidently not ready for sea, and is waiting for her guns or else for some person. I was informed yesterday that her guns are to be placed on board before she leaves this port; that they are to be boxed, taken over to Birkenhead, and there placed on tugs or lighters and conveyed to the vessel. I have no means of verifying this statement. I have communicated it to our Minister at London."†

According to these letters, and that of the 5th of March, previously quoted, Mr. Dudley had addressed several communications to Mr. Adams on the subject of the Oreto. No new facts can, however, have been communicated which Mr. Adams deemed worthy of being submitted to Her Majesty's Government, for no communication was received from him. If Mr. Dudley was in possession of available information and failed to communicate it to Mr. Adams, or if such information was communicated to Mr. Adams, but that gentleman omitted to make Her Majesty's Government acquainted with it, there would have been a want of "due diligence" on the part of the agents of the United States' Government. But the known vigilance and assiduity of these gentlemen renders such an imputation impossible.

On the 22nd of March, the day the Oreto actually sailed, Mr. Dudley writes thus to Mr. Adams :—

"The Oreto is still in the river. A flat boat has taken part of her armament to her. A part of the crew of the steamer Annie Childs, which came to this port loaded with cotton, have just left my office. They tell me that Captain Bullock is to command the Oreto, and that four other officers for this vessel came over with them in the Childs. The names of three are Young, Low, and Maffet or Moffit, the fourth was called Eddy; the first two are lieutenants, and the two last named midshipmen. They further state that these officers during the voyage wore naval uniforms; that they came on the Childs at a place called Smithville, some 20 miles down the river from Wilmington; that it was talked about and understood by all on board that their object in coming was to take command of this vessel, which was being built in England for the Southern Confederacy. They further state that it was understood in Wilmington, before they left, that several war vessels were being built in England for the South. As they were coming up the river in the Childs, as they passed the Oreto, she dipped her flag to the Childs. I have had this last from several sources, and the additional fact that the same evening, after the arrival of this steamer, a dinner was given in the Oreto to the officers who came over in the Childs. I understand she will make direct for Madeira and Nassau."‡

Here was, indeed, information of importance, but unfortunately it came too late; nor was it communicated to the Government or to the local Authorities till the ship had sailed. Had Mr. Dudley, instead of contenting himself with writing to Mr. Adams, at once put the Collector of Customs in communication with the part of the crew of the Annie Childs to whom he refers in his letter, the statement thus made, had it appeared to be such as could be depended on, might have made it incumbent on that officer to detain the vessel. But this obvious course does not appear to have occurred to Mr. Dudley. He contented himself with writing to Mr. Adams. The opportunity was lost and the vessel left.

It is further to be observed that a considerable portion of this information turned out to be untrue. In what is stated in the foregoing letter as to Captain Bullock and four other officers being intended for the Oreto, Mr. Dudley was again misled by his informants, whose names as usual are not given. Only one of these parties, a Mr. Low, went out in her. Her master and crew were English, and shipped, as we have seen, for the voyage to Palermo and Jamaica.

On the 25th of March, having received Mr. Dudley's letter of the 22nd, Mr. Adams, for the first time since his letter of the 18th of February, a period of five weeks, again writes to Earl Russell on the subject of the Oreto :—

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* United States' Documents, vol. vi, p. 223. † Ibid., p. 224.
‡ United States' Documents, vol. vi, p. 228; British Appendix, vol. i, p. 5.

The Florida.

At Liverpool.

"My Lord,

"I have the honour to submit to your consideration the copy of a letter received from the Consul of the United States at Liverpool, touching the case of the steam gun-boat Oreto, which I have already made the subject of a communication some time ago. It is with great reluctance that I am driven to the conviction that the representations made to your Lordship of the purposes and destination of that vessel were delusive, and that though at first it may have been intended for service in Sicily, yet that such an intention has been long since abandoned in fact, and the pretence has been held up only the better to conceal the true object of the parties engaged. That object is to make war on the United States. All the persons thus far known to be most connected with the undertaking are either directly employed by the insurgents in the United States of America, or residents of Great Britain notoriously in sympathy with and giving aid and comfort to them on this side of the water."*

The letter, which is of considerable length, then quits the subject of the Oreto, and goes into the question of the assistance derived by the insurgent States from England. It is so far important to the present purpose, that it shows that, while making general complaints on the part taken by British subjects in what was going on, Mr. Adams had no specific complaint to make on the score of the Oreto. He nowhere complains of the Oreto not having been seized, nor had he ever called upon the Government to seize her; nor has his complaint reference to the insufficiency of the existing municipal law to meet such a case as that of the Oreto; the complaint relates to the assistance derived by the Confederates from Great Britain in other ways—such as blockade-running and importation of contraband of war and other articles—and not to the special subject of the Oreto, or the Foreign Enlistment Act.

At this time Her Majesty's Government were not aware that the Oreto had, in fact, sailed. Earl Russell, therefore, on receiving the letter of Mr. Adams of the 25th immediately directed that the Treasury and Customs should be requested to take such steps as might be necessary to ascertain whether the Oreto was equipped for the purpose of making war on the United States, and if that fact could be proved, to detain the vessel.† He informed Mr. Adams that he had done so. In reply to the general complaints of Mr. Adams, he observes:—

"You have not yourself hitherto furnished me with evidence that any vessel has received a hostile or warlike equipment in British waters, which has been afterwards used against the United States. The care that was taken to prevent the warlike equipment of the Nashville in British waters must be familiar to your recollection."‡

The reference to the Commissioners of Customs led to the following report of April the 4th:—

"Your Lordships having referred to us the annexed letter from Mr. Hammond, transmitting, by desire of Earl Russell, a copy of a further letter, addressed by the United States' Consul at Liverpool to Mr. Adams, the United States' Minister at this Court, in which it is again affirmed that the Oreto is being fitted out as a vessel of war for the Southern Confederacy, and various statements are reported in support of that assertion, and requesting that your Lordships would instruct this Board to give directions that the Oreto might be vigilantly watched, and that, if any armament prohibited by the Foreign Enlistment Act should be discovered, the vessel might be at once detained;

"We report—

"That, on the receipt of your Lordships' reference, we directed our Collector at Liverpool immediately to inquire into the further allegations, made in regard to the Oreto, and to govern himself in accordance with the instructions contained in Mr. Hammond's letter, and, having received the report of the Collector, we find that the vessel in question was registered on the 3rd ultimo, in the name of John Henry Thomas, of Liverpool, as sole owner; that she cleared on the following day for Palermo and Jamaica in ballast, but did not sail until the 22nd, the day on which the American Consul's letter is dated, having a crew of fifty-two men, all British, with the exception of three or four, one of whom only was an American. She had no gunpowder, nor even a single gun, and no colours, saving Maryatt's Code of Signals and a British ensign, nor any goods on board except the stores enumerated on the accompanying copy of her victualling bill.

"With regard to the statements in the letter of the Consul, the Collector further reports that it is clear the passengers brought by the Annie Childs, the vessel therein mentioned, which has recently arrived from one of the Southern States, were not intended to form any portion of the crew of the Oreto, inasmuch as they were still in Liverpool, and that the dipping of the ensign on board the latter vessel on the arrival of the Annie Childs, as far as the Collector had been enabled to ascertain, was intended as a compliment to one of the Cunard steamers and another vessel which saluted the Annie Childs on her arrival, the masters of the several vessels being known to one another.

(Signed) "THO. F. FREMANTLE.
"GRENVILLE C. L. BERKELEY."§

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* United States' Documents, vol. vi, p. 227; British Appendix, vol. i, p. 4.
† British Appendix, vol. i, p. 5.
‡ British Appendix, vol. i, p. 6; United States' Documents, vol. vi, p. 30.
§ British Appendix, vol. i, p. 7; United States' Documents, vol. vi, p. 231.

The Florida.

At Liverpool.

It further appears from statements made afterwards in August 1862 by the officers of Customs at Liverpool, when evidence was being collected, to be used in the proceedings instituted against the Oreto at Nassau, that those officers never lost sight of the Oreto to the time of her final departure; and it also appears, from their statement and that of the pilot, who took the vessel out of the Mersey, that her condition was to the last wholly incompatible with any present purpose of war :—

Statement of Mr. Edward Morgan.

"I am one of the Surveyors of Customs at this port. Pursuant to instructions I received from the Collector on the 21st of February in the present year and at subsequent dates, I visited the steamer Oreto at various times, when she was being fitted out in the dock, close to the yard of Messrs. Miller and Sons, the builders of the vessel. I continued this inspection from time to time until she left the dock, and I am certain that when she left the river she had no warlike stores of any kind whatever on board.

"After she went into the river she was constantly watched by the boarding officers, who were directed to report to me whenever any goods were taken on board, but, in reply to my frequent inquiries, they stated nothing was put in the ship but coals.

(Signed) "EDWARD MORGAN, *Surveyor.*"

Statement of Mr. Henry Lloyd.

"In consequence of instructions received from Mr. Morgan, Surveyor, I, in conjunction with the other three Surveyors of the river, kept watch on the proceedings of the vessel Oreto from the time she left the Toxteth Dock, on the 4th March last, till the day she sailed, the 22nd of the same month. On one occasion I was alongside of her, and spoke to Mr. Parry, the pilot, and the chief mate. Neither I nor any of the other River Surveyors saw at any time any arms or warlike ammunition of any kind taken on board, and we are perfectly satisfied that none such was taken on board during her stay in the river.

(Signed) "H. LLOYD, *Examining Officer.*"

Statement on Oath of Mr. William Parry.

"I was the pilot in charge of the ship Oreto when she left the Toxteth Dock on the 4th March, 1862. I continued on board to the day of her sailing, which was the 22nd of the same month, and never left her save on Sunday, when all work was suspended. I saw the ship before the coals and provisions were taken into her; there were no munitions of war in her, that is to say, she had no guns, carriages, shot, shell, or powder; had there been any on board I must have seen it. I piloted the ship out of the Mersey to Point Lynas, off Anglesea, where I left her, and she proceeded down channel, since which she has not returned. From the time the vessel left the river until I left her she held no communication with the shore, or with any other vessel, for the purpose of receiving anything like cargo on board. I frequently saw Mr. Lloyd, the Tide Surveyor, alongside the ship while in the river.

(Signed) "WM. PARRY.*

"Sworn before me, at the Custom-house, Liverpool, this 23rd August, 1862.

(Signed) "S. PRICE EDWARDS, *Collector.*"

Upon the facts to which I have been referring, it seems to me impossible to entertain a serious doubt that if the cause had been brought into a Court of Justice, the case of the Government must have broken down hopelessly, and the vessel must have been forthwith released. In discussing the legal questions bearing on this part of the case, I have already given my reasons for thinking, that under such circumstances a Government would not be justified in instituting legal proceedings. I reiterate that opinion here. I think it would have been useless, and therefore wrong, to seize, and take proceedings to condemn, the Oreto.

The deficiency of proof, up to the time of the departure of the Florida from Liverpool, as to the vessel being intended for the Confederate States, is now sought to be made good by a general and sweeping statement as to the "notoriety" of the fact. "All the facts about the Florida," it is said, "and about the hostile expedition which it was proposed to make against the United States, were open and notorious at Liverpool."† Of course nothing is more easy than to make a general assertion of this kind; but such an assertion ought not to be made without some evidence to support it. The only proofs to which we are referred, are the dispatches of Mr. Dudley during the period in question; but having gone carefully through these despatches, almost all of which I have hereinbefore set out, I find nowhere any reference whatsoever to the "notoriety" which, on the authority of these dispatches, is thus boldly asserted to have existed. I find, however, strong proof of the contrary in the statement of Mr. Dudley himself, as to the great secrecy that was maintained about the vessel, and his consequent inability to

* British Case, p. 58; British Appendix, vol. i, p. 34.

† Case of the United States, p. 335.

The Florida. At Liverpool.

obtain any "definite information" concerning her, as well as in the fact that in all his statements respecting her he seldom adduced any definite or specific information, which did not afterwards turn out to be incorrect. The British Government is therefore, as it seems to me, well warranted in asking, Where is the proof of these assertions? Where is the proof that even the American Consul at Liverpool, whose activity in hunting for secret information appears to have been indefatigable, and to whom every one resorted who had information to disclose, knew of the contract with Bullock, or of the dispatch, cargo, and destination of the Bahama? And if he knew them, why did he not either communicate his knowledge, and the proofs in his possession, to the British Government, or himself lay an information on oath against the ship?*

But there is an important fact, which appears to me conclusive to disprove the alleged notoriety thus positively asserted. The crew of the Oreto had shipped at Liverpool for what they believed to be a mercantile voyage to Palermo and Jamaica. By the time they had arrived at Nassau, they began to suspect the true character of the vessel, and that she was intended for a vessel of war for the Confederate States, whereupon they refused to continue in her, and insisted on their discharge. It is plain that these men, coming from the port of Liverpool, had been wholly unaware of what is now represented to have been there matter of open notoriety. No one, acquainted with the habits of seamen, and aware of the interest this class of men take in the character of a vessel in which they are about to ship for a long voyage, can be credulous enough to believe, upon the mere credit of an assertion unsupported by proof, that a crew of fifty men could have shipped on board of this vessel in utter ignorance of a fact alleged to have been notorious to every one at the port; and which, if known to them, would, as the sequel showed, at once have deterred them from taking service in her? It is impossible to believe in anything so unlikely.

But even if this alleged notoriety had existed, it would have availed nothing towards proof of the facts to be established. If facts are notorious, they can the more readily be proved. But if notoriety rests, not on proof capable of being adduced, but on common talk and rumour, evidence of such notoriety is inadmissible in an English Court. It would have availed the Government nothing to allege that the destination of the Oreto to the Confederate service was matter of notoriety at Liverpool, even had the fact that such notoriety existed been true, which, however, appears not to have been the case.

The substance of the facts to be gathered from the correspondence, as stated in the British Counter-Case, appears to me, after a careful examination, to be so accurately stated, that I have no hesitation in transcribing it and giving the sanction of my confirmation :—

"It is clear that Mr. Dudley himself was in ignorance of the facts which, in the Case of the United States, are asserted to have been open and notorious to all. His attention had been called to the Florida, then in the builder's yard, as early as November 1861. On the 24th January, 1862, he writes that 'she is reported for the Italian Government;' but the fact of the machinery being supplied by Fawcett and Preston, and other circumstances, make him 'suspicious,' and cause him to believe she is intended for the South. On the 4th February the circumstances are still 'somewhat suspicious.' 'There is much secrecy observed about her, and I have been unable to get anything definite, but my impressions are strong that she is intended for the Southern Confederacy. I have communicated my impressions and all the facts to Mr. Adams, our Minister in London.' At that moment the ship was taking in her coal; and 'appearances indicate,' he wrote, 'that she will leave here the latter part of this week.' He makes, however, no representation to the Government, nor does Mr. Adams make any. On the 12th he writes to Mr. Seward that everything he sees and hears confirms him in the belief that the vessel is intended for the Confederacy; but he mentions no fact, except that Miller (the builder) had said that Fawcett, Preston and Co. gave him the contract. Still no representation is made. On the 17th, he has 'obtained information from many different sources,' which 'goes to show' that she is intended for the Confederate States. Nevertheless, the solitary fact mentioned is that Fawcett, Preston and Co. are said to be the owners, with the addition that advances are said to have been made to them and to Miller by Fraser, Trenholm, and Co. Afterwards he tells Mr. Seward that he has 'no doubt,' and has 'positive evidence, that she is for the South;' and, on the 5th March, that two persons in the employ of Fawcett, Preston and Co. had said so. But up to the time when she left Liverpool, his correspondence mentions not a single circumstance proving, or tending to prove, for what purpose she was intended, beyond some rumours as to her probable movements, which turned out to be erroneous. With the 'notorious fact' that she had been ordered by Bullock he is evidently quite unacquainted. As to the Bahama, so far is he from being aware of the 'notorious fact' that she was about to take out the Florida's armament, that up to the 6th March he is making fruitless inquiries about that vessel, and can obtain no information about her, or any vessel of that name. Several days afterwards he learns that she is loading with cannon and other munitions of war at Hartlepool, and '*will either run the*

* British Counter-Case, p. 74.

blockade, or land her cargo at Bermuda or Nassau, *and have it ferried over in smaller vessels.*' He believes her, in short, to the last, to be merely a blockade-runner laden with articles contraband of war, and has no idea of her having any connection with the Florida."*

But it is said that Her Majesty's Government ought not to have remained satisfied with the inquiry made by its officers; that it should have pushed its inquiries further; and that had it done so with due diligence, it might have obtained means to establish the fact of the Oreto being intended for the Confederate service. But we are not told where such further inquiry could or should have been made, or where this supposed evidence could have been obtained. We know from Mr. Dudley that the greatest secrecy was observed, so that even he could discover nothing definite. The secret would, of course, be confined to a very few persons; and though surmise and conjecture may have soon sprung up and given rise to the rumours and pretended information which found their way to Mr. Dudley, the persons really possessed of the secret would be little likely to reveal it. However pressing the inquiry, the same story would in all probability have been persisted in. The builders had already been applied to, and had given an apparently satisfactory answer. Mr. Adams himself appears (from his letter of the 25th of March) to have believed at one time that the vessel might at first have been intended for service in Sicily, and that such an intention had afterwards been abandoned. The firm by whom she had been built was a respectable one, and it could hardly be assumed that they would knowingly lend their names to an intentionally false statement. It is now plain that the statement then made was untrue; but there was no reason to believe so then. Possibly the firm were themselves misled. Mr. Thomas and the Palermo firm may have been introduced for the purpose of deceiving Miller and Sons into the belief that in building the vessel they were doing nothing wrong. Be this as it may, the question is what means the Government then had of knowing or discovering that the Oreto was not meant for the firm of Thomas Brothers of Palermo, but for a belligerent State. Of whom else is it suggested that the authorities could have inquired and ascertained the truth?

It may be said that it would have been better if the Government had again telegraphed to the British Minister in Italy, but a period of upwards of a month had elapsed since anything had been heard from Mr. Adams about the Oreto; the vessel was still unarmed, nor had the Government reason to suppose she was about to leave. It may, perhaps, be said that inquiry should have been made of Fawcett, Preston, and Co.; and I agree that it would have been better if that course had been taken, but I greatly doubt whether it would have produced any other answer than that which had been given by Miller and Sons.

It must not be forgotten that the persons who carried information, more or less entitled to credit, to Mr. Dudley, communicated with him in confidence and insisted on secrecy. Mr. Dudley more than once states that the information having been given in confidence he is not at liberty to disclose the names of his informers. It is obvious that these parties would not be likely to give similar information to the Authorities, who certainly would not have treated it as confidential. While aspersions are cast on the officers for omitting to make inquiry, I look in vain for a suggestion as to where such inquiry should have been made.

And here it is necessary to point out what perhaps will appear strange to those who are unacquainted with English procedure, which in this respect is identical with that of America; namely, that persons against whom a prosecution, or proceeding to recover penalties, is either pending or about to be instituted, cannot be interrogated; nor, if persons are called on to give evidence as witnesses, can any questions be put to them which have a tendency to implicate them in any breach of the law.

Still less is it in the power of the Government to institute any compulsory inquiry with a view to establish a breach of the law, except according to regular process of law; or to search a person's premises, or to insist on explanations from persons suspected of having committed an offence against the law. The Government had, therefore, no possible means of obtaining information, except from those who might be voluntarily disposed to give it. If Mr. Dudley had opened any of his secret sources of information, supposing him really to have possessed such, a clue to the truth might possibly have been discovered; but he kept them to himself, and those who were ready to furnish information to him kept aloof from imparting it to the Authorities.

Lastly, there is not in England, any more than in America, any system of espionage

* British Counter-Case, p. 74.

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or secret police to pry into men's secret actions or obtain information for the Government by underhand and unworthy means.

Can it be contended that Great Britain should have abandoned principles and rules of public conduct, hitherto held sacred, for the benefit of other nations embarked in quarrels and wars in which she herself had no concern—at all events before experience had shown that her existing law was insufficient?

When, therefore, a member of this Tribunal states as the principal ground of a judgment adverse to Great Britain that, notwithstanding the complaints of Mr. Adams, the English Authorities did not take the initiative; that they did not insist on its being proved what was the true destination of the ship, who was the true owner, who had given the orders for it, and who was to pay for it; and did not insist on the true position of Fraser, Trenholm, and Co. being shown by legal proof, or upon being positively informed as to the crew of the vessel, I am at a loss to know whether he means that the law of England was such as that the Government could have exercised the powers which he says they ought to have used, or whether he means to say that Great Britain ought to have changed the tenor of her law and the course of her procedure, before the necessity of such a charge had become apparent, simply because war had broken out between the Northern and Southern States of the American Union. If the former, the proposition appears to me untenable; if the latter, I must be allowed to express my regret that Great Britain should have to suffer by reason of a judgment founded upon an apparent misconception of her law.

If it is really meant to be said that Great Britain is to be held responsible because her law ought to have been other than it was, and ought to have been such as to give power to the Executive to insist on proof of the innocent destination of this vessel, and to detain her till such proof was given, or to enable it to exercise inquisitorial powers as to her character, I fall back on the position I asserted some time since, and say that not only could no such thing reasonably be expected, but that, inasmuch as the Government of the United States possessed no such power—for their assertion that they did possess it, is, as I have shown, but a pretence—and therefore, if the position of the two Governments had been reversed, could not have done for Great Britain what they now say Great Britain should have done for the benefit of the United States, they can have no claim in justice or equity for such an exercise of power on the part of the British Government.

After a careful review of the whole case, my opinion is that upon the then existing state of facts, and with the amount of evidence they then possessed, Her Majesty's Government were guilty of no want of due diligence in suffering the Oreto to leave the port of Liverpool, and, on the contrary, would not have been justified in detaining her.

Further, I am of opinion that Her Majesty's Government were not wanting in due diligence in not procuring the evidence necessary to insure the condemnation of the Oreto, for the simple reason that I am satisfied that there were no means whatever in their power of obtaining it.

I am very far from saying that officers to whom is committed the duty of guarding against any infraction of this part of the law are justified in considering themselves merely as the recipients of evidence to be furnished by the Agent of a belligerent Government, and that they may remain inactive till the latter has made out a complete case against a vessel, as to which a violation of the Foreign Enlistment Act is suspected to have taken place. If reasonable grounds of suspicion appear, it becomes their duty to make inquiry, according to the best of their ability, and to take active measures to prevent a breach of the law. On the other hand, it is the duty of a foreign Agent, if information comes to his knowledge of which the Authorities are not possessed, to set them in motion, and to aid them in their proceedings, more especially if he happens to have access to secret sources of information not open to them. Here Mr. Dudley either had information which could be made available, or he had not. If he had, he ought to have given the Authorities some clue whereby they might have got at the truth. Had he informed them, or Mr. Adams, of the facts which, transmitted to Mr. Seward alone, became useless, inquiries might have been instituted which might have led to the detention of the vessel. If Mr. Dudley had available information and neglected to communicate it in the proper quarter, the fault was his, and Her Majesty's Government ought not to be held responsible for the default of an Agent of the United States, when the latter are seeking damages at their hands. If he, with his superior opportunities, was unable to obtain such information, it ought not to be imputed to the Authorities as negligence that they were unable to do better.

To sum up the matter in a word:—

The equipping of this vessel not amounting to a violation of neutrality, but simply

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to a breach of the Foreign Enlistment Act, the Government had no authority to seize it by the mere exercise of the prerogative of the Crown, or by virtue of any executive power. Its powers were derived from the Act of the 59th of George III, the Foreign Enlistment Act.

There was not evidence on which to seize this vessel and to ask for her condemnation under the Foreign Enlistment Act.

There were no means of obtaining such evidence except by the exercise of inquisitorial powers which the Government did not possess.

It was not incumbent on the Government of Great Britain to ask for, or on Parliament to grant, powers inconsistent with the established principles of British law and government and with the general institutions of the country.

It cannot properly be imputed to the Government, as want of due diligence, that it did not endeavour to obtain such powers when the existing law had hitherto proved sufficient.

It would be in the highest degree inequitable and unjust to hold the contrary in favour of the United States, when the law of the latter was substantially, if not absolutely, the same as that of Great Britain, and therefore could have afforded no more efficacious means of prevention than that of Great Britain.

At Nassau.

I pass on to what may be termed the second stage in the history of this vessel, namely, the events which took place on her arrival at the Bahamas.

Having left Liverpool on the 22nd of March, she arrived at Nassau on the 28th of April.* On the 29th she quitted the part of the harbour which is adjacent to the town of Nassau, and proceeded to Cochrane's Anchorage, a station distant from the town about fifteen miles. It was stated that this was done by the advice of the pilot who had charge of her, for the reason that there was not room for her in the harbour;† but it is probable that this was only a pretext.

Ten days afterwards, namely, on the 9th of May, Mr. Whiting, the Consul of the United States at Nassau, writes to Mr. Bayley, the Governor of the Bahamas, as follows:—

"I have the honour to communicate to your Excellency several facts of importance, deeming it to be my duty so to do, as Representative of the Government of the United States of America.

"The tug Fanny Lewis, which arrived here from Liverpool on the 6th instant, has on board, I am credibly informed by letters received from that port, a large quantity of powder for the rebel States of America, or for the so-called Confederate States.

"On the 28th ultimo the steamer Oreto also arrived off this port from Liverpool, and now lies at Cochrane's Anchorage, where, it is believed, and so reported by many residents here, that she is being prepared and fitted out as a Confederate privateer, to prey on the commerce of the United States of America.

"I inclose for your Excellency's perusal a slip from the Wilmington North Carolina paper of the 20th April.

"I cannot but think that your Excellency will consider it proper that some inquiry should be made, to ascertain how far the vessels alluded to are preserving the strict neutrality so earnestly enjoined by Her Majesty's late Proclamation, and I am confident that I pay but a deserved tribute to your Excellency's high character when I express my firm belief that no illegal steps will be allowed to those who seek to subvert the Government which I have the honour to represent."‡

As the Colonial authorities of the Bahamas, including, of course, the Governor and his legal adviser, have, in the Case of the United States, been publicly accused of "open partiality to the cause of the South," and of having been "actively friendly to the insurgents," and it is directly imputed to them that, in the course they pursued with reference to the Oreto, they were induced by these motives to depart from what would have been the line of conduct which a sense of duty would have prescribed, I deem it no more than is due to absent men, whose honour is thus impugned, to call particular attention to the correspondence which passed on this subject and to the facts which actually occurred.

On the receipt of Mr. Whiting's letter, the Governor requested an immediate report from the Receiver-General of the Colony as to the truth of the allegations contained in it, and received from him the following reply, dated the same day:—§

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* British Appendix, vol. i, p. 58.
† Ibid., p. 63.
‡ Ibid., p. 14.
§ Ibid., vol. v, p. 35.

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At Nassau

"The British steamer Oreto entered at this office on the 28th April from Liverpool (Engla ballast. She did not enter the harbour, and now lies at Cochrane's Anchorage, and I have no information as to her future proceedings.

"The British brig Fanny Lewis entered 7th May from Liverpool with "assorted cargo, *not to be landed.*" She now lies near Potter's Cay, and I am confident that she has not transferred any part of her cargo, as no permission to do so has been asked, and without a permit she would be subject to a heavy penalty. I cannot tell whether she has any powder on board, as no such article is mentioned in the manifest.

The matter was at once referred by the Governor to the Attorney-General of the Colony in the usual course. The Attorney-General, on the same 9th of May, reported as follows:—

"Assuming the cargo of the Fanny Lewis to be such as stated by the United States' Consul, it is nevertheless one that can legally be imported here from the United Kingdom, and its future presumed destination does not invest it with any character of illegality which calls for, or would authorize any action with respect to it on the part of the Executive or other authorities of the Colony.

"2. With respect to the Oreto, the Consul's allegation is to the effect that it is believed and reported by many residents here that she is being prepared and fitted out where she now lies at Cochrane's Anchorage, which is within the limits of the port of Nassau, as a Confederate privateer. Now if such is the fact, an offence against the Foreign Enlistment Act has been committed, all parties implicated in which are liable to be criminally proceeded against for misdemeanor, and the vessel may be seized by any naval or revenue officer; but to justify proceedings either against the parties or the vessel, the matter must not rest on repute or belief alone, but the authorities must have positive facts to ground their proceedings on, and unless the Consul can adduce such, or they can be obtained through other channels, no steps can be taken either for the arrest of the vessel, or those on board of her.

(Signed) "G. C. ANDERSON."*

The Attorney-General was perfectly right on both points. The Governor had no power to prevent a merchant-vessel, such as the Fanny Lewis, with cargo, from attempting to run the blockade; he had no power to seize or interfere with a vessel as for a breach of the Foreign Enlistment Act, unless it could be shown not only that she was equipped for war, but also that she was destined for the service of a belligerent.

Upon the latter point, evidence was at this time wholly wanting, and therefore, so far, all was right. At a later period the circumstances became materially altered.

On the 9th of May, Governor Bayley wrote officially to Adderley and Co., a mercantile firm at Nassau, who were the consignees of the Oreto, notifying to them that, "if they were arming or putting arms on board that vessel, he should enforce the rules laid down in Her Majesty's Proclamation; as, in such case, looking to the description of the vessel, he must infer that she was a vessel of war intended to act against the United States;" adding that, "as Her Majesty's Government had expressed their deliberate intention of observing and enforcing neutrality in the Queen's possessions, he should use his strongest efforts to prevent either of the belligerent Powers from arming or equipping vessels of war in that port."†

The reply of Adderley and Co. appeared quite satisfactory. In positive terms they say, "We beg to state, for the information of his Excellency the Governor, that we have neither attempted to arm or put arms on board of the British steamer Oreto, consigned to our firm; nor are we aware of there being any intention on the part of the owners to arm that vessel."‡

So matters remained till the 28th of the month, when Commander McKillop, then commanding Her Majesty's ship Bulldog in the port of Nassau wrote to the Governor as follows:—

"Several steamers having anchored at Cochrane's Anchorage, I sent an officer yesterday to visit them and muster their crews, and ascertain what they were and how employed.

"The officer reports that one steamer, the Oreto, is apparently fitting and preparing for a vessel of war; under these circumstances, I would suggest that she should come into the harbour of Nassau to prevent any misunderstanding as to her equipping in this port, contrary to the Foreign Enlistment Act, as a privateer or war-vessel."§

On receipt of this letter the Governor desired the advice of the Attorney-General as to whether he had power, in point of law, to order the removal of the vessel from her then anchorage to Nassau, a question about which he might well entertain serious doubts. Thereupon that officer reported as follows:—

"Any British or foreign trading-vessel has a right, in carrying on her lawful commercial pursuits,

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* British Appendix, vol. i, p. 15. † Ibid. ‡ Ibid., p. 16. § Ibid.

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to use as anchorage-places any of the harbours, roadsteads, and anchorages in the Colony; she can, however, only lade or unlade cargo at such places as may be authorized for the purpose by the Revenue Department, and in the presence of a Revenue officer; and as the Revenue Department is, by the Trade Act, 17 Vict., cap. 3, placed under the jurisdiction and management of the Governor and the Executive Council, it will be lawful for the Governor, acting with the advice of the Council, to prohibit the lading of cargo on board of the Oreto otherwise than in the harbour of Nassau; but beyond exercising the powers conferred on him by the trade laws, his Excellency has no power to compel the removal of the Oreto from her present anchorage, unless some act has been done in respect of her, which would constitute a violation of law and subject her to seizure. This brings me to the question whether there is anything disclosed in your communication which would, in a Court of Law, justify the forcible removal of the vessel from her present position. The information amounts to this, that the Senior Naval Officer on the station has officially reported to the Governor that 'this vessel is apparently fitting and preparing for a vessel of war;' or, as stated in your note of yesterday, has the appearance of a privateer arming herself.' Now, unless Captain McKillop grounds the opinion formed and reported by him on some overt act, such as the placing of arms or other munitions of war on board of the vessel without the sanction of the Revenue Department, or some such similar act, evidencing an intention on the part of the persons in charge of the vessel to fit her out as a vessel of war to be employed in the service of a foreign belligerent Power, the forcible removal of the vessel from her present position, merely to guard against a possible infraction of the law, could not be justified. Such removal would, in fact, constitute a 'seizure,' which the parties making would be responsible for in damages unless they could show a legal justification, which must be based upon something beyond mere suspicion; but while mere suspicion is not sufficient to authorize the course of proceeding indicated in your letter, it is certainly sufficient to call for precautionary measures, such as I advised in respect of this very vessel in my minute on the Receiver-General's letter referred to me by the Governor two or three days since, namely, that the Receiver-General should, under the powers of his office, place a Revenue officer on board of her to watch the proceedings of the parties on board, in order that if any actual contravention of the law took place, it might be at once reported, and prompt measures taken by seizure of the vessel and otherwise to punish all parties implicated therein."*

So far, the opinion given by the Attorney-General was perfectly sound.

The letter of the Receiver-General here referred to was one dated the 26th of May, in which that officer stated that he had every reason to believe that the consignees of the vessel intended shipping large quantities of arms and munitions of war as cargo, and might probably apply for permission to tranship cargo to her from other vessels where she lay.†

In a letter to the Colonial Secretary of the next day (May 30), the Attorney-General writes:—

"Any act of arming, or any attempt to arm a vessel in contravention of the Imperial Statute, commonly known as the Foreign Enlistment Act, will subject the vessel to seizure; and it is quite immaterial in what manner the violation of the law is ascertained, or by whose testimony it is established, the only necessary requirement being that the facts testified to should be such as would be received in a Court of Law as legal proof of the violation of the Statute sought to be established."‡

Having received the Attorney-General's report, the Governor, on the 2nd of June, thus writes to Commander McKillop:—

"I may say that it is quite impossible that the Oreto, or any other vessel, should be allowed to arm herself for belligerent purposes within the jurisdiction of the harbour.

"The Oreto is registered as a British vessel, and carries the British flag. Therefore she would be guilty of piracy if, without changing her British nationality, she equipped herself as a vessel of war. And were she to change her nationality and to be equipped for the service of either of two belligerent States, with both of whom Great Britain is at peace, she would, under the directions of Her Majesty's Government, be precluded from remaining more than twenty-four consecutive hours in our harbour.

"But inasmuch as it is not yet proved beyond doubt that the Oreto is a vessel of war, and as it is just possible that she may be only a merchant-ship, taking arms and implements of war solely for exportation, it is desirable that a more special and minute examination of her conditions and equipment should be made before she can be treated as a pirate, a privateer, or foreign man-of-war arming within our waters; for, whilst it would be in contravention of the Foreign Enlistment Act to arm an English vessel for the service of a foreign belligerent Power, and contrary to the positive orders of the Queen's Government to allow a vessel of war belonging either to the Federal or Confederate Government to arm herself in an English port, it would be equally illegal on our part to seize a merchant-vessel honestly and exclusively employed in the shipment of cargo for the purpose of commerce.

"Therefore I request that you will take such steps as in your professional opinion seem best for the purpose of ascertaining the true character of the Oreto, and the nature of her equipment; and, if after inspecting her guns, her crew, and the general disposition of the vessel, you are convinced that she is in reality a man of war or privateer arming herself here, then it will become your duty either to concert measures for bringing the Oreto down into this part of the harbour, or, what would be a safer course, to remove your own ship to Cochrane's Anchorage, and there watch her proceedings from day to day.

* British Appendix, vol. i, p. 17. † Ibid., vol. v, pp. 35, 36. ‡ Ibid., vol. i, p. 18.

"I should much regret to disarrange your plans in any way, or to impose on you any irksome duty, and I hope the necessity of either may be averted. But I am sure you will concur with me in thinking that all considerations (except that of affording due protection to the harbour) must give way to the obligation of observing the strictest neutrality in our dealings with the two contending American federations, and carrying out the Queen's orders with the most perfect good faith."*

Can it be doubted that the Governor in thus writing was acting according to an honest sense of duty?

It appears that about this time a man of the name of Jones, who had come out as boatswain of the Oreto, together with two of the crew, having got on shore, had refused to return to the vessel; whereupon, he and his companions had been, at the instance of the captain, apprehended and sent to prison, as having deserted from a British vessel. This man, Jones, put himself in communication with Mr. Whiting, the United States' Consul. On the 4th of June Mr Whiting forwarded to the Governor the following letter from Jones to himself:—

"Sir, "*Nassau Prison, June* 4, 1862.

"The ship I am from is the Oreto, built by W. C. Miller, in Liverpool, after the model of the English navy gun-boats, with magazine, shot-lockers, ports and bolts for twenty guns. Everything is rigged, and ready for mounting; even all the articles necessary for seamen, such as hammocks, bedding, kettles and pans, with three years' provisions. In short, she is a perfect man-of-war. Captain, James Duguid; chief officer, William Duggin; second officer, — Hudson; I, Sir, was third officer and boatswain; the chief steward and purser, who refused duty, are in jail here."†

This letter only confirmed what was already known, namely, the capacity of the vessel for the purpose of war. No evidence of her belligerent destination was afforded in it, or in the report of Commander McKillop to the Governor of the 6th of June, wherein he says that he "has visited the screw-steamer Oreto and examined her, and that she is fitted out in every way for war purposes,—magazines, shell-rooms, and other fittings, totally at variance with the character of a merchant vessel. She has no guns or ammunition on board. The captain does not deny that she is intended for a war vessel."‡

On this, taking the same view as before, the Attorney-General reports:—

"There are no facts set forth in the within letter which would, in my opinion, authorize the seizure of the Oreto. They constitute only circumstances of suspicion, which, if coupled with some actual overt act, would doubtless materially strengthen the case against the vessel, but which do not in themselves form a ground of seizure."§

In a note of the 8th of June, Commander McKillop again adverts to the warlike character of this vessel, and states his opinion "that she was not capable of taking in any cargo, having no stowage; adding that, should she take in guns or ammunition, he should consider it his duty to seize her."‖

On the 12th of June Mr. Whiting again calls the attention of the Governor to the Oreto. "One of her officers," he says—I presume he refers to Jones, the boatswain—"testifies to her warlike character and equipment, with everything that marks a vessel of war—ports, magazines, shot-lockers, &c. He avers that shells were transferred from the steamer Hero to the Oreto at Cochrane's Anchorage, an act which, I suppose, would warrant her seizure and detention. The steamer Melita, from England, landed here last Sunday Captain Semmes and officers of the pirate Sumter, and I have no doubt they are here to join the Oreto and pursue their maritime depredations."¶

The Colonial Secretary replies:—

"His Excellency has been assured by the agents of the Oreto that it is their intention to clear her in ballast for Havana; and he has received from the Treasurer (as Collector of the Colonial Customs) an application to give her this clearance, an application to which he has accorded his assent.

"His Excellency has, therefore, no right to assume that she is now equipping herself, or will leave this port equipped, as a privateer.

"While his Excellency is bound by his instructions to observe the strictest neutrality between the United States and the Confederate States of North America, he has no power whatever to act on general suspicion or hearsay. He is bound to give the twenty-four hours' notice to any known privateer or man-of-war belonging to either of the belligerent States which may put into this port for indispensable supplies, but he is not bound to detain or obstruct any vessels professing to be engaged on a commercial voyage, unless he has evidence strong enough to satisfy the Court of Admiralty that she is in fact a belligerent vessel, proceeding on a belligerent mission.

"Not having any proof which would warrant the condemnation of the Oreto by a competent

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* British Appendix, vol. i, p. 18. † Ibid., p. 19. ‡ Ibid., p. 20. § Ibid.
‖ Ibid., p. 21. ¶ Ibid.

Court of Jurisdiction, or which would connect her with any privateering enterprise, his Excellency feels that it is as yet out of his power to interfere with this vessel, or prevent her presumably peaceful and innocent voyage to Havana."*

It would appear that, in the first days of June, the consignees of the Oreto had applied to the Receiver-General of the Colony for permission to load the vessel with cargo for a voyage to St. John's, New Brunswick, that port being the usual destination for which vessels intending to run the blockade ostensibly cleared. The Receiver-General, before acceding to this request, referred the matter to the Governor. The permission to ship the cargo was granted, but, in consequence of the suspicions attaching to the vessel, the following order was at the same time adopted by the Governor in Council on the 4th of June:—†

"*June* 4, 1862.

"At an Executive Council his Excellency the Governor, with the advice of the Board, was pleased to make the following Order:—

"1. That the Oreto, if practicable, should take in her cargo within the port of Nassau.

"2. That if, however, it be found impracticable, from the depth of water in port or otherwise, that she cannot conveniently take in her cargo within the port, then that she be permitted to do so at Cochrane's Anchorage, under the direct supervision of officers of the Revenue Department, to be specially appointed for the purpose.

"3. That, in consequence of the suspicions which have arisen respecting the character of the Oreto, it is advisable that a British vessel of war should remain at Cochrane's Anchorage, in the immediate vicinity of the Oreto, while she is taking in cargo, and, to prevent such vessel being detained at the anchorage an inconveniently long time, there be imposed as a condition, for the permission for the Oreto to load without the port, that she complete her lading at Cochrane's Anchorage, within a period to be designated by the Chief Officer of the Revenue Department.

"His Excellency was further pleased to direct that a copy of the foregoing Order be furnished to the Receiver-General and Treasurer, and the Commander of Her Majesty's ship Bulldog, respectively, for their information and guidance."

This order having been communicated to the consignees, the latter determined to remove the Oreto from Cochrane's Anchorage to the port of Nassau, which she entered on the 7th of June. On the 9th she commenced taking in empty shells as cargo, of which upwards of 400 boxes were shipped.‡

In deference, however, as it seems, to the desire of the Governor, the consignees changed their purpose, and determined to clear the vessel in ballast for Havana, and the shells were therefore discharged.§

In the meantime Mr. Whiting continued his communications with Jones, and on the 13th June drew up the statements of the latter in the form of an affidavit, in which all that had taken place since the vessel had left Liverpool was detailed, and the true character of the vessel placed beyond a doubt.

The following is the affidavit:—

"I, the Undersigned, Edward Jones, late third officer of the steamer Oreto, do solemnly swear to the following facts, viz.:—

"1. That, on the 3rd day of March, 1862, I shipped on board the steamer Oreto at Liverpool, as boatswain; the articles specifying that 'the vessel was bound to the port of Palermo, thence, if required, to any port in the Mediterranean or the West Indies, and back to a final port of discharge in the United Kingdom; the term of service not to exceed six months.

"2. That the Oreto was expressly built for a man-of-war, and was said to be destined for the King of Sardinia; that she has twenty ports, magazine of 50 tons' capacity, shot-lockers, &c., &c.; that on her passage to this port, breechings and gun-tackles were fitted and everything got in readiness for mounting guns.

"3. That the Oreto was supplied with two suits of sails, spare wire rigging, a large quantity of provisions, said to be sufficient for three years' supply for seventy-five men, &c., &c.

"4. That after leaving the channel the courses were frequently altered, and that my suspicions were then aroused as to her true destination as a rebel privateer, and I refused duty; that on the thirty-fifth day out, we anchored off the port of Nassau, New Providence, Bahamas, and the next day proceeded to Cochrane's Anchorage; that soon after I left the Oreto, and was imprisoned as a deserter at Nassau, for two weeks, when, after sending a petition to the Governor, I was at last released.

"5. I also testify to the fact that, for several nights prior to our arrival at Nassau, the lights on board the Oreto were ordered to be put out, and the smoke-stacks were reefed, while look-outs were kept at the mast-heads, and great anxiety was manifested and expressed by the officers lest they should fall in with American cruisers.

"I do also solemnly swear that the Oreto is, to my certain knowledge, owned by the so-called 'Confederate States of North America,' and that she is intended for one of their men-of-war, or armed privateers; which facts I stated in my petition to Governor Bayley while I was in prison at Nassau."‖

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* British Appendix, vol. i, pp. 21, 22. † Ibid., p. 53. ‡ Ibid., and vol. v, pp. 38, 40, and 47.
§ Ibid., vol. i, p. 24. ‖ United States' Documents, vol. vi, p. 251.

Mr. Whiting committed the unpardonable mistake of sending off this affidavit to Mr. Seward, instead of making it known to the local Government.

In the meantime, Captain McKillop having gone on other service, his place had been taken by Captain Hickley of Her Majesty's ship Greyhound. On the 10th of June Captain Hickley, having previously had a conversation with the Governor and the Attorney-General, relative to the Oreto taking in warlike stores for the purpose of becoming an armed vessel, and perceiving lighters alongside of her, went with competent surveying officers to examine her; after which he and the other officers made the following report:—

"On going on board the Oreto this morning, the captain informed me that the crew had refused to get the anchor up until they could be certain as to where the ship was going, as they did not know what might become of them after leaving port, and that the Oreto was a suspicious vessel. I then proceeded round her decks to note her fittings, &c., and to ascertain whether she had any warlike stores on board for her own equipment, and I have the honour to make the following Report:—

"That the Oreto is in every respect fitted as a man-of-war, on the principle of the dispatch gun-vessels in Her Majesty's Naval Service.

"That she has a crew of fifty men, and is capable of carrying two pivot-guns amidships and four broadside both forward and aft, the ports being made to 'ship and unship,' port bars, breeching, side tackle, bolts, &c.

"That she has shell-rooms, a magazine and light-rooms, and 'handing scuttles' for handing powder out of the magazine, as fitted in the naval service, and shot boxes for Armstrong shot, or shot similar to them. Round the upper-deck she has five boats (I should say), a ten-oared cutter, an eight-oared cutter, two gigs, and a jolly-boat, and davits for hoisting them up—her accommodation being in no respect different from her similar class of vessel in the Royal Naval Service.

"And on my asking the captain of the Oreto, before my own officers and three of his own, whether she had left Liverpool fitted in all respects as she was at present, his answer was, 'Yes, in all respects, and 'that no addition or alteration had been made whatever.'"*

In transmitting this report to the Governor, Captain Hickley adds:—

"When I boarded the Oreto she appeared to be discharging her cargo, and this cargo, to all appearance, shells; and I was proceeding to go on with the examination when the consignee (Mr. Harris) and a revenue officer told me that she (the Oreto) had cleared in ballast for the Havana, and was to sail shortly (I understood the next day), and that due notice had been given at the Custom-house. On this I considered interference unnecessary on my part, and came immediately with the consignee to you, to report what had taken place, and the determined destination of the Oreto, but with the understanding that, owing to the suspicions already cast on the vessel, I was to again visit her before her leaving. This took place on the 10th, and the 11th and 12th passed, and the Oreto did not sail, which again aroused my suspicions that the vessel was not acting in good faith, and that she was still equipping, or making very definite arrangements for so doing.

"This morning, at 6·30 A.M., I was informed by Mr. Harris that the Oreto was to sail immediately, at 8 A.M.: and feeling it a bounden duty to ascertain her character before her leaving, to make my Report to your Excellency, that by so doing I might have the Law Officers' opinion as to the legality of her sailing before she quitted the port.

"I have the honour to inclose my report for your Excellency's information, for the opinion of the Attorney-General and Queen's Advocate, that my course may be clear as to my dealing with the Oreto, and whether, under the circumstances detailed therein, she is entitled to go her way on the high seas under British colours."†

As the report of the officers and the letter of Commander Hickley, while conclusively establishing the warlike character of the vessel, failed to carry the case any further as to any attempt to equip or arm her within the waters of the Bahamas, the Attorney-General, to whom these documents were referred, still adhered to his former view, and advised that there was nothing contained in them which would justify the detention of the vessel.

From the foregoing letter of Captain Hickley, it appears that, on finding that the Oreto was discharging shells out of the vessel, and on being told by Mr. Harris, one of the consignees, and by a revenue officer on board, that she had cleared out in ballast for the Havana, and was to sail, as he understood, the next day, and that due notice had been given at the Custom-house, Captain Hickley, however, desirous of preventing with inflexible rigour any breach of neutrality in a port of Her Majesty, considered that all ground for further interference with the vessel—provided always that this undertaking should be carried out—was at an end.

Two more days, however, having elapsed since his last letter, and the vessel still remaining at her anchorage, the suspicions of Captain Hickley became aroused anew. He

* British Appendix, vol. i, p. 23. † Ibid., p. 22.

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does not appear to have been at first aware that the cause of the delay was the continued refusal of the crew to remain in the ship, in consequence of which it had become necessary to collect another crew. On the 15th, the boatswain Jones and some of the crew of the Oreto, acting under the influence and at the instigation of Mr. Whiting, as appears from the letter of the latter to Mr. Seward of the 18th of June, came on board the Greyhound, and made, as Captain Hickley reports, publicly before him a variety of statements to the prejudice of the vessel as a legal trader, both on her first leaving and subsequently to her leaving Liverpool, stating that they had now left the Oreto, as they could not ascertain her destination, although she had cleared out for the Havana some days since.*

Referring to the statements made to him by the boatswain and crew, Captain Hickley writes to the Governor:—

"These circumstances, her long detention in this port, her character, her fittings, convinced as I am also that during her stay in the port arrangements have been made for arming her outside, with the previous correspondence on her account, and the suspicions already cast on her, her evident equipment for war purposes, although not at present armed, or to my knowledge having any arms on board, and my conviction, as also that of my officers and men that have been on board her, that she is built intentionally for a war-vessel and not for a merchant-ship, make it incumbent on me to seize the Oreto, as a vessel that can be no more considered as a free-trader, but that she is, on the contrary, calculated to be turned into a formidable vessel of war in twenty-four hours; and that this, I am convinced, will be the case if she is permitted to leave Nassau."

Captain Hickley accordingly proceeded to seize the vessel, and reported to the Governor that he had done so. In his letter he proposes to "send the vessel to the Commodore or Commander-in-chief on his own professional responsibility."*

On the other hand Governor Bayley, in reply, states his general concurrence with the opinion of the Attorney-General:—

"I do not consider," he says, "that suspicion alone would justify the seizure of the Oreto, and the case as stated by yourself hardly seems to go beyond suspicion.

"And the suspicion itself attaches not to any acts done by the Oreto, but only to the intention of her equipment. Indeed, the testimony of the crew I understand to amount to no more than an expression of suspicion. Now, I do not consider that I have any legal authority to seize a vessel merely on the suspicion of her intentions. It seems to me that such an act on my part would violate the hospitalities of the harbour, and be a precedent for grave injustice on future occasions.

"The Oreto, as you are aware, has, in deference to your remonstrances and my orders, discharged her cargo of shell, shot, and ammunition, and is ready to clear in ballast. She has thus divested herself of the character of an armed vessel leaving this port for belligerent purposes. I do not think it consistent with law or public policy that she should now be seized on the hypothesis that she is clearing out for the purpose of arming herself as a vessel of war beyond the limits of the harbour. We have done our duty in seeing that she does not leave the harbour equipped and prepared to act offensively against one of two belligerent nations, with each of whom Great Britain is at peace.

"And if she has still any such intention—an intention which cannot be fulfilled within the harbour—I think this could be effectually thwarted by giving instructions that the vessels which are supposed to be freighted with her arms, and to be prepared to go out with her, should not leave the harbour within forty-eight hours after the Oreto has left it.

"If, however, you still retain the firm conviction not only that she is about to arm as a vessel of war, but also that she is already partially equipped as one, and, moreover, that she is engaged to act against a belligerent State, which is at peace with Great Britain, and that she has enlisted a crew for that object, your proper course undoubtedly is, on seizing the Oreto, to submit the question of her condemnation to the Vice-Admiralty Court of this Colony.

"To remove her to Bermuda, Halifax, or any other Colony, for the purpose of having her condemned there, would be a course not only at variance with prescriptive usage, but, as I cannot help thinking, open to censure, as implying an unmerited imputation on the fairness and competency of the Court of this Colony. It is a course which I cannot myself recommend or sanction, and which, if adopted by you, must be adopted on your own responsibility."†

The opinion of the Attorney-General remained unshaken:—

"The report of Captain Hickley," he writes, "does not appear to me to carry the case against the Oreto further than that shown in the previous reports of himself and Commander McKillop, and I contend that no case has as yet been made out for the seizure of that vessel under the Foreign Enlistment Act.

"With respect to the suggestion in the concluding part of Commander Hickley's letter, I have to remark that, if the vessel is liable to seizure at all, it must be under the provisions of the Foreign Enlistment Act, and if so seized, the question of her liability may as readily and efficiently be decided in the Court of Vice-Admiralty in this Colony as before any tribunal in Her Majesty's Colonial Possessions, and consequently that no necessity exists, nor do I think that any excuse can be made

* British Appendix, vol. i, pp. 23, 24. † Ibid., pp. 24, 25.

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for sending her, as suggested by Commander Hickley, to the Commodore or Commander-in-Chief, who, I presume, are either at Bermuda or Halifax; while, on the other hand, if I am correct in the view I have taken of her non-liability to seizure, the reasons against sending her hence will, of course, be far more powerful; and therefore, on either view of the case, I advise his Excellency to withhold his sanction from the course of action suggested."*

On the receipt of these communications, Captain Hickley replies, "repeating his professional opinion, and that of his brother officers, and again expressing his conviction that the Oreto was a vessel of war that could be equipped in twenty-four hours for battle, and that she was then going out of the harbour as nearly equipped as a vessel of war could be without guns, arms, or ammunition;" but "declining to take on himself the responsibility of the further detention of the Oreto for the purpose of placing her in the Admiralty Court, it being contrary to the Law Officers' opinion, or of adopting the course of sending her to the Commander-in-chief contrary to the Governor's wishes." He announced his intention, therefore, of removing the officers and men from the Oreto, and, "as a final decision had been come to, of offering no further obstacle to her sailing."†

On the 17th, Governor Bayley replies that he "had felt it to be his duty, in his letter of the day before, to express unreservedly his opinion on the case of the Oreto, and the doubt he entertained respecting the legality and policy of preventing her from leaving the harbour—doubts which had been much increased by the strong opinion expressed by the Law Officer of the Crown, who discharged the conjoint duties of Queen's Advocate and Attorney-General in this Colony." He continues:—

"In deference to the views entertained by that officer and myself, you have, I now understand, removed the officers and crew who were in charge of the Oreto, and thereby given her the option of leaving the harbour.

"But, in the letter which announces this proceeding, you repeat the expression of your own and your officers' conviction that 'the Oreto is a vessel of war, which can be equipped in twenty-four hours for battle.' And, in your brief conversation with me this morning, you stated that, though the Oreto had discharged some of her suspected cargo here, still she was not leaving the port empty. A professional opinion coming from an officer of your character and rank cannot fail to have its due weight with me. On the one hand, I am unwilling to place any restraint on a vessel which has not as yet been formally proved to have violated the law, or impugned the neutrality of the harbour by any overt act. I am equally unwilling to place any limit on the rights of hospitality usually accorded to vessels of all nations in English harbours. I am most unwilling to strain the law to the prejudice of any vessel seeking that hospitality. But, at the same time, I cannot fail to recognize the great importance of the testimony which may be brought forward by yourself and your crew; nor can I fail to see the grave consequences which might result if a vessel, equipped and fitted as you represent for the purposes of war, were quietly allowed to take a crew here and quit the harbour with the intention of fighting on the side of one of two belligerent States, with each of whom Great Britain is at peace.

"To the doubts which this dilemma creates, I can see only one solution. The equipment of the Oreto, the object of her voyage hither, the intent of her voyage hence, the nature of her crew and the purpose of their enlistment, are all the fair subjects of judicial investigation. We cannot detain or condemn her on mere suspicion; nor, when suspicion has been so generally aroused, can we permit her to depart unexamined and unabsolved.

"Under every aspect therefore of the case, I think the best course which can be taken in the interests of yourself, the Colony, and the Government, will be to seize the Oreto, and at once submit the question of her condemnation to the local Court of Vice-Admiralty; and I am glad to see that you abandon the idea of carrying her before the Court of any other Colony. If, on the evidence which you adduce, the Court condemn her, you will have the satisfaction of having prevented, certainly an illegal, and probably a disastrous, voyage. If the Court do not condemn her, you will have the satisfaction of having discharged your duty under circumstances of anxious doubt and difficulty, the solution of which will hereafter smooth the course of others placed in situations equally trying and embarrassing.

"My opinion is that an appeal to the decision of the local Vice-Admiralty Court is the best expedient which could be embraced by all the parties interested in the matter. I will give the necessary instructions to the Queen's Advocate."‡

The course suggested was accordingly adopted. The Oreto was seized, and proceedings taken in the Admiralty Court of the Bahamas for her condemnation, the result of which I shall advert to further on.

From the correspondence which, in view of the accusations made, I have thought it my duty towards absent men, deprived of all means of defence, to set out in some detail before the Tribunal, even at the risk of appearing tedious, it is apparent that two different and opposite views were taken as to the propriety of seizing the Oreto. The naval officers, finding her equipped as a ship of war, and, from her presence at Nassau,

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* British Appendix, vol. i, p. 25. † Ibid., p. 26. ‡ Ibid., pp. 26, 27.

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and the other suspicious circumstances connected with her, entertaining no moral doubt that she was intended for the service of the Confederates against the United States, were for seizing her with a high hand. The civil Authorities, sensible that to seize the vessel, unless they could afterwards hold her upon legal proof of her destination as a belligerent vessel, such as would be received in a Court of Law, would be worse than useless, and seeing no such proof forthcoming, were unwilling to take upon themselves the responsibility of a proceeding which, if it ended in defeat, would be attended with serious consequences. In addition to this, the Attorney-General appears to have entertained an opinion that, in order to warrant a seizure at Nassau, some equipment of the vessel must have taken place within the precincts of the Colony—an opinion which, as we shall see presently, was shared by the Judge of the Vice-Admiralty Court. That opinion was, in my judgment, erroneous; but, after a careful perusal of the correspondence, and consideration of the facts, I am bound, in common justice to these parties, whose conduct has been so cruelly impugned, to say that I cannot find any ground to justify the suggestion that the views put forward by the Governor and Attorney-General in the course of these proceedings were not honestly and sincerely entertained.

But while I feel bound to give credit to the Governor and Attorney-General for perfect honesty of intention, I am not prepared to go the length of saying that, in my judgment, a degree of activity, such as the circumstances demanded, was exhibited in ascertaining the true character of the Oreto. Down to the time, indeed, when revelations as to the antecedents of the vessel were made by the crew, and while all that had happened at Liverpool remained unknown in the Colony, I am entirely of opinion with the Law Officer of the Colony that the seizure of the vessel would not have been warranted. However strong the suspicion, there was till then no actual proof of her destination. But, when the men on the 4th of June communicated all the facts to Mr. Whiting, and afterwards, at his suggestion, to Commander Hickley, and it thus became known to the Authorities that there were antecedents of a suspicious character connected with the vessel, it became, in my judgment, the business of the Law Officers to inquire into the facts. It is true Mr. Whiting neglected the obvious duty of communicating to the Authorities the affidavit made by the boatswain Jones. But the Attorney-General must have been aware that there were important matters connected with this vessel which the men who had come out in her were prepared to disclose; and I cannot but think that, in such a state of things, he should have taken steps to inquire into and ascertain the facts. In all probability the opinion—as I think, a mistaken one—that nothing but what took place in the waters of the Colony could be made available against the vessel, may have had the effect of inducing him to remain passive.

But the question, whether the omission to resort to this source of information did not amount to a want of due diligence, loses its importance by reason of the circumstance that, in spite of the opinion of the Attorney-General, the Oreto was in fact seized and brought into court with a view to her condemnation. Upon that fact supervening, any previous omission in this respect becomes, practically speaking, wholly immaterial. Whether the vessel was seized a few days sooner or a few days later can, obviously, under the circumstances, not have been of the slightest consequence.

In like manner, when M. Staempfli suggests that the Government at home were wanting in due diligence, because, on finding that the Oreto had not been built for the Italian Government, they did not send out to Nassau and other British Colonies to direct the seizure of the vessel should she come into a British port, the obvious answer, which I should have hoped would have occurred to his own mind, is that, even assuming that the Government were bound to send instructions to that effect all over the globe, the only purpose which such exemplary activity could have served would have been to secure the seizure of the vessel and the bringing her into court. But this end having been otherwise effected, by the action of Captain Hickley and the Governor, any want of diligence in any other quarter becomes wholly immaterial.

When once the end to be obtained is by some means or other effected, what matters it whether some other means, whereby the same result might possibly have been brought about, may have been omitted to be resorted to?

It cannot surely be necessary to point out that the omission to use due diligence, if it produces no injury to a party entitled to claim the exercise of such diligence, affords no ground for complaint or compensation. If, for example, a vessel were, by the negligence of the Authorities, permitted to be equipped and armed and to go forth to wage war on a belligerent, but before doing any actual mischief, were fallen in with

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by a more powerful enemy and taken, no amount of negligence in suffering her to go forth could constitute a ground for asking for pecuniary compensation.

We may, therefore, pass over all the facts preliminary to the seizure of the vessel, and come to the trial before the Judge of the Court of Admiralty of the Colony.

Now I at once feel bound to say that with the result of this trial I am anything but satisfied. In my opinion, the Oreto ought to have been condemned, and there was a miscarriage of justice in her acquittal. Not that, on the point which the Judge of the Vice-Admiralty Court thought the only issue in the case, namely, whether there had been any equipment of the vessel within the waters of the Colony, I am prepared to quarrel with the judgment. The mistake of the Judge, which led to the acquittal of the Oreto, consisted in holding that the equipment of a vessel in any part of the British dominions, for a purpose prohibited by the Foreign Enlistment Act, would not, so long as the property in it remained in a British subject and had not been transferred to a foreign belligerent, of which there was here no sufficient proof, form a sufficient ground of condemnation in any court of competent authority, within whose jurisdiction the vessel might be found, though no part of such equipment might have taken place within such jurisdiction. Fitted out, equipped, or armed within British dominions, in contravention of the statute, a vessel becomes at once forfeited by the effect of the statute, and becomes liable to be seized and condemned as forfeited. The character of forfeiture once attaching to her remains permanently affixed to her, and the proceeding being *in rem*, any competent Court within whose jurisdiction she may be, may adjudge her to be the property of the Crown, and give effect to the seizure of her as such.

It is admitted by Her Majesty's Government, upon the advice of its Law Officers, that such is the law.

It is clear that, if the Judge on the trial had acted on this principle, there was abundant evidence on which to condemn this vessel, and that she ought to have been condemned.

That she was equipped, though not armed for war, not only when at the Bahamas, but also when she left Liverpool is undoubted. The obstacle to her seizure at Liverpool was the absence of sufficient proof of her being intended for a belligerent. But when it turned out that her asserted destination for a firm at Palermo, or for the Italian Government, was a mere pretence, and that, having cleared out and shipped her crew for Palermo and Jamaica, she never went near either, but proceeded at once to Nassau, a port conveniently situated with reference to the coast of the Southern States; and when to these facts was added the evidence of the statements of those who had had charge of her that she was intended for the Confederate service, evidence which acquired additional force from the antecedent circumstances, no rational doubt could remain of the service for which the vessel was designed. Had the adjudication proceeded on right legal principles, the vessel must clearly have been condemned.

But, when I am asked to sanction the imputation that the prosecution was conducted by the Attorney-General in the scandalously corrupt manner imputed to him—that he directed it with the predetermined purpose of getting the Oreto released; that he hurried on the trial before evidence could be obtained from Liverpool; that he conducted his cross-examinations so as to suppress evidence unfavourable to the Oreto when it could be done; that he neglected to summon witnesses, who must have been within his control, who could have shown conclusively that the Oreto was built for the insurgents, and was to be converted into a vessel of war,—witnesses, I may add, by the way, who, if called, would have been privileged from answering, or certainly would have been hostile, and whom, therefore, a Counsel, in the exercise of his discretion, would scarcely think of calling—witnesses, too, who could have added nothing as to that which the Attorney-General and the Judge believed to be the essential matter to be proved—namely, an equipment of the vessel in the port—and when I am asked to ascribe to a Judge the disgraceful partiality imputed to Mr. Lees, I must refuse my assent to imputations, which go to fix a stigma on the character of high legal functionaries, who are not here to defend themselves, on grounds which appear to me of the most shadowy and unsubstantial character. These imputations of scandalous dereliction of duty in a public prosecutor, and of gross partiality in a Judge, are of a very grave and serious character. I must express my opinion that they ought never to have been made, more especially in the tone of careless and offensive levity in which they are presented to us in the pages of the American Case. Few things of the kind, I can say with truth, ever gave me more pain than the perusal of the observations in that document relating to this part of the case.

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I say this the more, because it appears to me that these accusations were unnecessary to the case of the United States. There was a miscarriage of justice on the trial of the Florida. If that miscarriage can be imputed to the British Government as negligence, so as to render it responsible, the Government of the United States is entitled to the benefit of it, no matter whether the miscarriage arose from corrupt design or mistake of law. It would surely have been sufficient to show the judgment to be wrong, without assailing men's characters by the imputation of base and evil motives and corrupt disregard of duty.

I have yet to consider, whether any default on the part of Her Majesty's Government can have contributed to the failure of the proceedings against the Florida. It is certain that, as soon as the fact of the seizure of the vessel and the institution of the suit was communicated to the Government at home, they approved of and ratified what had been done, and directed that Commander Hickley, as the prosecutor, should be indemnified against all the expenses of the suit. Instructions were given that any witnesses from Liverpool, who could give evidence material to the case, should be sent to Nassau. But when the evidence came to be looked into by Sir R. Phillimore, who had then succeeded to the office of Queen's Advocate, it turned out that the Liverpool witnesses could really add nothing to the evidence already forthcoming at Nassau.* Their evidence went to prove that the vessel, when she left Liverpool, was equipped so as to be capable of being armed; but, to prove this, no evidence was needed. The fact could not be disputed; if it had been, there was the vessel at Nassau to speak for herself.

The Liverpool evidence would, indeed, have established that the Oreto had cleared out on what after events showed to have been a pretended and fictitious voyage,—no doubt a most material fact; but of this again abundant evidence was forthcoming, from the evidence of the crew, who had signed articles for the voyage to Palermo and Jamaica. The evidence was, therefore, unnecessary: what is more, had it been forthcoming, it would have proved unavailing, by reason of the Judge holding the absence of equipment at Nassau to be fatal to the exercise of his jurisdiction to condemn the vessel.

It is complained that the Attorney-General hurried on the trial to avoid the evidence of the Liverpool witnesses. Now, as I have just remarked, no witnesses were sent, or were thought by Sir R. Phillimore of sufficient importance to be sent for the purpose of the trial; which is a sufficient answer to this head of complaint. It is complained that Maffit and other persons connected with the Oreto were not called on the trial; and this head of charge is also dwelt upon by M. Staempfli, as one of the grounds of his judgment. But this was a matter on which it was for the Public Prosecutor to exercise his discretion.

In the first place, the witnesses would of course have been hostile, and it is not usual with English advocates to call witnesses known to be adverse; they leave them to be called on the other side, that they may have the advantage of cross-examining them, which they are not permitted to do if they produce them themselves. Had the Attorney-General called these witnesses himself, the complaint would probably have taken the opposite form. It would then have been said that he had called witnesses from the enemy's camp for the purpose of damaging his own case.

In the second place, as these witnesses, if mixed up in a transaction involving a breach of the Foreign Enlistment Act, such as was involved in this suit, would have been liable to be prosecuted and punished, they would, by English law, have been privileged from giving evidence at all.

Thirdly, all that these persons, if called, could have proved, was that the vessel was intended for the Confederate service. But this, in the view unfortunately taken by the Judge, that equipment within the local limits of his jurisdiction was indispensable as the foundation of his authority to condemn, would obviously have availed nothing, and therefore no detriment can have arisen on the result from its not being produced.

There is an observation of the honourable Arbitrator, M. Staempfli, namely, that the witnesses on the trial were not examined on oath, which it is necessary to correct, lest it should go forth to the public that the Attorney-General and the Judge

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* British Appendix, vol. i, pp. 30-36.

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were so unmindful or ignorant of their duty as to allow the witnesses to be examined without the sanction of an oath. This statement must have been founded on an oversight; every witness called is shown by the report of the trial to have been sworn before he was examined. I am sure the honourable gentleman will regret his mistake.

The Oreto ought to have been condemned. She escaped condemnation by reason of a mistake on a matter of law of the Judge before whom she was brought for condemnation. Can such a failure be ascribed to the Government? The question is one of serious importance. I have already stated my views on it in an earlier stage of these remarks.

But a further charge of negligence is brought against the Government of the Bahamas by reason of the Oreto having received her armament in the waters of the Colony. The facts are as follows.

Having been released by the Court of Admiralty, the Oreto cleared out as a merchant-vessel for St. John's, New Brunswick, in ballast,* the port for which vessels intending to run the blockade usually cleared. On the 7th of August the vessel went out, into the neighbourhood of Hog Island, to try her steam.† She was at that time very short handed. It appears, from the letter of the United States' Consul to Mr. Seward of the 6th of September, that her crew at that time was "a very small one and that the officers expressed great doubts of being able to man her sufficiently for their nefarious purposes."‡ It is stated in the United States' Case that the Oreto lay outside, with a hawser attached to one of Her Majesty's ships of war.

In a letter of the United States Consul of the 9th of August, that gentleman writes to Mr. Seward as follows:—

"Sir, "*United States' Consulate, Nassau, N.P., August* 9, 1862.

"I have the honour to inform you of the arrival off this port yesterday morning of the United States' steam-ship R. R. Cuyler, Winslow Commander, eight days from Boston. The steamer Oreto had left this harbour the day previous and anchored off Hog Island; but early on the morning of the Cuyler's arrival she got under way, and kept "backing and filling" around that vessel while she lay off the port. Seeing these suspicious movements of so suspicious a vessel, Captain Winslow concluded not to leave his ship, but sent a boat for me, and I promptly joined him on board, giving him all the information in my power. He concluded to stand over for the North-west Passage, as I advised that course as the most likely method of trapping the Oreto, which vessel is reported to be bound for Charleston.

"Shortly after the Cuyler had disappeared, the Oreto came to anchor off the mouth of the harbour, and Her Majesty's steamer Peterel, Watson Commander, went out and anchored near her as 'a protection against the Yankees cutting out the privateer.'

"Last night guns and shells were transported to the Oreto by the schooner Prince Alfred, which has been purchased by the Confederate States' agent, Lafitte, for a tender on the British Confederate ships.

"A person landing at Nassau, ignorant of facts, would certainly think that this was England's war, from the activity of the people here to forward supplies to the rebels.

"I have, &c.,

"Hon. William H. Seward, (Signed) "SAML. WHITING.§

"Secretary of State."

Full explanation of the circumstances referred to, so far as the Peterel is concerned, is given in two letters of Captain Watson, who was in command of the ship in question, Her Majesty's ship Peterel, in answer to an inquiry from the Admiralty in consequence of this statement:—

"Sir, "*H.M.S. Pembroke, Sheerness, March* 22, 1872.

"I have the honour to acknowledge the receipt of your letter dated the 19th instant, with its inclosure from Admiral Sir Alex. Milne, dated 18th March, 1872.

"In reply, I beg leave to report that I perfectly remember the circumstance connected with a British steam-vessel, called the Oreto, that had been placed in the Vice-Admiralty Court at Nassau, N.P., by Commander Hickley, of Her Majesty's ship Greyhound, and that after a trial of some length she was released.

"I remember receiving a communication from his Excellency the Governor of the Bahamas, to the effect that there were two American ships of war under steam inside the bar, and that he would be glad if I could put myself in personal communication with their captains, and offer them the customary hospitalities. On receipt of his Excellency's communication, or as soon after as the tide permitted, I

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* British Appendix, vol. i, p. 58.
† United States' Documents, vol. vi, p. 305; British Appendix, vol. v, p. 50.
‡ United States' Documents, vol. vi, p. 307. § United States' Appendix, vol. vi, p. 304.

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proceeded in Her Majesty's ship under my command, under steam across the bar, and went on board the United States' steam-ship of war R. R. Cuyler, where I had a long and friendly conversation with her captain. Winslow, I think, was his name.

"At the time I was on board the R. R. Cuyler, the Oreto, with two other British ships, were steaming up and down the coast abreast Hog Island, trying their machinery. The Oreto certainly was, as I know she came out for that purpose, it being the first day she had had her steam up since being placed in the Vice-Admiralty Court.

"The two United States' steamers of war having declined the hospitalities of the port, proceeded towards Abaco, as far as I can remember, and I anchored the Peterel outside the bar of Hog Island, the tide or lateness of the date preventing my recrossing it.

"Having anchored as above stated, a boat came to me from the Oreto, asking for the assistance of some men, under the following circumstances;—

"A man, who stated he was the master in command of the Oreto, said he was very short-handed and wanted to anchor for about two hours to adjust his machinery, but if he anchored outside he had not sufficient crew to weigh his anchor, and begged I would assist him by lending him men.

"I declined lending him any men, but told him he might hold on astern of the Peterel, and I would give him a line for that purpose.

"About 6·30 or 7 P.M., having seen the Oreto fast, holding on by one of our hawsers, I went down to dinner, and when I came on deck again she was gone.

"I had told the master that she must go out of our waters before the tide slacked.

"This small act of courtesy I considered a duty that I should have extended to any ship, British or foreign, and until the receipt of your communication never gave it a second thought; in fact, I must have considered it too trivial to mention in my letters of proceedings, which at that time were full of matter of far greater interest.

"In conclusion, I may remark that the only reason I had for refusing to send men on board was in consequence of the prevalence of yellow fever in the merchant shipping at Nassau, and I had prohibited all communication, as far as practicable, with them.

"I have, &c.
(Signed) G. W. WATSON, *Captain.**

"Vernon Lushington, Esq.,
"Admiralty."

"*H.M.S. Pembroke, Sheerness, March* 31, 1872.

"Sir,

"With reference to my letter of the 22nd instant, I wish to make the following alteration in paragraph 6:—

"1. Having anchored as above stated, *no communication* of any sort took place between Her Majesty's ship Peterel and the British merchant-ship Oreto, until the following evening (Saturday), when a boat came alongside from the Oreto, asking for the assistance . . . . . the remainder of the paragraph and letter remains the same.

"2. When I sent my letter of the 22nd, I had not my private journal or letter with me.

"3. I wish to add also to my former letter that I never had any other communication, direct or indirect, with the Oreto, or any one connected with her, except as set forth in my official correspondence.

"I have, &c.
(Signed) "J. J. WATSON, *Captain.*†

"V. Lushington, Esq.,
"Secretary of the Admiralty."

We now see how unfounded was Mr. Whiting's suspicion as to the intentions of the Peterel.

The Oreto being in this position, on the 9th of August, a small steamer called the Prince Alfred, having been loaded with the armament intended for the Oreto, which had been brought out partly in the steamer Bahama, partly in other vessels, having also cleared out for St. John's, left Nassau, as if with the intention of running the blockade.‡ The Prince Alfred having passed the Oreto, the latter soon afterwards let go the hawser, and put to sea; and having overtaken the Prince Alfred, took her in tow, when both vessels proceeded to Green Cay, a small desert island, lying 60 miles south of Nassau, on the edge of the Great Bahama Bank, wholly uninhabited, and only frequented at times by fishermen. There, out of sight of every one, the armament of the Oreto was transferred to her from the Prince Alfred, the Confederate flag was hoisted, and the Oreto thenceforth received the name of the Florida.§

It had been surmised in the Colony that the Prince Alfred was taking out the armament of the Oreto, but the matter went no further than surmise. The harbour was full of shipping and vessels were leaving every day loaded with contraband of war for the purpose of running the blockade.

Mr Whiting, as we have seen, had stated it as a fact in his letter of the 9th. In a later letter to Mr. Seward of the 12th, he speaks with less certainty; he says:—

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* British Appendix, vol. v, p: 50.
† Ibid., p. 51.
‡ United States' Documents, vol. vi, p. 324.
§ Ibid., pp. 307, 319–321.

"On the 9th, the schooner Prince Alfred, which had been purchased by Lafitte, the Confederate Agent here, left this port, and it was currently reported and generally believed that she had on board the armament for the Oreto, and as that vessel left the same night (both clearing for St. John's), I think it probable.

"I have given full details of these movements to the commanders of the Adirondack and Cuyler, and also sent such information to the different Consulates.*

On the 16th, a report of the two vessels having gone to Green Cay appears to have reached Nassau.

Mr. Whiting writes on that day:—

"The Oreto is reported to have gone to Green Cay, about 50 miles south-west from Providence Island, and it is also reported that the schooner Prince Alfred has gone there to deliver to the Oreto her piratical armament.

"I have sent despatches to the United States' cruizers by the best channels open to me."†

The fact did not, however, become actually known at Nassau till the 6th of September, when certain men, who had been engaged at Nassau to go out in the Oreto for the purpose of assisting in transferring the guns and arms from the Prince Alfred, having returned to Nassau, gave to the American Consul an account of what had happened at Green Cay.‡

That, till a week after the vessels had left, no one in the Colony had any idea of an intention to transfer the armament in any place in the Bahamas, is plain. So far from expecting anything of the kind, Mr. Whiting expressly states, in his letter of the 9th, that he "advised Captain Winslow to stand out for the North-West Providence Channel, as the most likely method of trapping the Oreto, as she was reported to be bound for Charleston." Upon the faith of this belief, Mr. Whiting, as he tells us, "gave full details of these movements to the Commanders of the two American ships of war the Adirondack and Cuyler."§

What then is the negligence complained of in respect of the arming of the Oreto within the waters of the Colony? In the American Case the argument is put thus:—

"The arrangements for arming were made in the harbour of Nassau, and the two vessels left that port almost simultaneously, and proceeded to Green Cay together. The purpose for which they went was notorious in Nassau. This was so palpable an evasion that the act should be assumed as having taken place in the harbour of Nassau."‖ This is a very adroit way of putting the case, but is it a just one? In the first place, it is a great deal too much to assume that it was "notorious" that the Prince Alfred had on board the armament of the other vessel. The Consul puts it no higher than that it was so reported, and the Government could not act on mere report. The fact was never said to have been notorious till 1865, three years later, when Mr. Kirkpatrick, the then Consul, who knew nothing of the facts when they happened, thought proper so to state.¶

But the Argument further puts it as though the purpose of going to Green Cay was notorious; whereas we now know that neither the Consul nor any one else had the remotest idea that the transfer of the armament was intended to be effected within the limits of the Colony. The Consul believed that both vessels were going to Charleston. Can it be said that the Governor ought to have sent a British ship of war to accompany the two ships some sixty miles or more, till clear of the waters of the Bahamas, to prevent the possibility of a violation of neutrality in this respect?

But then, it is said, "the act was committed within British jurisdiction, and was therefore a violation of the first clause of the first Rule of the Treaty."

But, with submission, the act is not necessarily within the first Rule of the Treaty, because it was committed in British jurisdiction. To bring it within the first Rule of the Treaty it must be shown that there was a want of due diligence in not preventing the act so done, and of this I find no proof in the American documents.

To be sure, our honourable colleague M. Staempfli, in the grounds of his judgment, says:—

"Que Green Cay était éloigné et peu fréquenté; cette objection est d'autant moins importante que tout ce qui se fit à Green Cay partit de Nassau, et pouvait fort bien s'apercevoir depuis ce dernier endroit."

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* United States' Documents, vol. vi, p. 305. † Ibid., p. 305. ‡ Ibid., p. 306.
§ Ibid., pp. 304, 305. ‖ United States' Case, p. 439.
¶ United States' Documents, vol. vi, p. 327.

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I confess I do not quite understand what is meant by this. I do not suppose M. Staempfli can mean that what was done at Green Cay could be seen at Nassau, sixty miles off. I must, therefore, take it that what he means is, that the loading of the Prince Alfred and the nearly simultaneous departure of the two ships from Nassau could have been seen at Nassau—which, as it strikes me, is a self-evident proposition. But if he means that, because the cargo of the Prince Alfred consisted of guns and arms that might be transferred to the Oreto, therefore the Authorities ought to have stopped the Prince Alfred, the answer is that, until such transfer had actually taken place, or was about to take place, in British waters, the Authorities had no power to seize or detain the vessels.

The Prince Alfred had a perfect right, subject to the chance of capture, to take arms to a belligerent port. There was nothing to show that she was not about to do so. The American Consul believed she was. What authority had the Government to assume the contrary?

Lastly, M. Staempfli makes it matter of reproach to the local Government that no prosecution was instituted against the master of the Prince Alfred.

I must observe that this Tribunal has nothing whatever to do with the question of whether Her Majesty's Government should or should not have directed a prosecution in this or that particular instance. Though this is a point which has more than once been dwelt upon, it is wholly irrelevant to our inquiry.

However, let us see how the facts stand in this respect. On the 8th of September Mr. Whiting having seen the men who had returned from the Oreto, and having obtained a deposition from them, writes to the Governor:—

"I have the honour to inform your Excellency that I have good authority for stating that the schooner Prince Alfred, of Nassau, took the Oreto's armament from this port and discharged the same on board that steamer at Green Cay, one of the Bahamas. That the Oreto afterwards left Green Cay with the Secession flag flying at her peak. That the Prince Alfred has returned to this port, and now lies at Cochrane's Anchorage, and I am credibly informed that her Captain is again shipping men to be sent to the Oreto, in direct contravention of the Foreign Enlistment Act.

"I earnestly urge upon your Excellency the propriety of instituting some inquiry into these matters, and of preventing acts so prejudicial to the interests of the friendly Government which I have the honour to represent."*

To which the Colonial Secretary answers:—

"Sir, "*Colonial Office, Nassau, September* 9, 1862.

"In reply to your letter of the 8th instant, directed to the Governor, I am instructed by his Excellency to inform you that, if you feel assured that you have sufficient credible evidence to substantiate your allegation, and will put your evidence in the hands of the Attorney-General, his Excellency will direct a prosecution against the Captain of the Prince Alfred, or others who may have been guilty of violating the Foreign Enlistment Act.

"But his Excellency has no authority to take any steps against the Oreto, which is out of his Excellency's jurisdiction.

"I have, &c.

(Signed) "C. R. NESBITT, *Colonial Secretary.*"*

Instead of putting his evidence into the hands of the Attorney-General, who, of course, was not himself in the possession of any, Mr. Whiting allowed the matter to drop. He probably thought, and thought rightly, that it would profit the United States' Government very little to punish this man.

Alleged recruitment of crew.

Another charge in respect of this vessel is that Maffitt, her commander, when at Nassau, induced about 40 men to enlist on board the Oreto. The United States' Case, without more, sets this down as a violation of the second Rule of the Treaty, but is wholly silent as to any negligence of the local Government in this behalf.

M. Staempfli, nevertheless, but without any reference to facts showing negligence, states, as a ground of his judgment, that the manning of the Oreto at Nassau is to be imputed to the negligence of the British Authorities. In the first place, it does not appear that the Authorities knew anything whatsoever about the matter. In the second place, the Oreto, at the time these men were engaged, had not adopted the character of a ship of war; it was not known that she would do so; it was not known to the local Government, or even to Mr. Whiting, that she had been made over to the Confederate Government; it was not known that Maffitt had taken possession of her

* British Appendix, vol. i, p. 87.

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as their officer; Duguid, who had brought her out, still remained apparently the master of her; her former crew had all left her; the crew she had engaged were wholly insufficient as a fighting crew, and there was not, and could not be, any present purpose of using her as a fighting ship; it was believed she was going to run the blockade. If that fact had turned out to be true, the allowing her to hire a crew would have been perfectly legitimate, and could not have been prevented.

Was the vessel to be kept at Nassau permanently for want of a crew?

It is quite true that, by the second Rule of the Treaty, a neutral Government is not to permit its ports or waters to be used by a belligerent for the recruitment of men. But at this time, as I have already remarked, though it was known that the vessel was intended for the Confederate Government, it was not known that she had been transferred to them; still less that she was about to be used for belligerent purposes, which indeed she could not be till a different crew could be obtained. Till then she might be liable to capture as contraband of war, but she would not be liable to seizure as for a breach of the municipal law.

I confess I do not see the negligence which M. Staempfli's keener sight is enabled to discover.

Florida after leaving Green Cay.

When the Florida had taken in her armament at Green Cay, the crew shipped at Nassau being altogether inadequate for the vessel as a ship of war, she proceeded to the port of Cardenas in Cuba, where she remained till the 31st of August. She there attempted to ship a crew, but the matter having come to the knowledge of the Authorities, the officer in command repudiated the transaction, and left the port without any increase of his numbers.* Unable to keep the sea for purposes of war, with so insufficient a crew, the Florida ran past the hostile cruizers, though challenged and fired at, and succeeded in getting into the Confederate port of Mobile, where she arrived on the 4th of September.†

She remained in the port of Mobile upwards of four months; at the end of which time, having shipped a crew, she was sent out, on the 15th of January, 1863, under the command of Maffitt, as a Confederate ship of war.‡

Question as to effect of going into and remaining at Mobile.

A grave question here presents itself whether Great Britain, even if open to the imputation of want of due diligence in respect of the original equipment of the Oreto, or of her arming at Green Cay, can properly be held responsible for the acts of this ship subsequently to her entry into Mobile.

It is all important to bear in mind that the original equipment of this vessel, though an offence against the municipal law of Great Britain, was not, there being up to the time she arrived at the Bahamas no present intention of war, an offence against international law. All the power which the Government could exercise against her, in respect of any offence against the municipal law, was such as was derived from that law, that is to say, from the Foreign Enlistment Act. Now, all that the latter empowered the Government to do was to seize the vessel and to bring her before a competent Court for condemnation. If, when such a proceeding has been adopted, it results in the acquittal and release of the vessel, the matter becomes *res judicata*, the original vice becomes purged, and no further proceeding *in rem* can be had. A ship cannot be seized, and brought into Court again and again, when once it has been decided by a competent Court that she was not liable to seizure and condemnation at all. After the Oreto had been thus acquitted, all power of further seizure, as for an infraction of the Foreign Enlistment Act in her original equipment, was at an end. I grant that the right of a belligerent to redress for a breach of neutrality against international law would not be affected by a judicial proceeding under the municipal law; but there having been here, according to my view, no more than a breach of the municipal law, all that the belligerent could possibly exact was that the municipal law should be put in force by a proceeding against the vessel. When under such a proceeding the vessel had been acquitted, the matter was at an end.

It will be said that a second offence was committed in British jurisdiction by the arming of this vessel at Green Cay; and this may be so; but here again we have in like manner no breach of neutrality according to international law if, owing to the

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* United States' Documents, vol. vi, p. 331. † Ibid., p. 332.

‡ British Appendix, vol. i, pp. 117, 120, and 122.

deficiency of the crew, there was no present intention of applying the ship to the purpose of war. The Florida. After Mobile.

There is a decision of the Supreme Court of the United States which is in point to the present question, in the case of the United States *v.* De Quincy, reported in the 6th volume of Peters' Reports, page 445.* Case of the United States *v.* De Quincy.

In that case the defendant was indicted under the 3rd section of the American Act of 1818, for having been concerned in fitting out a vessel called the Bolivar, afterwards Las Damas Argentinas, with intent that such vessel should be employed in the service of the United Provinces of Rio de la Plata against the subjects of the Emperor of Brazil, with whom the United States were then at peace. The vessel in question, originally a pilot boat, had been fitted out at Baltimore for the defendant and one Armstrong, and adapted for carrying a gun. She sailed from Baltimore to the Island of St. Thomas, Armstrong being on board as part owner and agent for the other owners. On the way to St. Thomas's, Armstrong told a witness that it was his intention and wish to employ the vessel as a privateer, but that he had no funds. He spoke of the difficulty of getting any, and said he could not tell, until he got to the West Indies, whether he should be able to procure any. After negotiating for two or three days at St. Thomas's, Armstrong succeeded in obtaining funds; the Bolivar was fitted out as a privateer; and, Armstrong having provided himself with a commission from the Buenos Ayres Government, the vessel, under the name of Las Damas Argentinas, cruized under the flag of that Government and took several prizes. Two questions presented themselves for the decision of the Court as to the direction which should be given to the jury. The first was whether, to constitute an offence within the Act, it was necessary that the vessel should have been armed when she left Baltimore, the decision on which is immaterial to the present purpose. The second question is the one which touches the present case. On the part of the defendant it was submitted that the jury should be directed :—

"That if the jury believe that, when the Bolivar was fitted out and equipped at Baltimore, the owner and equipper intended to go to the West Indies in search of funds, with which to arm and equip the said vessel, and had no present intention of using or employing the said vessel as a privateer, but intended, when he equipped her, to go to the West Indies to endeavour to raise funds to prepare her for a cruize, then the defendant is not guilty.

"Or, if the jury believe that when the Bolivar was equipped at Baltimore, and when she left the United States, the equipper had no fixed intention to employ her as a privateer, but had a wish so to employ her, the fulfilment of which wish depended on his ability to obtain funds in the West Indies for the purpose of arming and preparing her for war, then the defendant is not guilty."

The Court said :—

"We think these instructions ought to be given. The offence consists principally in the intention with which the preparations were made. These preparations, according to the very terms of the Act, must be made within the limits of the United States; and it is equally necessary that the intention with respect to the employment of the vessel should be formed before she leaves the United States; and this must be a fixed intention, not conditional or contingent, depending on some future arrangements. This intention is a question belonging exclusively to the jury to decide. It is the material point on which the legality or criminality of the act must turn, and it decides whether the adventure is of a commercial or warlike character."*

At the same time the Court, at the instance of the prosecution, held that if there was an intention of employing the vessel as a privateer when she left Baltimore, the offence would be complete, though subsequent events might have prevented that intention from being carried into effect.

The distinction is a sound one. A present intention does not the less exist, because unexpected events may afterwards change it; but an intention which is to depend on uncertain contingencies cannot be said to be a present one. It is the present intention of the immediate employment of the vessel for hostile purposes which makes the sending out an armed ship an offence against the law of nations, as a violation of neutrality, as distinguished from merely making it contraband of war. Assuredly there must be a distinction between the two things, and I am at a loss to see where the line can otherwise be drawn.

A similar purpose, in like manner, makes the equipping of a vessel an offence against the municipal law, when without it—as if, for instance, the vessel had been already built and equipped—the transaction would be simply one of trade. Now, in the case before us, it may, perhaps, be questioned whether there was any present

* See also British Appendix, vol. iii, p. 92. † Ibid., p. 93.

The Florida.

intention of using the Florida as a ship of war, or whether such employment was not contingent on her obtaining a war crew. If no crew could be got, the cruise was, as the sequel shows, to be given up, and an attempt made to run her into one of her own ports. Be this as it may, the belligerent purpose, if any such existed, was frustrated by the ship not obtaining a crew, and the voyage was lost. This being so, why, as Sir Roundell Palmer puts it to us, should not a vessel, equipped in a neutral port, contrary to the municipal law of the neutral, be considered, like any other contraband of war,—such being, in point of international law, the true character of such a vessel till she actually enters on her employment as a ship of war,—as no longer *in delicto* when she has once reached the port of the belligerent.

Having shown, as I think, abundant grounds for saying that as to what passed at Green Cay, no possible imputation of want of due diligence can attach, it seems to me that it would be carrying the doctrine of neutral responsibility to an unheard-of and most unreasonable length to say that, after a lapse of five months, during which no vessel of the United States was captured by the Florida, and after this vessel had been four months in a Confederate port, and had there shipped a new crew, Great Britain is to be held liable for damage afterwards done by her.

I agree with Sir Roundell Palmer in thinking that, with her arrival at Mobile, if not with her departure from the Bahamas, the illegal voyage upon which any liability attached came to an end, and with it all responsibility which can reasonably be fastened on the Government of Great Britain.

Question whether the Florida should have been seized on again coming into a British port.

But it is said that the Florida, having again come into a British port, and being known to be engaged in hostile operations against the United States, ought to have been detained, it being obligatory on the British Government to stop such a vessel, by reason of the admission in the second branch of the first Rule, viz., that "a neutral nation is bound to use due diligence to prevent the departure from its jurisdiction of any vessel intended to cruize or carry on war" under the circumstances referred to in the first branch; "such vessel having been specially adapted, in whole or in part, within its jurisdiction, to warlike use."

The question is one of considerable importance, as it may affect not only the Florida, but also the Georgia and the Shenandoah, vessels as to the equipping of which it will be impossible to fix the British Government with want of due diligence.

I cannot understand how such a contention can have been raised. It appears to me to rest on a thorough perversion of the obvious meaning of the Rule. It is impossible to read the first Rule without seeing that it is intended to apply to two branches of one entire transaction, which consists, first, in allowing the vessel to be equipped, next in allowing her to depart; the second branch of the Rule being intended to meet a case in which a vessel may have been equipped in such a manner as to elude the diligence of the Authorities, but where there may be an opportunity, on her character being discovered, to arrest her before she has quitted neutral waters.

The second branch of the Rule is obviously intended to apply to the first departure of a vessel—that is to say, its departure from a neutral port before passing into the hands of a belligerent Government—and to that alone.

It is absurd to suppose that, if it had been intended that, Great Britain should be held liable for not having seized these vessels on their re-entering her ports, this would not have been expressly stated; especially when it is remembered that this might have been virtually to admit liability in respect of all these vessels, if shown to have been specially adapted for war within British territory; for every one of them returned to a British port at an early period of its career. It is plain that it never could have entered into the mind of the British Ministry that the Rule would be treated as applicable to anything beyond the first departure of the vessel.

The moral bearing of the question has been admirably pointed out in Sir R. Palmer's argument:—

"It would have become the plain duty of any neutral State which had entered into such an engagement to give notice of it beforehand to all belligerent Powers, before it could be put in force to their prejudice. It is impossible that an act, which would be a breach of public faith and of international law towards one belligerent, could be held to constitute any part of the '*diligence due*' by a neutral to the other belligerent. The Rule says nothing of any obligation to *exclude* this class of vessels, when once commissioned as public ships of war, from entrance into neutral ports upon the ordinary footing. If they were so excluded by proper notice, they would not enter; and the Rule (in that case) could never operate to prevent their departure. If they were not so excluded, instead of being 'due diligence,' it would be a flagrant act of treachery and wrong to take advantage of their entrance, in

order to effect their detention or capture. Can Her Majesty be supposed to have consented to be retrospectively judged as wanting in due diligence, because, not having excluded these Confederate ships of war from her ports by any prohibition or notice, she did not break faith with them, and commit an outrage on every principle of justice and neutrality by their seizure? The Rules themselves had no existence at the time of the war; the Confederates knew, and could know, nothing of them; their retrospective application cannot make an act *ex post facto* 'due,' upon the footing of 'diligence,' to the one party in the war, which, if it had been actually done, would have been a wholly unjustifiable outrage against the other." The Florida.

And this being so, it may safely be asserted that the United States' Government must have framed the Rules with a like mind; for it would be to give them credit for sharp practice indeed, if, while the British Government agreed to the Rule, on the supposition that its application was to be limited to the first departure of an offending vessel, the United States should be at liberty to insist on its application, *toties quoties*, to every subsequent departure. I will say no more than that the construction thus sought to be put on the second branch of the first Rule is quite preposterous.

But it is said, in the second place, that the equipment and sending out of an armed vessel from the port of a neutral being a violation of its territory and neutral rights, and therefore a hostile act, Great Britain had the right to seize these vessels on their again coming within her jurisdiction, and was bound to do so, to prevent them from continuing to make war on vessels of the United States.

The answer of the British Government is threefold:—

1st. That it had not the right, according to international law, to seize these vessels, seeing that when they came again into British ports, they were admitted as the commissioned ships of war of a belligerent State.

2ndly. That, independently of the foregoing ground, the British Government could not as a neutral Government, seize a ship of war of a belligerent State for that which was not a violation of neutrality but only of its own municipal law.

3rdly. That even if it had the right, it was under no obligation to exercise it.

The first of these grounds depends on the effect of the commissions which these vessels had in the meantime received from the Government of the Confederate States as ships of war. Effect of Commissions on ships of war.

Now, it must be taken as an unquestionable fact that these ships were built, or equipped, for the *de facto* Government of the Confederate States, and were employed by it as regular ships of war, under the command of officers regularly commissioned. Hereupon two questions present themselves. Were these commissions valid? If so, what was their effect as to affording immunity to a vessel, thus commissioned, from seizure by the Government of Great Britain?

It is a familiar principle of International Law that the ships of war of a State are entitled to the privilege of exterritoriality. This is a point on which leading publicists are agreed. Wheaton, in his "Eléments de Droit International,"* writes:— Ships of war exterritorial.

"Une armée ou une flotte appartenant à une puissance étrangère, et traversant ou stationnant dans les limites du territoire d'un autre Etat, en amitié avec cette puissance, sont également exemptes de la juridiction civile et criminelle du pays.

"Il s'ensuit que les personnes et les choses qui, dans ces trois cas, se trouvent dans les limites du territoire d'un Etat étranger, restent soumises à la juridiction de l'Etat auquel elles appartiennent, comme si elles étaient encore sur son territoire.

"S'il n'y a pas de prohibition expresse, les ports d'un Etat sont regardés comme étant ouverts aux navires de guerre d'une autre nation avec laquelle cet Etat est en paix et amitié. Ces navires, entrés dans les ports étrangers, soit en vertu de l'absence d'une prohibition, soit en vertu d'une autorisation expresse, stipulée par Traité, sont exempts de la juridiction des tribunaux et des autorités du lieu."

Heffter declares ships of war to be exempt from the territorial jurisdiction of the country within whose waters they are.† Heffter.

Sir R. Phillimore writes as follows:—‡

"Long usage and universal custom entitle every such ship to be considered as a part of the State to which she belongs, and to be exempt from any other jurisdiction; whether this privilege be founded Sir R. Phillimore.

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* Vol. i, p. 119. † "Völkerrecht der Gegenwart," §148.
‡ "International Law," vol. i, p. 399.

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upon strict international right, or upon an original concession of comity with respect to the State in its aggregate capacity, which, by inveterate practice, has assumed the position of a right, is a consideration of not *much* practical importance. But it is of *some* importance, for if the better opinion be, as it would seem to be, that the privilege in question was originally a concession of comity, it may, on due notice being given, be revoked by a State, so ill-advised as to adopt such a course, which could not happen if it were a matter of natural right. But, unquestionably, in the case of the foreign ship of war, or of the foreign Sovereign and Ambassador, every State which has not formerly notified its departure from this usage of the civilized world, is under a tacit convention to accord this privilege to the foreign ship of war lying in its harbours"

No writer has, however, discussed the subject with so much clearness and force as M. Ortolan in his "Diplomatie de la Mer":—

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"Les bâtiments de guerre au contraire, armés par l'Etat lui-même et pour sa défense, en sont les représentants à l'etranger; leurs commandants et leurs officiers sont comme des délégués du pouvoir exécutif, et sur quelques points du pouvoir judiciaire de leur pays. Ces bâtiments doivent donc participer pleinement à l'indépendance et à la souveraineté de la puissance qui les arme; ils ont droit aux respects et aux honneurs qui sont dus à cette souveraineté: c'est ce que reconnaissent et ce que commandent les lois internationales.* . . . . ."

"Par cela seul que les bâtiments de guerre sont armés par le Gouvernement d'un Etat indépendant, auquel ils appartiennent, que leurs commandants et leurs officiers sont des fonctionnaires publics de cet Etat et en exercent la puissance exécutive, en certains points même la puissance judiciaire, enfin que tout individu faisant partie de leur équipage, sans distinction de grade, est un agent de la force publique; ces bâtiments, personnifiés, sont une portion de ce Gouvernement et doivent être indépendants et respectés à son égal.

"Ainsi, quel que soit le lieu où ils se trouvent, qui que soit au monde, étranger au Gouvernement auquel ils appartiennent, n'a le droit de s'immiscer en rien dans ce qui se passe à leur bord, et encore moins d'y pénétrer par la force.

"On exprime généralement cette règle par une métaphore passée en coutume, et tellement accréditée, tellement traditionnelle, que dans la plupart des esprits elle est devenue comme une raison justificative de la proposition dont elle n'est véritablement qu'une expression figurée. On dit que tout bâtiment de guerre est une partie du territoire de la nation à laquelle il appartient: d'où la conséquence que même lorsqu'il est dans un port étranger, les officiers, l'équipage et toute personne quelconque qui se trouve à son bord, est censée être, et que tout fait passé à bord est censé passé, sur ce territoire. C'est par une continuation, par une expression résumée de la même figure, qu'on appelle ce privilège le privilège ou le droit d'*exterritorialité*."†

The matter is so well handled by this able writer that I am induced to cite one or two more passages:—‡

"Ce qui est vrai, c'est que le navire est une habitation flottant, avec une population soumise aux lois et au Gouvernement de l'Etat dont le navire a la nationalité, et placée sous la protection de cet Etat. Ce qui est vrai, c'est que si le navire est bâtiment de guerre, il est, en outre, une forteresse mobile portant en son sein une portion même de la puissance publique de cet Etat, des officiers et un équipage qui forment tous dans leur ensemble un corps organisé de fonctionnaires et d'agents militaires ou administratifs de la nation.

"S'il s'agit de navires de guerre, la coutume internationale est constante; ces navires restent régis uniquement par la souveraineté de leur pays; les lois, les autorités, et les juridictions de l'Etat dans les eaux duquel ils sont mouillés leur restent étrangères; ils n'ont avec cet Etat que des relations internationales par la voie des fonctionnaires de la localité compétents pour de pareilles relations. . . .

"Le navire de guerre portant en son sein une partie de la puissance publique de l'Etat auquel il appartient, un corps organisé de fonctionnaires et d'agents de cette Puissance dans l'ordre administratif et dans l'ordre militaire, soumettre ce navire et le corps organisé qu'il porte aux lois et aux autorités du pays dans les eaux duquel il entre, ce serait vraiment soumettre l'une de ces Puissances à l'autre; ce serait vouloir rendre impossibles les relations maritimes d'une nation à l'autre par bâtiments de l'Etat. Il faut ou renoncer à ces relations, ou les admettre avec les conditions indispensables pour maintenir à chaque Etat souverain son indépendance.

"L'Etat propriétaire du port ou de la rade peut sans doute, à l'égard des bâtiments de guerre, pour lesquels il aurait des motifs de sortir des règles ordinaires et pacifiques du droit des gens, leur interdire l'entrée de ces eaux; les y surveiller s'il croit leur présence dangereuse, ou leur enjoindre d'en sortir, de même qu'il est libre, quand ils sont dans la mer territoriale, d'employer à leur égard les moyens de sûreté que leur voisinage peut rendre nécessaires; sauf à répondre, envers l'Etat auquel ces vaisseaux appartiennent, de toutes ces mesures qui pourront être, suivant les événements qui les auront motivées, ou la manière dont elles auront été exécutées, des actes de défense ou de précaution légitime, ou des actes de méfiance, ou des offenses graves, ou même des causes de guerre; mais tant qu'il les reçoit, il doit respecter en eux la souveraineté étrangère dont ils sont une émanation; il ne peut avoir, par conséquent, la prétension de régir les personnes qui se trouvent et les faits qui se passent à leur bord, ni de faire sur ce bord acte de puissance et de souveraineté."

Case of the Exchange.

In the case of the Exchange, reported in Cranch's Reports (vol. vii, pages 135-147) the principle that a vessel bearing the flag and commission of a belligerent Power was

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* Vol. i, p. 181. † Ibid., p. 186. ‡ Ibid., pp. 188-191.

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not within the local jurisdiction of the neutral law, though claimed by citizens of the neutral country as having been forcibly taken from them as prize, contrary to international law, was fully upheld on appeal by the Supreme Court of the United States.

"By the unanimous consent of nations," says Chief Justice Marshall, "a foreigner is amenable to the laws of the place, but certainly, in practice, nations have not yet asserted their jurisdiction over the public armed ships of a foreign sovereign entering a port open for their reception. . . . It seems, then, to the Court to be a principle of public law that national ships of war entering the port of a friendly Power open for their reception are to be considered as exempted by the consent of that Power from its jurisdiction."

It has been ingeniously attempted by the Counsel of the United States to place the decision in this case and the judgment of Chief Justice Marshall on the footing that a neutral Court has no jurisdiction over a belligerent vessel as a matter simply of judicial authority. But this is not so; the eminent Judge who delivered the judgment in that case places the matter not on the footing of jurisdiction in a judicial point of view, but as one of international right. In proof of which the following passages are deserving of the fullest attention:—

"*A nation* would justly be considered as violating its faith, although that faith may not be expressly plighted, *which should suddenly, and without previous notice, exercise* its territorial powers in a manner *not consonant to the usages and received obligations of the civilized world.* . . . .

"If, for reasons of State, the ports of a nation generally, or any particular ports, be closed against vessels of war generally, or the vessels of war of any particular nation, notice is usually given of such determination. If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all Powers with whom it is at peace, and they are supposed to enter such ports, and to remain in them, while allowed to remain, under the *protection of the Government of the place.* . . . .

"But in all respects different is the situation of a public armed ship. She constitutes a part of the military force of her nation; acts under the immediate and direct command of the Sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign State. Such interference cannot take place without affecting his power and his dignity. The implied license, therefore, under which such vessel enters a friendly port, may reasonably be construed, and it seems to the Court ought to be construed, as containing *an exemption from the jurisdiction of the sovereign* within whose territory she claims the rights of hospitality."

Commission of mere belligerent.

No doubt the effect to be given to the commission of a belligerent Government must depend on its power to act as a Government. And I repeat what I have before endeavoured to make good: namely, that where an integral portion of a nation separates itself from the parent State, and establishes a *de facto* Government of its own, excluding the former Government from all power and control, and thereupon a civil war ensues, a neutral nation is fully justified in recognizing the Government *de facto* as a belligerent, though it has not as yet acknowledged it as a nation; and that from the time of the acknowledgment of its belligerent status, the Government *de facto* acquires, in relation to the neutral, all the rights which attach to the status of a belligerent of an established nationality. The practice of nations has been uniform on this point; all the maritime nations concurred in according to the Confederate Government the status and rights of a belligerent. The commissions of the Confederate States, must therefore be taken to have been valid, and to have had the same force and efficacy as the commissions of any recognized Government would have had.

It has, indeed, been contended that, in the particular instance of the vessels belonging to the Confederate States, the commissions of the Government *de facto* ought not to have been respected. After having listened, with the utmost attention, to the argument of Mr. Evarts, I protest I am at a loss to know why. Setting aside all the idle language that has been written and spoken about "piracy"—as though the ships of eleven great provinces, having an organized Government, and carrying on one of the greatest civil wars recorded in history, could be called pirates—the argument comes to this: that a country, the independent nationality of which has not been acknowledged, and which has not been admitted into the fraternity of nations, has no rights of sovereignty, and consequently cannot by its commission exclude the right of the local sovereign to seize one of its vessels of war if any infraction of the municipal law has been committed in respect of it. But what is this, practically, but to deprive the recognition of belligerency of all the effects it was intended to have? It is admitted among nations that such a recognition may be made by a neutral State. Its purpose is to invest the *de facto* Government with the character of a belligerent Power, for the common benefit of both belligerent and neutral, without any recognition of independence or sovereignty. The recognition would plainly be idle if it did not carry with it one of the most important rights incidental to a belligerent Government, that of commissioning and employing vessels of war, and of having those vessels, when sailing under its flag,

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and armed with its commissions, invested with the privileges conceded to ships of war, and therefore exempted from the jurisdiction of any neutral country in whose waters they may be.

Effect of alleged violation of neutral territory.

But it is alleged that, even assuming the Commissions to have been valid, these vessels ought nevertheless to have been seized. The argument, as I understand it, is in substance this: the equipping and sending forth of a vessel from neutral territory, for the purpose of being employed in the service of a belligerent, is a violation of the territorial rights of the neutral; every violation of the territory of a neutral is a hostile act; every hostile act calls upon the neutral to vindicate its rights by force; therefore Great Britain ought to have seized these vessels.

Hautefeuille.

In support of this argument the following passage is cited from Hautefeuille:—

"Le fait de construire un bâtiment de guerre pour le compte d'un belligérant, ou de l'armer dans les Etats neutres, est une violation du territoire. Toutes les prises faites par un bâtiment de cette nature sont illégitimes, en quelque lieu qu'elles aient été faites. Le souverain offensé a le droit de s'en emparer, même de force, si elles sont amenées dans ses ports, et d'en réclamer la restitution lorsqu'elles sont, comme cela arrive en général, conduites dans les ports hors de sa juridiction. Il peut également réclamer le désarmement du bâtiment illégalement armé sur son territoire, et même le détenir s'il entre dans quelque lieu soumis à sa souveraineté, jusqu'à ce qu'il ait été désarmé."*

After which the learned author goes on to use the following strong language, which, however, appears to express a view peculiar to himself, and, so far as I am aware, shared by no other writer on international law:—

"Le peuple neutre ne peut négliger l'accomplissement de ce devoir, sans s'exposer à la juste vengeance de la nation à laquelle cet abandon de ses droits porterait un grave préjudice, sans lui fournir un juste sujet de guerre. On pourrait en effet l'accuser, avec raison, d'abdiquer les droits de sa souveraineté, de son indépendance, en faveur de l'une des parties en guerre, au préjudice de l'autre, et par conséquent de manquer d'impartialité, de méconnaître le second devoir de la neutralité."†

If, indeed, by constructing or arming a ship, M. Hautefeuille means constructing or arming for the immediate purpose of war, so as to constitute a hostile expedition from the shore of the neutral, I entirely agree that this will amount to a violation of neutral territory. Short of that, it will only be a violation of the local law, and therefore will not amount to a violation of territory. This distinction is all important, but appears to have been wholly lost sight of.

But even should it amount to a violation of territory, it seems monstrous to assert that the neutral is bound to have recourse to force, possibly to become involved in war, for the benefit of the other belligerent.

It is to be observed that M. Hautefeuille, before he came to the subject of ships, had been speaking of the violation of neutral territory by acts of hostility, such as the taking of a ship in neutral waters.

He could hardly, I imagine, mean to go the length of saying that the clandestine equipment of a ship for belligerent use, not amounting to a hostile expedition, would be such a violation of the rights of the neutral as would justify, much less necessitate, a declaration of war.

Ortolan.

M. Ortolan discusses the subject with the calm judgment which distinguishes him.

It is true that his reasoning is addressed to the obligation of the neutral State to insure the restoration of prizes illegally captured within its waters; but it is obvious that the principle he lays down applies to every violation of neutral territory by a belligerent:—

"L'illégalité des actes d'hostilité exercés dans les eaux territoriales d'une puissance neutre entraîne, comme conséquence directe, l'illégalité des prises faites en dedans des limites de ces eaux. Ces prises ne sont pas valables, soit qu'elles aient été faites par des navires de guerre, soit qu'elles l'aient été par des corsaires. C'est le devoir de l'Etat auquel appartient le capteur de les restituer aux premiers propriétaires; et même c'est le droit et le devoir de l'Etat neutre dont le territoire a été violé de prononcer lui-même cette restitution si la prise se trouve amenée chez lui.

"Toutefois la nullité des prises ainsi faites n'est pas tellement absolue qu'elle puisse être invoquée, et que l'Etat du capteur doive la prononcer même en l'absence de toute réclamation de la part de l'Etat neutre dont on prétend que les droits ont été méconnus. 'C'est une règle technique des cours de prises,' dit à ce sujet M. Wheaton, 'de ne restituer leur propriété aux réclamants particuliers, en cas pareil, que sur la demande du Gouvernement neutre dont le territoire a été ainsi violé. Cette règle est fondée sur le principe que l'Etat neutre seul a été blessé dans ses droits par une telle capture et que le réclamant ennemi n'a pas le droit de paraître pour entraîner la non-validité de la capture.'

* "Droits et Devoirs des Nations Neutres," vol. i, p. 295. † Ibid., p. 296.

"Nous adhérons complètement à cette doctrine et à cette jurisprudence pratique. Elle concorde parfaitement avec ce que nous avons dit ci-dessus des cas où, à raison des circonstances et de l'état des côtes, les actes d'hostilité peuvent être excusés bien qu'ayant eu lieu dans une mer littorale neutre. Elle est même indispensable dans le système de tous ceux qui admettent, comme nous, cette possibilité d'excuse. Puisque la nullité des prises ainsi faites n'a rien d'absolu, qu'elle est subordonnée aux réclamations de l'Etat neutre, le fait est remis à l'appréciation de cet Etat. C'est à lui à juger s'il y a eu, ou s'il n'y a pas eu, véritablement atteinte portée à sa souveraineté; s'il doit à sa propre dignité et aux obligations d'impartialité que lui impose sa qualité de neutre, de réclamer contre cette atteinte et de demander que les conséquences en soient annulées ou réparées; ou bien s'il peut garder le silence et n'élever aucune réclamation. S'il réclame, et que ses plaintes soient fondées, le Gouvernement du capteur doit annuler la prise ainsi faite au mépris d'une souveraineté neutre; s'il ne réclame pas, nul n'est admis à le faire pour lui, et le Gouvernement du capteur n'a pas à tenir compte de pareilles objections."*

Duty of seizing for breach of municipal law.

But it is said that—independently of any violation of territory in the sense of international relations—because the vessel was equipped and armed in defiance, or in fraud, of the municipal law of Great Britain, it was incumbent on the British authorities to seize her when she next entered a British port. In this contention there appears to be—I say it with all possible respect—considerable confusion of ideas, and a losing sight of elementary principles. I agree with M. Staempfli that, these vessels having been ordered by agents of the Confederate Government, it is the same thing as though they had been ordered by that Government itself; and that there was, consequently, in respect of them, a violation of the municipal law of Great Britain by the Confederate Government itself. But it is a great mistake to suppose that a breach of the municipal law of a neutral country, though relating to neutrality, becomes a violation of the territorial rights of the neutral, because committed by a belligerent Power. The character of the offender does not change or affect the character or quality of the offence. Nothing short of a breach of neutrality, according to international law, can justify a resort to forcible measures on the part of the neutral as for a violation of his neutral rights.

Now, the equipment of the Florida in England for the service of the Confederates constituted no violation of neutrality by international law, the vessel not having been armed, or sent out for the present purpose of war. On her way to Nassau she would have been subject to seizure as contraband of war; but that is all. In like manner, though the arming of the vessel at the desert island of Green Cay may have been, strictly speaking, a violation of British law, yet, there being no present purpose of war, it was no violation of neutral territory within the rules of international law. It was, at the utmost, a breach of the law of Great Britain. And here the distinction should be kept in view to which I have already referred, and which seems to me to have altogether been lost sight of, namely, that a breach of the municipal law, though it may be of a law relating to neutrality, does not constitute a breach of neutrality as between nations. That which, if done by a subject, would simply amount to a breach of his own law, does not become a violation of neutrality, because done by a foreigner. Nor is it the more so because done by a belligerent Government, or the agent of such Government. Let such a Government send agents to purchase ships equipped and ready for war, not with any immediate purpose of using them as ships of war on leaving port, but that they may be conveyed to its own country, to be eventually used for war, if such an act is an offence by local law, it will still be an offence against the local law alone. How, then, can it be said that for a violation of municipal law alone a neutral can seize a vessel, in respect of which that law alone has been violated, when it has become the property of the Government of another State? No principle of the law of nations is more firmly settled or universally acknowledged than that an independent Sovereign or Government,—and, for this purpose, the Government of a State, as yet acknowledged only as a belligerent, must be taken to be an independent Government—is not amenable to the municipal law of another country. All rights, all obligations, all duties, all liabilities, as between Sovereign and Sovereign, State and State, Government and Government, depend wholly and solely either on express convention or on the principles and rules of the common law of nations. How, then, in the matter of an infraction of the municipal law only, could a neutral State have recourse, as against a belligerent Government, to the powers which that law gave it against its own subjects alone?

But, assuming even that a neutral State would be entitled to seize a vessel, though

* "Règles Internationales et Diplomatie de la Mer," vol. ii, p. 298.

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armed with a commission from a belligerent Power, by reason of some offence committed against its neutrality, as a reparation for a wrong done against itself, how can it possibly be asserted that it is under any obligation to do so? It may be said that a nation is bound to maintain its own sovereignty, to vindicate its honour, to maintain the inviolability of its territority; and, morally speaking, this may be true; but, I ask, what law is there which makes it obligatory on it to do this? A State, like an individual, may omit to insist on its rights, among others on its right of reparation for wrong done to it—*unusquisque potest renuntiare juri pro se constituto.* I cannot admit the argument that it is less free to do so, because it is to the interest of a belligerent that it should resent a wrong by force, and so inflict damage on his adversary. To ask for apology or reparation is one thing; but to seize the ship of another State, is neither more nor less than a step towards war. It is an act which no powerful State would submit to; which would lead to reprisals, in all probability to war. It is, therefore, one which no powerful State should have recourse to as against a weak one. Again, the neutral State may be a weak one—the wrong-doing belligerent a powerful one. The neutral may have the strongest motives for remaining at peace. Is it to be said that, in spite of all such considerations, the neutral, who would not have recourse to forcible measures so far as his own interests are concerned, is nevertheless bound to do so, no matter what may be the consequences, because the other belligerent has a right to insist on it? Yet this is what I understand our honourable President to maintain. I cannot, for my part, concur in such a view. What would be said if a State, the neutrality of which is secured by international arrangements, such for instance as Belgium, were to find itself in such a position? Would it be bound to have recourse to force because a belligerent had had a vessel of war constructed in one of its ports without its knowledge. I cannot think so. I adopt the conclusion of M. Ortolan. The question whether a breach of its neutral rights shall be resented or not is matter for the neutral State to determine. "C'est à lui à juger s'il y a eu, ou s'il n'y a pas eu, véritablement atteinte portée à sa souveraineté; s'il doit à sa propre dignité et aux obligations d'impartialité qui lui impose sa qualité de neutre, de réclamer contre cette atteinte et de demander que les conséquences en soient annulées ou réparées; ou bien s'il veut garder le silence et n'élever aucune réclamation."

No doubt a neutral State may, and in some instances ought—as, for instance, in such a flagrant case as the capture of the Florida by the Wachusett in the port of Bahia—to insist on redress. If the Florida had not sunk in the meantime, Brazil would have had a right to insist on her being set at liberty. But what if the Florida had not fortunately sunk, and the United States had refused to release her on the demand of Brazil? Though the latter might, if so minded, have made reprisals, or gone to war in vindication of her own rights, will any one say that Brazil must necessarily, and as matter of obligation to the Confederate Government, have gone to war with the United States? Surely it is for a nation whose neutrality has been infringed to judge for itself whether it will or will not resent it. In some cases, as where the disparity of force is very great, it might not think it politic to do so. In others, where the degree of offence is comparatively slight, it might not be thought worth while to follow the matter up. In the present instance, Great Britain, having no diplomatic relations with the Confederate Government, had no opportunity of remonstrating. This is an inconvenience which necessarily accompanies the recognition of belligerency without that of sovereignty, though the inconvenience is counterbalanced by other weighty considerations. Being thus unable to remonstrate, will it be said that Great Britain ought to have thrown the weight of her arms into the contest going on between the Confederate States and their more powerful opponent, because these vessels had managed to get away from her shores? especially when there was very great doubt whether, in respect of vessels armed out of British jurisdiction, any offence had been committed against international law. Would the world's opinion have sanctioned such a proceeding? At all events, would not public opinion have reprobated the seizure of these vessels as an act of unpardonable perfidy, if they had been allowed to enter British ports without notice, a deliberate intention of seizing them having been first formed?

In truth, this contention on the part of the United States is entirely an afterthought. During the whole course of the war, amid the numerous demands and reclamations made by the United States' Government and its Representatives, it never occurred to them, so far as I am aware, to suggest to Her Majesty's Government to detain these vessels on their entering British ports. The conclusion, then, at which I arrive, is that, even if Great Britain had a right by international law to seize these vessels, she was not bound to do so, and in common honour could have not done so without giving

notice; that the United States had no right to insist on the seizure of them, and, at all events, never having attempted to do so, can have no right now to claim damages by reason of its not having been done. The Florida.

But it has been said that, whether or not Great Britain had the right to seize, or whether or not, having the right, she was under any obligation to exercise it, or whether or not she was bound to give notice of the intention to do so, the Government should have resented the violation of its law by refusing to the delinquent vessels entrance into British ports. Duty of excluding from neutral ports.

The answer is, that the questions—whether the law of Great Britain had been broken, and whether the vessels were, in this sense, delinquent or not, were in each case disputable questions of mixed law and fact, which could not in any way be investigated between Great Britain and the Confederate States, and on which the opinions of high legal authorities in Great Britain were known to differ. It was the right and duty of the British Government, under such circumstances, to take the course which it deemed most consistent with the maintenance of a strictly impartial neutrality; and if, under the influence of this motive, it decided (as it did) against attempting to discriminate between the different vessels bearing the public commission of the Confederate States, it acted in the exercise of its own proper right, and violated no obligation due to the other belligerent. The Rules of the Treaty of Washington are wholly silent as to any such obligation, and the law of nations imposes none.

The question as to the effect of a belligerent commission in the case of a vessel illegally armed in a neutral port came under the consideration of a Circuit Court of the United States in the case of the United States *v.* Peters,*—a case relating to a ship called Les Jumeaux, otherwise the Cassius. The result was remarkable, and is deserving of serious attention.

The vessel in question was originally a British cutter engaged in the Guinea trade. She was pierced for twenty guns, but only carried four guns in broadside and two swivels. Having passed into the ownership of one Lemaître, a Frenchman, she came into Philadelphia with cargo as a merchant-vessel. Lemaître having admitted others of his countrymen to joint ownership, it was resolved to augment the force of the vessel, with a view to her sale to the French Government, then at war with England, as a ship of war. The attempt having been prevented by the United States' Government, the vessel left Philadelphia in ballast; but some sixty miles down the river took in more guns and a considerable number of men. There was no doubt that what was done amounted to a breach of the Neutrality Act of 1794. One Guinet, who had taken part in arming the vessel, was indicted under that Act, found guilty, and was sentenced to a year's imprisonment and a fine of 400 dollars. Case of the Cassius.

The vessel was sold to the French Government and duly commissioned as a vessel of war. Coming again into Philadelphia, the year after, with a prize, no less than three suits arose; one *in rem* for restitution of the prize; one *in personam* against Davis, the officer in command of the Cassius, for damages for taking the prize vessel, neither of which are in point to the present purpose: in the third, a Mr. Ketland instituted a suit to have the vessel declared forfeited. The Act of 1794 giving half the value of forfeited vessels to the informer, Ketland filed his information for the forfeiture, as it is technically termed *qui tam*, for the benefit as well of the Treasury as himself, on the ground of the illegal equipment of the vessel, the year before. On M. Adet, the French Minister, writing to complain of this procedure, Mr. Pickering, then Secretary of State, replied that the Executive could not take this case, any more than it could the preceding one relative to the same vessel, from the judiciary; and that the court had decided that it could not, in this penal proceeding, accept security for the Cassius in lieu of the vessel herself. He stated the unquestioned fact that, the Cassius was, the year before, fully equipped and armed in the United States, and that the acts done had been already decided (in the trial of the United States *versus* Guinet) to be a violation of their laws of neutrality; and he added that the French Minister ought not to be surprised that this matter should become a subject of judicial inquiry, and the effect of the subsequent alleged transfer to the French government, a matter of judicial decision.

The United States' Attorney was instructed by he Government to intervene in these suits, and to suggest for the consideration of the Court, as matter of

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* Reported in 3 Dallas, 121, and in a note to Dana's edition of Wheaton, reprinted in the United States' Documents, vol. vii, p. 18.

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defence, the transfer of the vessel to the French Government, and her having been commissioned by the latter, which he did in the form of a suggestion. In the suit *in rem* against the vessel, at the term of the Court in April 1796, the Secretary of State, Mr. Pickering, requested M. Adet to furnish the evidence of the *bonâ fide* transfer to the French Government, for the use of the United States' Attorney. M. Adet replied, declining to furnish proofs to the judiciary of a sale and payment, saying that his relations were solely with the Executive. He, however, gave a certificate that the vessel was a French public ship, duly commissioned, to which he afterwards, on request of the Attorney, added the date of her acquiring that character. Mr. Rawle, the United States' Attorney, expressed his fear that this certificate would not be accepted as legal proof; but M. Adet declined to furnish any other, as beneath the dignity of his nation, and informed the Secretary of State that the French Government had ordered him to ascertain, in conference with the Secretary, the reparation for the injuries and damages from the proceedings in the matter of this vessel; and that he furnished the certificate as a courtesy to the United States' Government and not for a cause in which the French Government had any further interest. In October term, 1796, the motion of the United States' Attorney for a dismissal of the proceedings came on for argument. At the hearing, another question presented itself under the statute, namely, whether the Circuit Court could take cognizance of informations for forfeiture under the Act of 1794; and the Court dismissed the proceedings on the ground that such a suit must be instituted in the District Court, and, consequently, that the Circuit Court had no jurisdiction in the cause.

Thus, no decision was actually given by a Court of Law on the important question—how far the commission of a belligerent Power would be a bar to the seizure of a vessel illegally equipped or armed in the port of a neutral. But, on the other hand, the intervention of the Government, through its chief legal officer, with a suggestion to the Court in which the suit was pending, that such a Commission afforded a sufficient defence, shows, beyond all possibility of doubt, that the United States' Government considered the question as one which it ought to raise in favour of the belligerent who had acquired property in the vessel, and had commissioned it, notwithstanding that there had been a flagrant violation of its own neutrality and of its own law; and, what is of still greater importance, that the United States' Government would not itself seize, or be party to the seizure and condemnation of a vessel under such circumstances, but, on the contrary, did its best to oppose it. With what pretence of reason or justice, then, can it be said that Great Britain was bound to do, for the benefit of the United States, in the case of the Florida, what the American Government not only refused to do, but opposed being done, under precisely the same circumstances?

Stay of belligerent ships in neutral ports. Supplies of coal there.

I proceed to the consideration of another subject which arises, in the first instance, with respect to the Florida, but which applies equally to the whole series of vessels with which we have to deal—namely, that of the entry and stay of belligerent ships of war in the ports and waters of a neutral, and of the supplies which may be there afforded to them.

There are certain points on which all writers are unanimous, and, as I had till now imagined, all nations agreed.

Power of neutral Sovereign.

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 can 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.

Law as asserted by the United States.

The Case of the United States seeks, indeed, to put further limits on the liberty thus conceded to belligerent ships. It would prohibit "successive supplies to the same vessel;" would limit repairs to be done to a belligerent vessel to such as are "absolutely necessary to gain the nearest of its own ports;" would make the permission afforded to a vessel to take what it calls "an excessive supply of coal" a failure in the performance of the duty of the neutral.

Such restrictions, though they may be created by the will of the local sovereign, have, however, no existence by international law. They are unknown to it. No authority is adduced in support of them, nor can any be found. No writer on international law, in speaking of the general liberty of belligerent vessels to have repairs done or to obtain supplies, speaks of any such restriction as existing independently of local regulations. The authorities are conclusive to the contrary.

Two leading authors are express on the point. M. Ortolan writes thus:—

"Les règles relatives à l'accès et au séjour momentané des bâtiments dans les ports et dans les rades étrangers restent les mêmes en temps de paix qu'en temps de guerre."*

M. Hautefeuille says:—

"L'asile maritime consiste à recevoir dans les rades fermées, même dans les ports, les bâtiments des belligérants, que leur entrée soit volontaire ou nécessité par la tempête, par le manque de vivres, ou par toute autre cause, même par la poursuite de l'ennemi. Les vaisseaux admis peuvent acheter les vivres qui leur sont nécessaires, réparer les avaries faites, soit par les accidents de mer, soit par le combat, soigner leurs malades ou leurs blessés, *puis sortir librement pour aller livrer de nouveaux combats.*"†

While restraints may be and often have been imposed by neutral Sovereigns in respect of the entry of belligerent vessels into their ports and waters, of the length of their stay, and of the supplies to be afforded them, no one has till now ever gone the length of saying that it forms any part of the obligations of the neutral to make such regulations.

The greater number of the maritime States made none such on the occasion of the civil war, except as regards the reception of privateers, it being the apparent desire of all nations to put down for ever this worst and most noxious form of maritime warfare. Some imposed a restraint on ships of war bringing prizes into their ports, though mostly this was confined to privateers. Spain, France, Brazil, and Great Britain adopted the rule contained in Her Majesty's Instructions of the 31st January, 1862, of limiting the stay of belligerent vessels to twenty-four hours, except in cases of necessity; Brazil and Great Britain, but these alone, that of limiting the supply of coal to the quantity sufficient to take the ship to the nearest port of her own country.

The Government of the Netherlands issued instructions to the Governors of its

* "Diplomatie de la Mer," vol. ii, p. 286.
† "Droits et Devoirs des Nations Neutres," vol. i, p. 344.

West India Colonies, limiting the stay of belligerent vessels of war to twice twenty-four hours, but afterwards did away with such restrictions on the occasion of a complaint made by the United States.

By Article 4 of the present Maritime Regulations of the Netherlands it is provided that—

"The ships of war of the belligerent parties, provided they submit to the international regulations for their admission into neutral ports, may remain for an unlimited time in Dutch harbours and estuaries; they may also provide themselves with an unlimited quantity of coal. The Government, however, reserves to itself the right, whenever it is thought necessary for the prevention of neutrality, to limit the duration of such stay to twenty-four hours."

Italy had at the time in question no regulations on the subject. By the present Italian Naval Code (chap. 7), while it is provided that "nothing shall be furnished to vessels of war or to belligerent privateers beyond articles of food and commodities, and the actual means of repair necessary to the sustenance of their crews and the safety of their navigation," it is further provided that "vessels of war or belligerent privateers wishing to fill up their stores of coal, cannot be furnished with the same before twenty-four hours after their arrival"—this regulation being to prevent hostile vessels from leaving together.

Nothing is said as to the "navigation" being to the nearest port, and "stores" of coal are spoken of without limitation. It is evident that this code contemplates no such restriction.

As, then, the general law neither imposes any limit on the stay of a belligerent vessel in a neutral port, nor any restriction as to quantity in respect of the articles of which it sanctions the supply, no question can arise as to the stay of any Confederate vessel in a British port, or as to the quantity of coal supplied to it, prior to the Queen's Regulations of January 31, 1862.

After that date, the stay of belligerent vessels in Her Majesty's ports having been limited, save under exceptional circumstances, to twenty-four hours, and the supply of coal to so much as should be necessary to take them to their nearest port, and a second supply within a period of three months having been prohibited, it became the duty of Her Majesty's officers not to allow either of these limits to be exceeded; and it became the duty of belligerents, knowing that they were admitted into British ports on the condition of complying with these regulations, honestly and in good faith to conform to them. What if there should have been at any time an instance of deviation from the strict tenor of these regulations? The officer offending would, of course, be responsible to his superior. Would the Government be responsible to the other belligerent for any damage done by the vessel?

In the first place, it being the undoubted right of the local Sovereign to impose such conditions as he pleases on the entry of belligerent vessels into his ports, but the regulations being directed to the Sovereign's own officers to be carried out by them, and thus forming part of the municipal law of the neutral, what right does a belligerent acquire to insist that the regulation shall be enforced against his enemy? Simply that which arises from the duty, always incumbent on the neutral, as being of the very essence of neutrality, of enforcing against the one belligerent any rule which he enforces against the other. If both are treated alike there can be no cause of complaint.

Again, to constitute an offence against the law of neutrality, there must be, as to constitute an offence against any law, a *malus animus*, a *mens rea*—an intention to contravene the law—here, that of showing undue favour to the one belligerent to the disadvantage of the other.

When, therefore, any departure from the letter of a regulation has arisen from mistake, as where a Governor believed that, because a vessel had suffered from *vis major*, as from storm and tempest, the case formed an exception to the rule; or where he considered that, because he had furnished an extra supply to one belligerent, he might, under similar circumstances, do the same for another; or, where a mistake might be made as to the precise quantity of coal necessary to take the vessel to the nearest port—there would, as it seems to me, be no violation of neutrality for which, on rational grounds, a nation could be held responsible.

In all such cases of alleged infraction of neutrality, the true question should be, not whether a vessel has been permitted to stay in a port a few hours more or less than the precise time prescribed, nor whether a few tons, more or less, of coal have been allowed to be taken, but whether there has been an honest intention to carry out the regulations

fairly and impartially. And, in judging of this, credit should be given to persons in authority for honesty of purpose and a desire to discharge their duty faithfully. This Tribunal should take a larger and more generous view of official conduct than it may have assumed in the eyes of jealous belligerents, disappointed that exclusive favour was not shown to themselves, and irritated because, notwithstanding their loud demands that their opponents should be treated as pirates and outcasts, civilized nations, with Great Britain at their head, took a more liberal and enlightened view of the relative position of the parties.

Undoubtedly, if, after regulations had been made by a neutral Sovereign as to the accommodation and hospitality to be accorded to belligerent ships in the neutral ports, the regulations were enforced against the one, while they were not enforced or were relaxed with regard to the other, there would be a breach of neutrality, of which the less favoured belligerent, if injury was thereby occasioned to him, would have a right to complain. And, in truth, it is to this point, and this point alone, and not to *minute* questions of hours of stay or tons of coal supplied, that the inquiry with reference to what has been called the hospitality afforded to belligerent vessels should be directed. Whether Her Majesty's regulations were carried out by the local Governors in the different ports fairly and conscientiously, with an honest desire to discharge their duty in obedience to those regulations, we shall see as we advance; but so far as I am aware, there is no ground for saying that the ships of the United States were not admitted into British ports as freely, or were not supplied with coal and other necessaries as liberally, as the ships of the Confederates. One or two complaints made by querulous officials during the war will be noticed by-and-by. In substance they really come to nothing.

Whether coaling makes a port a base of naval operations.

But a novel and, to my mind, most extraordinary proposition is now put forward, namely, that if a belligerent ship is allowed to take coal, and then to go on its business as a ship of war, this is to make the port from which the coal is procured "a base of naval operations," so as to come within the prohibition of the second Rule of the Treaty of Washington.

We have here another instance of an attempt to force the words of the Treaty to a meaning which they were never—at least so far as one of the Contracting Parties is concerned—intended to bear. It would be absurd to suppose that the British Government, in assenting to the Rule as laid down, intended to admit that whenever a ship of war had taken in coal at a British port and then gone to sea again as a war vessel, a liability for all the mischief done by her should ensue. Nor can I believe the United States' Government had any such *arrière pensée* in framing the Rule; as, if such had been the case, it is impossible to suppose that they would not have distinctly informed the British Government of the extended application they proposed to give to the Rule.

The rule of international law, that a belligerent shall not make neutral territory the base of hostile operations, is founded on the principle that the neutral territory is inviolable by the belligerent, and that it is the duty of the neutral not to allow his territory to be used by one belligerent as a starting point for operations against the other. This is nowhere better explained, as regards ships of war, than by M. Ortolan, in the following passage:—

"Le principe général de l'inviolabilité du territoire neutre exige aussi que l'emploi de ce territoire reste franc de toute mesure ou moyen de guerre, de l'un des belligérants contre l'autre. C'est une obligation pour chacun des belligérants de s'en abstenir; c'est aussi un devoir pour l'Etat neutre d'exiger cette abstention; et c'est aussi pour lui un devoir d'y veiller et d'en maintenir l'observation à l'encontre de qui que ce soit. Ainsi il appartient à l'autorité qui commande dans les lieux neutres, où des navires belligérants, soit de guerre, soit de commerce, ont été reçus, de prendre des mesures nécessaires pour que l'asile accordé ne tourne pas en machination hostile contre l'un des belligérants; pour empêcher spécialement qu'il ne devienne un lieu d'où les bâtiments de guerre ou les corsaires surveillent les navires ennemis pour les poursuivre et les combattre, et les capturer lorsqu'ils seront parvenus au-delà de la mer territoriale. Une de ces mesures consiste à empêcher la sortie simultanée des navires appartenant à des puissances ennemies l'une de l'autre."*

It must be, I think, plain that the words "base of operations" must be accepted in their ordinary and accustomed sense, as they have hitherto been understood, both in common parlance and among authors who have written on international law. Now, the term "base of warlike operations" is a military term, and has a well-known sense. It signifies a local position which serves as a point of departure and return in military operations, and with which a constant connection and communication can be kept up, and which may be fallen back upon whenever necessary. In naval warfare it would mean something analogous—a port or water from which a fleet or a ship of war might

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watch an enemy and sally forth to attack him, with the possibility of falling back upon the port or water in question, for fresh supplies, or shelter, or a renewal of operations.

The meaning to be ascribed to the term in question as applicable to a neutral port is to be gathered, as was so well pointed out by Sir Roundell Palmer, from the instances given by the various writers on international law. Thus we find the distinguished author before referred to saying, in addition to the passage cited above:—

"Si des forces navales belligérantes sont stationnées dans une baie, dans un fleuve, ou à l'embouchure d'un fleuve, d'un Etat neutre, à dessein de profiter de cette station pour exercer les droits de la guerre, les captures faites par ces forces navales sont aussi illégales. Ainsi, si un navire belligérant mouillé ou croisant dans les eaux neutres capture, au moyen de ses embarcations, un bâtiment qui se trouve en dehors des limites de ses eaux, ce bâtiment n'est pas de bonne prise; bien que l'emploi de la force n'ait pas eu lieu dans ce cas, sur le territoire neutre, néanmoins il est le résultat de l'usage de ce territoire: et un tel usage pour dès desseins hostiles n'est pas permis."†

"It is a violation of a neutral territory," says Chancellor Kent, "for a belligerent ship to take her station within it in order to carry on hostile expeditions from thence, or to send her boats to capture vessels beyond it."‡

So Heffter:—

"Le neutre ne doit pas permettre que ses rades ou ses mers territoriales servent de stations aux bâtiments des Puissances belligérantes.

"Le respect dû aux mers territoriales neutres ne se borne pas à l'abstention absolue de tout acte d'hostilité; il s'étend également aux faits qui préparent immédiatement ces actes. Ainsi une flotte, un vaisseau de guerre, un armateur ne saurait, sans commettre une violation de territoire, s'établir sur un point quelconque de cette mer, pour épier le passage des bâtiments, soit de guerre, soit marchands, de l'ennemi, ou les navires neutres, encore qu'il sorte de sa retraite pour aller les attaquer hors les limites de la juridiction neutre. Il est de même défendu de croiser dans les eaux réservées pour arriver au même but.§

So Pistoye and Duverdy:—

"Les belligérants ne doivent, ni par eux-mêmes ni par leurs corsaires, s'établir dans les mers neutres, pour surveiller l'ennemi et lui courir sus. Ils ne doivent non plus rester en croisière dans les mers neutres, pour saisir l'ennemi à sa sortie des ports neutres."‖

None of the instances thus given have the remotest reference to the case of a vessel which, while cruizing against an enemy's ships, puts into a port and, after obtaining necessary supplies, again pursues her course.

If a military or naval officer were asked whether a ship merely putting into a port to coal, and then going to sea again, possibly on a particular warlike expedition, but without any idea of returning to or communicating with such port, for the next three months, can be held to be using it as "a base of operations," he would certainly laugh at the simplicity of the question.

That the United States are putting this construction on the term for the first time is plain from their own conduct throughout the civil war; unless, indeed, they are prepared to acknowledge a perpetual violation of British neutrality on their own part.

It appears from the return sent from the various British ports of the amount of coal supplied to ships of war of the United States,¶ that these vessels received over 5,000 tons during the civil war. It appears from the claims made by the United States in respect of the employment of their vessels of war in the pursuit and capture of Confederate Ships,** that of the foregoing amount no less than 4,000 tons was had expressly for the purpose of watching or pursuing particular ships.

The case of the Vanderbilt, when in pursuit of the Alabama, is a striking instance. After having coaled at Rio, she proceeded to St. Helena, there took in 400 tons (all she could get), then proceeded to Simon's Bay, and there took in 1,000 tons; she then went to the Mauritius and there coaled again. If the construction put by the United States' Government on the term "base of operations" is correct, in every one of these instances, there was a violation of neutrality and an infraction of the second and third Rules. Is there to be one law for the United States, and another for Great Britain?

But, in truth, such a construction is altogether unwarranted.

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* "Diplomatie de la Mer," vol. i, p. 291.
† Ibid., p. 302.
‡ "Kent's Commentaries on International Law," by Professor Abdy, p. 326.
§ "Droit International," p. 275.
‖ "Prises Maritimes," vol. i, p. 108.
¶ British Appendix, vol. v, pp. 223–234.
** United States' Appendix, vol. vii, p. 120.

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Right of asylum.

It may, perhaps, be as well to notice, as one instance occurs in this inquiry of a vessel remaining in a British port to avoid capture by an enemy, that the right of naval asylum is not subject, as is that afforded to military forces on land, to any condition of disarming or dismantling the vessel. Azuni alone proposed to subject a vessel seeking refuge from an enemy to a similar condition to that of a military force on land, but he admitted that no precedent could be found for such a thing, and all subsequent writers have repudiated such a notion.

M. Hautefeuille for instance says:—

"Le droit d'asile maritime diffère essentiellement de celui que les neutres peuvent exercer en faveur des belligérants sur le territoire continental. Dans les guerres terrestres, lorsqu'une armée, fuyant devant son ennemi, vient se réfugier sur un territoire neutre, elle y est reçue, il est vrai; elle y trouve tous les secours d'humanité. Mais l'armée est dissoute, les hommes qui la composent sont désarmés et éloignés du théâtre de la guerre: en un mot, on remplit les devoirs d'humanité à l'égard des individus, mais on n'accorde pas l'asile à l'armée pris comme corps. Le neutre qui, au lieu d'agir ainsi que je viens de la dire, accueillerait les troupes ennemies, leur fournirait des vivres, leur donnerait le temps de se remettre de leurs fatigues, de soigner leurs malades et leurs blessés, et leur permettrait ensuite de retourner sur le théâtre des opérations militaires, ne serait pas considéré comme neutre; il manquerait à tous les devoirs de son Etat. L'asile maritime, au contraire, consiste à recevoir dans les rades fermées, même dans les ports, les bâtiments des belligérants, que leur entrée soit volontaire ou nécessitée par la tempête, par le manque de vivres ou par toute autre cause, même par la poursuite de l'ennemi. Les vaisseaux admis peuvent acheter les vivres qui leur sont nécessaires, réparer les avaries faites, soit par les accidents de mer, soit par le combat, soigner leurs malades ou leurs blessés, *puis sortir librement pour aller livrer de nouveaux combats.* Ils ne sont pas, par conséquent, soumis au désarmement comme les troupes de terre."*

M. Calvo in his recently published work on "International Law," says:—

"Tous les auteurs sont d'accord sur la différence radicale à établir entre l'asile accordé aux forces navales et celui qui l'est aux troupes de terre. En effet lorsqu'une armée en fuite ou en déroute franchit les frontières d'une nation neutre celle-ci doit aussitôt la désarmer, l'interner, et l'éloigner le plus possible du théâtre des hostilités. Les mêmes mesures ne sont évidemment pas praticables à l'égard des navires qui entrent dans les ports, et qu'un usage universellement établi autorise, au contraire, à s'approvisionner, à se réparer, et à faire soigner leurs blessés, sauf à remettre en mer dès qu'ils ont pourvu à leurs besoins."†

M. Hautefeuille gives what seems to me to be the true ground of the distinction. Galiani and Azuni had ascribed it to the perils to which ships and men are exposed on the seas.

M. Hautefeuille says:—

"Il y a donc à cette différence immense une autre cause qu'il est utile de rechercher. Je crois qu'elle est tout entière dans la qualité reconnue du bâtiment. Il est une partie du territoire de son pays; pour tout ce qui concerne son gouvernement intérieur, il est exclusivement placé sous la juridiction de son Souverain. Or, il est évident qu'ordonner le désarmement, c'est s'immiscer dans le gouvernement intérieur du vaisseau, c'est faire un acte de juridiction sur le vaisseau; le Prince neutre n'a pas le droit de le faire. Il peut refuser l'asile; il peut l'accorder seulement sous certaines conditions, avec des restrictions. S'il veut remplir les devoirs d'humanité, arracher le bâtiment aux périls qui peuvent le menacer, il le reçoit dans ses ports, il lui accorde les secours nécessaires pour le mettre en état de reprendre la mer. Tel est, à mon avis, le seul motif de la différence dont je viens de parler."‡

It is plain, therefore, that M. Staempfli was in error when, in speaking of the Sumter at Gibraltar, he assumed that her being allowed to remain in port, to avoid hostile capture, was a violation of neutrality.

Supply of coal.

It would be to carry the perversion of language too far to contend that, to supply coals to a belligerent from a neutral port was a use of the port for a "renewal or augmentation of military supplies" within the meaning of the rule of the Treaty. The term can only have reference to munitions of war—things necessary for actual battle, as powder, shot, shell, and the like. No question has ever been raised—no one has ever entertained a doubt—as to the perfect legality of supplying to a belligerent vessel whatever was necessary to it for the purpose of navigation. Machinery and coal having taken, in a great measure, the place of masts and sails, the same principle must of course apply to them. It was upon this principle that the great maritime nations—France, Holland, Spain, Brazil, acted in allowing coal to be supplied to Confederate vessels; it was on this principle that so abundant a supply was afforded in British ports to vessels of the United States.

In the result then it seems to me beyond all doubt that no question can arise

* Hautefeuille, "Droits et Devoirs de Nations Neutres," vol. i, p. 307.
† "Le Droit International," vol. ii, p. 420.
‡ "Droits et Devoirs des Nations Neutres," vol. i, p. 309.

The Florida.

as to the stay of belligerent ships in British ports prior to the issuing of the regulations of 31st of January, 1862, or as to the quantity of coal supplied to them before that time, so long as equal accommodation was afforded to both; and that, subsequently to that period, the only question is, whether these regulations were honestly and fairly acted upon towards both parties. To that question I shall now proceed to address myself, with reference, in the first instance, to the Florida.

At Nassau.

Having left Mobile on the 16th of January, 1863, the Florida arrived at Nassau on the 26th. It is complained in the Case of the United States* that "her entry into the harbour, though made without permission, was condoned;" that the visit lasted thirty-six hours, instead of twenty-four; "that the supplies exceeded largely what was immediately necessary for the subsistence of the crew;" that "by the permission of the authorities she took in coal and provisions to last for three months." "She entered the port," it is said, "without any restrictions, and the officers landed in the garrison boat, escorted by the Fort Adjutant, Lieutenant Williams, of the 2nd West India Regiment." "The Governor made a feint of finding fault with the way in which she had entered, but ended by giving her all the hospitality which her Commander desired."

In an intemperate letter from Consul Whiting to Mr. Seward, of the 26th, he says:—

"Sir,—I have the honour to inform you of the arrival at this port, this morning, of the Confederate steamer Florida, late the noted Oreto, in command of one Maffit, once a lieutenant in the United States' navy. This pirate ship entered this port without any restrictions, with the Secession ensign at the peak and the Secession war pennant at the main, and anchored abreast of Her Majesty's ship Barracouta, Maffitt and his officers landing in the garrison boat, escorted by the Fort Adjutant, Lieutenant Williams, of the Second West India Regiment.

"The pirate officers proceeded at once to the Royal Victoria Hotel to breakfast with the Confederate agents here, and they were received with much enthusiasm by the Secession sympathizers and a display of Secession bunting. The pirate ship, soon after anchoring, commenced coaling, by permission of the Governor; an evidence of the perfect neutrality which exists here, where the United States' steamer Dacotah, but a few months since, was only permitted to take on board twenty tons of coal from an American barque off Hog Island, and then only on Captain McKinstry and myself pledging ourselves, in *writing*, 'that within ten days after leaving this port she would not be cruizing within five miles of any island of the Bahama Government.'

"Pretty neutrality this, I must say."

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"*January* 27, 1863.—The pirate ship is still at anchor, having exceeded her time of lying in a neutral port. Gangs worked all night taking in her coal, and she is ordered to sea this forenoon. By this time, however, my despatches have most likely reached some of our war vessels, and I trust they may be able to capture this formidable pirate.

"At noon the pirate got under way and stood out of the harbour, but continued all day coasting up and down the Hog Island shore, within two miles of the land. Twenty of her men left here, and others were shipped in their place. From one of the deserters I gleaned the following information, viz.:—

"The Oreto left Mobile, January 15th, under command of Maffit; touched at Havana, where she lay twenty-four hours; thence sailed for Nassau, where she lay thirty-six hours and took on board coal. She has six 32-pounders, two 9-inch pivot guns, two brass 12-pounders, ample stores, ammunition, and one hundred and thirty men."†

I do not see why it should be stated in the Case that the Florida remained in the port of Nassau thirty-six hours, when Mr. Whiting's letter states that she arrived on the morning of the 26th and left at noon on the 27th. In point of fact she remained twenty-six hours. It behoves those who make accusations to use "due diligence" to secure accuracy in their facts.

It is to be regretted that it should be asserted that this steamer was allowed to take in coal for three months, when the other facts stated in the Case show this to have been impossible. It is difficult to suppose that the Consul should not have been aware of the circumstances under which Captain Maffit, the Commander of the Florida, had been brought on shore in the garrison boat. It is to be regretted that his statement on this subject should have been repeated in the Case of the United States, accompanied by the offensive remark that "the Governor *made a feint* of finding fault with the mode in which the vessel had entered, but ended by giving her all the hospitality which her Commander required"—especially after the full explanation afforded by Governor Bayley at the time, both to Lord Lyons and to the Secretary of State for the Colonies, which was in due course communicated to the Government at Washington. It is the

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* Page 350.

† United States' Documents, vol. vi, p. 333.

The Florida.
At Nassau.

more to be regretted that these imputations should have been made, because it must have been known to those who make them that a ship of war of the United States had shortly before entered the port of Nassau without permission; that her Commander had, in like manner, been brought on shore in the garrison boat; and that the entry had been, in like manner, "condoned," and the ship allowed to remain in the harbour for repairs. The conduct of a British Governor being thus called in question I think it right to call attention to the correspondence, which will speak for itself.

Mr. Whiting's letter having been brought to the notice of Lord Lyons, and his Lordship having applied to Governor Bayley for an explanation, the latter, in a letter of the 11th of March, 1863, replies as follows:—

"My Lord, "*Government House, Nassau, Bahamas, March*, 11, 1863.

"I have the honour to acknowledge your Lordship's despatch inclosing a complaint from the United States' Consul at this port to Mr. Seward, the Secretary of State, respecting undue advantages alleged to have been given to the Confederate steamer Florida in this harbour.

"In reply, I beg leave to state that no undue advantages were accorded to the Florida. She arrived in our harbour, having steamed over the bar without a pilot, early in the morning of the 20th of January. I was not aware of it till 8 or 9 o'clock A.M. About that hour Captain Maffit called (I think in company with the Fort Adjutant) to explain that he was ignorant of my Proclamation requiring that permission should be formally asked before any man-of-war belonging to either of the two belligerents could enter the harbour. I did not see him; but in a very short time I received a letter from him, of which I transmit your Lordship a copy, along with the copy of the Memorandum endorsed on it by myself before I sent it to the Colonial Secretary. The Florida remained in harbour about twenty-six hours, during which time I neither spoke to nor saw Captain Maffit.

"So far from any advantage having been accorded to the Florida which was not accorded to United States' vessels, she did not receive privileges equal to those which I granted to the United States' gun-boat Stars and Stripes. That vessel entered the harbour without permission (which she asked for after she had come in). Her Commander then asked for an extension of the permission, which I also accorded; and she remained in harbour, if I remember rightly, three or four days for the alleged purpose of undergoing repairs.

"I regret that the Secretary of State should have given credence to the misrepresentations of a person of such infirm judgment and excitable temperament as Mr. Whiting has proved himself to be.*

"I have, &c.

(Signed) "C. J. BAYLEY."

Captain Maffit, the Commander of the Florida, having written to the Governor, saying that the vessel was in distress for want of coal, and asking leave to enter the harbour in order to obtain a supply, the following Memorandum was made by the Governor:—

"I grant this request under the circumstances; thereby according to a Confederate steamer the same privileges which I have formerly granted to Federal steamers. But the irregularity in delaying to make this request should be pointed out, and the pilot called on to explain how he admitted the Florida without my permission."†

Repeating these statements in a letter to the Secretary of State for the Colonies, of May 2, Governor Bayley adds:—

"I have no distinct recollection of the special reasons which induced me to impose the restrictions mentioned by the Consul in the Dacotah's coaling; I can only suppose that I did this in consequence of the pertinacity with which Federal vessels about that time resorted to the harbour on pretence of coaling, but really with the object of watching the arrival and departure of English merchant-vessels, supposed to be freighted with cargoes for the Southern ports. Had not such prohibition been issued, the harbour would have become a mere convenience for Federal men-of-war running in and out to intercept British shipping. And that such conditions as I thought it my duty to impose were tempered by a proper feeling of courtesy and humanity will, I think, be made evident by the accompanying letters from the American Consul on the subject of the Federal man-of-war, the R. Cuyler, and the memoranda of my replies endorsed upon them by myself.

"On the whole I am satisfied that I have acted with perfect impartiality in all my dealings with Federal and Confederate men-of-war. But I am not surprised that my conduct should have been misrepresented by so hot-heated a partizan as the late American Consul, Mr. Whiting, whose ingenuity in misconstruction is well illustrated by his reply to my letter af the 29th of September, of both of which papers I inclose copies, with the endorsation of the draft of my replies to his last communication.

"I think that these inclosures will be sufficient to prove that, in my demeanour to the Federal men-of-war, I have generally preserved an attitude of fairness and impartiality. And that if at any time I have appeared to assume an unfriendly or inhospitable mien, the charge can be fully explained and defended by my desire to maintain the security of a British possession, and the rights of British subjects."‡

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* British Appendix, vol. i, p. 77. † Ibid., p. 78. ‡ Ibid., p. 79.

It is not worth while to set out the inclosures, with the exception of the letter of Lieutenant Williams, the Fort Adjutant, which is of importance, and is in these terms :—

"Sir, "*Nassau, New Providence, April* 30, 1863.

"In answer to your letter of yesterday, requesting me to state, for the information of his Excellency the Governor, whether Captain Maffit, of the Confederate States' steamer Florida, came ashore in the garrison boat, I beg to observe that, in the middle of last year, I received instructions from his Excellency, through the Colonial Secretary, that when I boarded any ship of war belonging to either belligerent, I was to hand to the captain of such vessel a copy of the Proclamation regarding neutrality, and to point out the clause forbidding belligerent vessels to anchor in the port or roadstead of Nassau without having previously obtained the Governor's permission, adding at the same time that, circumstances permitting, his Excellency would always be most happy to extend the hospitality of the port to such as might require it.

"The first vessel which I had occasion to visit after the receipt of the above instructions, was the Federal gun-boat Stars and Stripes. I pointed out to the Captain the requirements of the Proclamation, but he said that, 'owing to certain injuries received by his machinery, and the roughness of the weather, he must anchor at once, or his ship would go on shore.' I therefore suggested to him the propriety of coming ashore with me, and proceeding to Government House to explain personally to his Excellency the necessities of his position. He landed in the garrison boat, and went with me to the Governor.

"A short time after this the Confederate States' steamer Florida ran into the port at daybreak, and cast anchor before I was able to board her. I gave a copy of the Proclamation to Captain Maffit, who stated his entire ignorance of any such restrictions, and expressed his regret for having unwittingly violated the regulations of the port, and also asked me what course he had better follow. I told him that he had better come ashore in my boat, and go with me to the Governor, explain matters, and obtain the necessary permission to remain. He therefore, like the Captain of the Stars and Stripes, landed in the Government boat, and proceeded with me to his Excellency the Governor.

"Trusting that his Excellency will consider the above explanation sufficient for the purpose for which he may require it, I have, &c.

(Signed) "S. W. WILLIAMS,
"*Lieutenant, 2nd West Indian Regiment, Fort Adjutant.*"*

The Tribunal must judge for itself how far, after these explanations, which were communicated to the United States' Government, and the fact that precisely the same circumstances had previously occurred with a Federal vessel—unless, indeed, the word of a British Governor or of a British officer is to be discredited or set aside by an offensive sneer—the colour attempted to be given to this transaction in the Case of the United States is just or right. I pass on to what is of greater relevancy to the present inquiry, namely, the quantity of coal taken by the Florida on this occasion.

It is stated in the American Case† that the Florida at the time in question "received a three month's supply." A moment's reflection would have sufficed to satisfy those who make this rash assertion that, upon their own data, it must necessarily be incorrect. The only evidence adduced in support of it is a loose statement from the "Liverpool Journal of Commerce" of the 27th February, 1863, in which, after saying that the Florida had arrived at Nassau on the 30th January (instead of the 26th), it is said, by some one writing on this side of the Atlantic, that she left on the evening of the 31st (instead of the 27th) "fully supplied," it is not said with what, "for a three months' cruise."‡ To which must be added a passage from an anonymous journal afterwards found on board the Florida, in which it is said, under the date of January 26, "We took on board coal and provisions to last us several months."§ But when we come to the only evidence worthy of a moment's consideration, namely, the deposition furnished to Mr. Whiting by John Demeritt, who assisted to put the coal on board, the quantity is reduced to 180 tons. "I suppose," he says, "she had on board over 180 tons that we put there; she did not have less than that quantity."‖ Yet even this must have been an exaggeration. According to the report of the British officers, who afterwards surveyed the Florida at Bermuda in June 1864, and which will be set out hereafter, her capacity for carrying coal was limited to 130 tons. Demeritt, it is true, says, "we placed some on deck, and in every place that would hold it;" but a vessel of war would not be likely to encumber her decks with very much coal; nor in such a vessel would there be many places in which coal could be stowed, except those expressly appropriated to the purpose. Rear-Admiral Wilkes, writing to Governor Walker at Barbados on the 6th of March following, says that the Florida had "obtained a full supply (160 tons) at Nassau;"¶ but gives no other authority than the public prints. But even if Demeritt's statement as to the quantity having been

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* British Appendix, vol. i, pp. 79, 80.
‡ United States' Documents, vol. vi, p. 334.
‖ Ibid., p. 336.
† Pages 351, 352.
§ Ibid., p. 335.
¶ British Appendix, vol. i, p. 93

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180 tons could be taken as true, it would fail to bear out the assertion of a three months' supply. For it is stated in the United States' Case* that the Florida "generally sailed under canvas, and that, when using steam in the pursuit and capture of vessels, her consumption of coal, as shown by her log book, did not average 4 tons a day." Now, at the rate of 4 tons a day, a supply for three months or ninety days would have amounted to 360 tons, *i.e.*, just double the amount which according to Demeritt's statement she actually took in.

But the best proof of the incorrectness of the assertion is to be found in what follows in the American Case :—†

"The Florida left the port of Nassau on the afternoon of the 27th of January, 1863. By the middle of the following month her coal was getting low. On the 26th day of February, Admiral Wilkes, in command of the United States' squadron in the West Indies, wrote to his Government, thus :—'The fact of the Florida having but a few days' coal makes me anxious to have our vessels off Martinique, which is the only island at which they can hope to get any coal or supplies, the English islands being cut off, under the rules of Her Majesty's Government, for some sixty days yet, which precludes the possibility, unless by chicanery or fraud, of the hope of any coal or comfort there.' Admiral Wilkes' hopes were destined to disappointment. On the 24th of February, two days before the date of his despatch, the Florida had been in the harbour of Barbados, and had taken on board about 100 tons of coal in violation of the instructions of January 31, 1862."

How, if the Florida took with her from Nassau a provision of coal sufficient for three months, or even 180 tons as stated by Demeritt, her coal could have been getting low in a fortnight's time, even though she had been obliged to consume a greater quantity than usual, owing to bad weather—or how far, having taken in such a quantity, she could by the 24th of February have been able to take in 100 tons more—her capacity being limited to 130 tons—it is for those who make these apparently inconsistent statements to explain. For my part, I must decline to give credit to them.

We may then, I think, safely assume that the Florida took away with her from Nassau little more coal, if any, than what her capacity enabled her ordinarily to carry. At the same time, it must be admitted that, reference being had to the Regulations of the 31st of January, this quantity was in excess of what would have sufficed to take her to the nearest port of the Southern States. But up to this time, there being, owing to the blockade of the Southern ports, no port of their own country to which the Confederate cruizers could resort, and these vessels being consequently compelled to remain at sea, the Colonial Governors appear to have relaxed somewhat of the rigour of the Rule; a line of conduct, however, which was soon after changed by reason of what occurred on the occasion of the visit of this same vessel to Barbados in the ensuing month, to the facts of which I am about to refer.

At Barbados.

The Florida arrived at Barbados on the 24th of February. Her commander stated to the Governor that, unless he was allowed to have some lumber to repair damages which he had suffered in a recent gale of wind to the northward, and some coal, as every bit he had had before had been exhausted in the same bad weather, he could not go to sea, and should be obliged to land the men and strip the ship. He received permission to ship 90 tons of coal. No complaint is made as to the quantity thus allowed; but it is alleged that a supply of coal having been granted within a month previous, the further allowance thus accorded was in contravention of the Regulations of January 31, 1862. And this no doubt, strictly speaking, is true, and it is admitted by Governor Walker that, though he had not received official information that the Florida had received the supply at Nassau, yet the fact had transpired and was not unknown to him. But it appears that the view he took was that the rule laid down was not applicable to a case of distress, and the case was dealt with by him as the earlier case of the Federal ship San Jacinto had been; both vessels having been, to use Governor Walker's own expression, "dealt with specially as being in distress," and, therefore, "without reference to the circumstance of having been in British ports within the previous three months."‡

I trust we are not called upon to doubt the word of Governor Walker that, in granting liberty to the Florida to take in a fresh supply of coal, he believed himself to be following a precedent set by himself in the case of the San Jacinto. It has, however, since been discovered, though only as lately as last year, by reference to the papers of the Navy Department of the United States, that it was a mistake to suppose that the San Jacinto when, on the 13th of November, 1862, (the occasion to which Sir James Walker had referred), she took in a supply of 75 tons of coal at Barbados, had had a

* Page 352. † Page 354. ‡ British Appendix, vol. i, p. 92.

supply from a British port within three months before.* That the Governor believed she had done so must be taken as undoubted. He referred to the fact at the time, in his conversation with Admiral Wilkes, as the precedent which he had followed with reference to the Florida. How the mistake arose admits of easy solution. It appears from a letter of Mr. Robeson to Mr. Secretary Fish, that on the 1st of November, 1862, the San Jacinto "came to anchor in Grassy Bay, off Bermuda, and there remained till the morning of the 4th, having been in port sixty-three hours, twenty-seven minutes." It appears from a return of the United States' men-of-war that visited Bermuda during the civil war (set out at page 226 of Volume V of the Appendix to the British Case), that the San Jacinto and another United States' ship of war, the Mohican, entered Grassy Bay together on the 1st November, and that the latter was allowed to repair damages, and, as not being on a belligerent errand, to take in 100 tons of coal.† The fact of the two vessels having put into Bermuda together, and of the one having coaled during their stay, a fact which must have come to the Governor's knowledge, would easily account for any confusion which might have arisen as to which of them it was that had coaled on that occasion.

The coaling of the Florida at Barbados gave rise to a more rigorous application of the rules contained in the Regulations of January, 1862.

The American Admiral, Wilkes, who, as we know from his letter of the 26th of February, had been lying in wait for the Florida off Martinique, no sooner heard of her having put into and coaled at Barbados, than he sought a personal explanation from Governor Walker. The Governor explained the principle on which he had acted, and referred to the coaling of the San Jacinto as a precedent directly in point. He failed, however, to appease the anger of the Admiral, who, having returned to his ship, addressed to the Governor an offensive letter of remonstrance, or rather of reproach, with a demand of explanation—a proceeding wholly unprecedented and irregular, it being altogether beyond the authority of an officer of the United States' Navy to address a letter of remonstrance to the Queen's Representative in the person of the Governor of one of Her Colonies, in respect of acts done in the execution of his duty, such Representative being responsible to Her Majesty alone, and any alleged misconduct on his part being matter for discussion between the two Governments.

Governor Walker, of course, declined to furnish any explanation in answer to such a demand, and transmitted Admiral Wilkes' letter to the Duke of Newcastle, then Secretary of State for the Colonies, with a simple statement of the facts.

Both these letters were submitted to the Law Officers of the Crown, to report whether there had been any breach of Her Majesty's Regulations.

The Law Officers reported as follows:—

"We are of opinion that his Excellency the Governor of the Windward Islands does not appear to have been guilty of showing any undue partiality to the Oreto, or to have committed any literal breach of Her Majesty's Regulations. We would take the liberty of observing further, that his Excellency owes no account to Admiral Wilkes of his conduct in the matter of his discharge of his duties towards Her Majesty; and that the very offensive tone and language of that officer's letter ought to apprise his Excellency of the inexpediency of long personal interviews and explanations with him. It is manifest that upon this, as upon other occasions, these interviews and explanations are made the pretext for writing subsequent letters of this description, intended to be used hereafter very disingenuously, as proof of charges made at the time of the favour shown by Her Majesty's Officers to the Confederate States.

"We feel ourselves called upon, while giving to Governor Walker full credit for honest and impartial conduct, to add that, in our opinion, the letter and spirit of Her Majesty's Regulations (quoted in Rear-Admiral Wilkes' despatch of the 6th March, 1863), have not been adhered to with sufficient strictness in either of the cases mentioned, that of the San Jacinto or that of the Oreto. The limits of the supply of coal, in particular, prescribed by that Regulation, ought to be observed, both as to the quantity of coal to be supplied in the first instance, and as to the interval of time which, in the absence of "special permission" (a permission not contemplated except under "special" circumstances of a kind different, in our opinion, from those which occurred in the two cases in question), ought to elapse between two successive supplies of coal from British ports.

(Signed) "Wm. Atherton.
"Roundell Palmer.
"Robert Phillimore."‡

It will be observed that this opinion bears the signature of Sir Robert Phillimore, who, as we know, is held up to us, and deservedly so, in the Argument of the United States, for our guidance, as a great authority. From this time forward to the end of the war, Sir Robert Phillimore filled the high office of Queen's Advocate, and must share

* United States' Documents, vol. vi, p. 345. † British Appendix, vol. v, p. 226. ‡ Ibid., vol. i, p. 96.

the responsibility of many things which are made matter of complaint on the part of the United States. The Florida. At Nassau.

In the meantime, Mr. Secretary Seward having transmitted to Lord Lyons Admiral Wilkes' letter to Governor Walker, Lord Lyons, in forwarding it to Earl Russell, accompanied it with the following very pertinent and sound advice:—

"I have always been myself of opinion, that the course best calculated to avoid unpleasant discussions with this Government, is to adhere as closely as possible to the Regulations. A departure from them, even in favour of the United States' cruizers, is likely (as indeed happened at Bermuda) to lead to misunderstandings respecting the nature and extent of the concession intended, and to demands for similar concessions on other occasions; while the displeasure occasioned here by any favour granted to a Confederate ship is in no degree diminished by proof that a similar favour had been previously granted to a United States' ship.*

The Colonial Secretary appears to have deemed the report of the Law Officers too general and too deficient in precision to afford a sufficient guide to the Governors of Colonies in the great difficulty of their position between the belligerent parties—a difficulty which will be the better appreciated from his Grace's observations and the questions put to the Law Officers to enable him to give instructions to the Governors for their future guidance. His Under-Secretary, Mr. Elliot, writes:—

"With regard to the Law Officers' opinion that the Governor did not adhere to Her Majesty's regulations with sufficient strictness either in the case of the Oreto, or in that of the San Jacinto, his Grace observes that the Law Officers have not afforded any such specification of the Governor's errors as might be a guide to him in future. They say that the limits of the supply of coal prescribed by the regulation should be adhered to. But they do not say on what grounds they come to the conclusion that it has been exceeded. The supply is to be limited to such as will enable the ship to reach the nearest of its own ports, or any nearer destination. The supply to the Oreto was 90 tons. The papers do not show (though possibly the Law Officers may be aware from other sources) what was the supply to the San Jacinto. The question, therefore, arising upon these papers is, whether 90 tons is more than would be required by such a vessel as the Oreto to reach the nearest Confederate port, or any nearer destination.

"It would be very desirable to explain to Governor Walker for what destination (supposing all Confederate ports to be under blockade) the Oreto, or any other Confederate ship under similar circumstances, should be allowed to take in coal.

"On the next point of alleged insufficient strictness, his Grace is disposed, to a certain extent, to agree with the Law Officers. The regulation requires that "no coal shall be again supplied to any such ship of war, or privateer in the same, or any other port, roadstead, or waters, subject to the territorial jurisdiction of Her Majesty, without special permission, until after the expiration of three months from the time when such coal may have been last supplied to her within British waters, as aforesaid.

"The Oreto appears to have coaled at Nassau within three months, and indeed, within thirty days of her arrival at Barbados; and though the American Consul's vehement remonstrance of the 24th February against her being allowed to coal, did not touch the point, and the Governor had no official information of the fact, he does not deny that the fact had transpired, and was known to him, but states, that the supply of coal was allowed on the ground of the ship having suffered at sea in a gale of wind, had been obliged to exhaust her coal, the whole of which was gone; so that, if supplies were refused, the captain said he would be obliged to land his men, and strip the ship. The statement of the captain of the San Jacinto was of a like tenor. The first question seems to be, whether the Governor ought to have instituted an inquiry into the truth of the statements made to him by the captains of the Oreto and San Jacinto. It appears to his Grace that he ought. It is, no doubt, very desirable to avoid resting decisions, of which the impartiality is sure to be questioned, upon the results of inquiries in which more or less doubtful and conflicting testimony has to be weighed. But, in the case of an allegation that a vessel is destitute of coal, all that seems necessary is to send an officer on board to see whether there is coal there or not. Perhaps if the Governor were to refuse to take the word of an American Admiral for such a fact, and were to send an officer on board to verify it, the Admiral would regard the proceeding as offensive; but, nevertheless, his Grace thinks that he should be required to submit to it before he should be allowed to coal out of time, unless he be prepared to consent to the word of a Confederate officer being taken in like manner without inquiry.

But, supposing the Governor to have erred in these cases, it is not explained in the Report of the Law Officers whether it is of this, or of what other errors, he has been guilty, so as to help him to avoid a repetition of error. For example, supposing it had been the fact duly ascertained, that the Oreto or San Jacinto had suffered severely in a gale of wind, had exhausted all her coal, and was disabled from proceeding to sea unless supplied, was the Governor to have forbidden her to coal on the ground that she had coaled at some British port within thirty days.

"On the other hand, did his only error consist in his having allowed her to coal without verifying the fact of her distress.

"Again, assuming the fact to be that there is, or may be hereafter no Confederate port unblockaded, and that the real destination of a Confederate vessel asking for supplies is a cruizing destination, so that she is not bound for any particular port, is this to deprive her of the supplies which would be granted to a Federal cruizer in all respects similarly circumstanced, except that in her case a port can be designated which is in the possession of her Government, by the distance of which from the British Colony a standard is afforded for measuring the quantity of coal to be supplied.

* British Appendix, vol. i, p. 97.

The Florida.
At Nassau.

"His Grace would be glad to be enabled to send out instructions to Governor Walker, founded upon the opinions of the Law Officers, so far as they shall appear to have fully and correctly understood the course taken by the Governor, together with any further instructions which would serve for the Governor's guidance on the points adverted to, and on the nature of the cases (if not those alleged by the Oreto and San Jacinto) in which 'special permission' is to be given to take in coals.

"His Grace desires me to observe that Governor Walker, by adopting the course of sending immediate notice to all the other Governors in the West Indies of a belligerent vessel having obtained coals and supplies at Barbados, appears to have taken a very useful precaution against the violation of the Regulations, and that it would apparently be expedient to instruct the other Governors to do likewise."*

To these questions the Law Officers answered:—

"That with respect to the observance of Her Majesty's Regulations, in answer to the questions of the Duke of Newcastle, it is most desirable that the terms of Her Majesty's Proclamation should be strictly adhered to; that coal ought not to be supplied to either belligerent, except in such quantity as may be necessary to "carry such vessel to the nearest port of her own country, or to some nearer destination;" and that by these latter words it is not intended to include a mere cruizing destination, but some definite port or place. That, therefore, coal granted at any of Her Majesty's ports, and consumed in cruizing, ought not to be replenished under the terms of the Proclamation; but that a vessel, whose coal has, owing to real necessities arising from stress of weather, been prematurely exhausted, before she could (if time and weather were the only obstacles) reach her port of destination, ought not to be forbidden by the Governor to coal, although within the time specified in the Regulations.

"It would appear to us that the suggestion of sending an officer on board to verify in each case the necessity of coaling, would be likely to give great offence to belligerent men-of-war; but of course it would be competent to Her Majesty's Government, if they thought fit, to make such a verification the condition of liberty to coal in Her Majesty's ports.

(Signed) "WM. ATHERTON.
"ROUNDELL PALMER.
"ROBERT PHILLIMORE."†

Hereupon the following despatch of the 16th July, 1863, was addressed to Governor Walker:—

"Sir, "*Downing Street, July* 16, 1863.

"I have received and had under my consideration your despatch of the 7th March, giving an account of certain communications which have passed between yourself and Rear-Admiral Wilkes of the United States' Navy.

"You were quite right in refusing to enter into correspondence with that officer upon the matter adverted to in his despatch of the 5th March. On this and other occasions it has become evident that interviews and explanations such as you accorded to Rear-Admiral Wilkes were made the pretext for placing on record charges more or less direct against officers of Her Majesty. And I think that, as the Governor of one of Her Majesty's Colonies owes no explanation of his conduct to an officer of the United States' Navy, it will be prudent hereafter to avoid such explanations as far as the rules of courtesy will allow. It is the wish of Her Majesty's Government that matters of complaint should in general be discussed between the two Governments concerned rather than between any subordinate officers.

"With regard to the issue of coal to the war-vessels of the belligerents, you have, I think, allowed yourself too much liberty in giving the 'special permission' to take in fuel contemplated in Her Majesty's Proclamation. Coal, in the opinion of Her Majesty's Government, ought not to be supplied to a vessel of war of either belligerent except in such quantity as may be necessary to carry such vessel to the nearest port of her own country (or, of course, any nearer port), and this, I will add, without reference to the question whether the ports of that country are or are not under blockade. In case of such blockade it will rest with the officer in command to seek some more convenient destination. If within the period prescribed by the Proclamation, a vessel thus furnished with coal in one of Her Majesty's possessions should apply for a second supply in the same or another Colony, the application may be granted, if it is made to appear that, owing to real necessities arising from stress of weather, the coal originally given has been prematurely exhausted before it was possible that the vessel could, under existing circumstances, have reached the destination for which she coaled.

"But if it should be the case that the vessel has not, since taking in coal, been *bonâ fide* occupied in seeking her alleged destination, but has consumed her fuel in cruizing, the coal should not be replenished under the terms of the Proclamation. Such a case is not one to which the 'special permission' referred to in that Proclamation was intended to apply.

"Her Majesty's Government are of opinion that the regulations of the Proclamation thus interpreted should be strictly adhered to, without any arbitrary concession to either belligerent. It is by such a course that misunderstandings and complaints of partiality will be most certainly avoided. An unauthorized concession to one belligerent, it may be safely assumed, will not be accepted by those to whom it is made as a justification of a similar concession in an opposite direction.

"I approve of your having communicated to the officers administering the Government of the other West Indian Islands the fact that certain Federal and Confederate vessels of war had called at Barbados.

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* British Appendix, vol. i, p 98. † Ibid., p. 100.

"I shall instruct the Governors of the other islands to follow the same course, communicating in all cases the name of the vessel, its alleged destination, and the date of receiving the coal, and the quantity allowed to be placed on board. The Florida. At Barbadoes.

"I have, &c.
(Signed) "NEWCASTLE."*

The foregoing papers are certainly deserving of attentive consideration, as establishing beyond controversy that the British Government were desirous of carrying out, in their fullest extent, the Queen's Regulations for the maintenance of neutrality, and, what is more, that they were prepared to do so, though an adherence to the letter of these Regulations would have the effect of placing one of the belligerents in a position of great disadvantage relatively to the other. It was obvious that the rule that, unless the whole of the last supply of coal obtained in a British port had been consumed in seeking the nearest port of the belligerent, not even distress of weather should form a ground for allowing a further supply within the three months, was one which exposed to very great difficulties those whose own ports were closed, and who, having few other ports to resort to, were thus compelled to keep the sea at the same time that their means of doing so were seriously diminished, while it was of very little importance to the other belligerent, who, having his ports open, could always have recourse to them for supplies if other resources failed.

Yet, when Sir James Walker, recollecting what had happened on the former occasion, and solicitous to carry out the instructions he had since received, in all their stringency, on the application of Captain Boggs, in April 1865, to remain a few days at Barbados for the purpose of overhauling the piston and feeding-pump of the engine of his ship, the Connecticut, replied that it would be necessary in order that he should sanction a stay beyond the prescribed time of twenty-four hours, that Captain Boggs should give a definite assurance of his inability to proceed to sea at the expiration of that time, and as to the period within which it would be possible to execute the necessary repairs—matters as to which the Florida at Bermuda had to submit to a survey by the naval authorities—Captain Boggs allowed his temper to get the better of of him; says that "an American man-of-war can always go to sea in some manner," —which sober-minded people may perhaps think a somewhat idle boast—and that he shall do so, "though with risk to his vessel and machinery"—which, as it involved danger both to his ship and crew, may be thought a questionable view of his duty; "regrets that the national hospitality of remaining at anchor for the purpose named in his letter is refused," which was the reverse of the fact; and, evidently with considerable temper, informs the Governor that he shall depart from the port to-morrow at 10 A.M.†

It is a pity that this outbreak of temper on the part of Captain Boggs should have been exposed by his own countrymen, as though it had been an example of heroism, or that the requisition of Governor Walker, induced by the stringent instructions issued by the British Government on the occasion of the complaints of the United States relatively to the Florida, should have been distorted into anything more than a resolution to carry out those instructions efficiently and impartially towards both belligerents.

I return to the Florida. Her next visit to a British port was at Bermuda. At Bermuda.

From a despatch of Governor Ord to the Duke of Newcastle it appears that the Florida was off the port of St. George's on the evening of the 15th of July, and on the following morning received the necessary permission to enter the port:—

"Having sent to Captain Maffit a copy of the printed Circular letter I have had drawn up, embodying the instructions of Her Majesty respecting the treatment of Federal and Confederate vessels of war, he called on me on the day of his arrival, and stated that he had been at sea seventy days, with the exception of two visits to Havana and Barbados, each of which occupied less than twenty-four hours, and a visit of shorter duration to a port in the Brazils; that he was last from the immediate neighbourhood of New York, within sixty miles of which he had been harassing the United States' commerce; that he was in want of repairs to the hull and machinery of his ship, and a small supply of coal; that he feared he should experience difficulty in obtaining the latter, as he was informed that there was no steam coal whatever in the Colony, except in the stores at the dockyard; and that he trusted, under the circumstances, he would be permitted to receive from this source as much as would serve to carry him to a port of his own country; that he would then use every exertion to complete his refitment, and would leave the Colony forthwith.

"I told Captain Maffit that his application for coal from Admiralty stores must be made to the senior naval officer, but I assured him at the same time that it would not be complied with, and I granted

* British Appendix, vol. i, p. 101. † United States' Documents, vol. vi, p. 178.

The Florida.

At Bermuda.

him permission to remain so long as might be necessary to fit his ship for sea, and to procure from private sources the coal actually required."*

All supply of coal from the dockyard was refused. Thereupon Mr. Walker, a merchant of the colony, applies on behalf of Captain Maffit to the Governor:—

"As the Florida must of necessity be detained at this port, as a vessel in distress, until the arrival of coals which are daily expected, Captain Maffit begs me to inquire of your Excellency if the privilege will be accorded to him of proceeding to the dockyard for the purpose of having effected some repairs to machinery and hull of ship, which are of essential importance, and which cannot be effected in the port of St. George's."†

The answer of the Governor was that the application could not be granted, to which he adds:—

"In making this communication I have to express a hope that Captain Maffit may yet find it in his power to obtain for his vessel such supplies of coal, and such necessary repairs as will enable her to proceed without delay to her destination, but I must at the same time point out that Her Majesty's instructions (with a copy of which Captain Maffit was supplied on the 16th instant) are very stringent as to the limitation of the stay in British waters of vessels of war of the United States or Confederate States, and that it is necessary that whatever may be required to enable the Florida to take her departure from these islands should be provided in the shortest possible period. If, however, Captain Maffit should find it impossible to procure at the present time whatever may be requisite for this purpose, I must request that he will at once proceed with the Florida to Grassy Bay, there to remain until his departure from the Colony is rendered practicable."‡

Mr. Walker wrote again, suggesting that there was a large quantity of coal lying in the Commissariat Department, and applying, on behalf of Captain Maffit, in his great emergency, for a sufficient quantity to carry his vessel to some coaling depôt, offering to pay for them, or to return them in kind within a week or two. This again was refused.

On the 22nd of July the Governor writes to Mr. Walker, requesting him "to ascertain, for his satisfaction, when the necessary repairs and coaling of the Florida will be completed, so as to enable her to proceed to sea." In answer, Mr. Walker says he is requested by Captain Maffit to inform his Excellency that he is using every effort to proceed to sea with as little delay as possible.

"Captain Maffit," he says, "is fully aware of the stringent character of Her Majesty's instructions with regard to the stay in British waters of men-of-war of the United States and of the Confederate States; and begs me to assure your Excellency that his detention has been occasioned not by any disposition to contravene Her Majesty's instructions on the subject, but from the great deficiency of labour at this port, and from causes to which the attention of your Excellency has already been directed.

"The necessary repairs to Captain Maffit's ship are now nearly completed, and he will commence taking in his coals at 12 A.M. to-day. As it is probable that it will be impossible to finish coaling until to-morrow (Friday), Captain Maffit would be happy to receive the permission of your Excellency to remain in the port of St. George's until Saturday morning."§

The Governor answers that—

"Although the instructions of Her Majesty respecting the limitation of the stay in British waters of vessels of war of the Confederate and United States are very stringent, yet, as I have reason to believe, that circumstances beyond Captain Maffit's control have obstructed him in procuring the supply of coal and repairs to his vessel, necessary to enable him to proceed to sea, I think I am justified in complying with his request; and I accordingly authorize the Florida remaining in these waters until the morning of Saturday the 25th instant, but no longer."§

A cargo of coal had, in the meantime, arrived in a vessel called the Harriet Pinckney, out of which Captain Maffit was enabled to obtain a supply. It is stated in the United States Case and Argument‖ that this vessel was one of the "insurgent transports;" from which it is sought to be inferred that the cargo of coal brought out in her was intended expressly for the Florida; and upon this a charge is founded of a violation of neutrality in a breach of the rule that neither belligerent was to be permitted to establish depôts of coal on British territory. To prove that the Harriet Pinckney was an "insurgent transport," a letter from Mr. Dudley to Mr. Seward of January 2, 1863,¶ is referred to; but, on turning to that letter, it will be found that Mr. Dudley is not speaking of or referring to "insurgent transports" at all, but to British vessels employed in running the blockade with arms and contraband of war. The word "transport," which, in the Argument, is printed between inverted

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* British Appendix, vol. i, p. 108.
† Ibid., p. 109.
‡ Ibid., p. 110.
§ Ibid., p. 111.
‖ United States' Case, p. 358; United States' Argument, p. 161.
¶ United States' Documents, vol. i, p. 732.

commas, as if taken from the letter, does not occur in it at all. The vessel was, to all appearance, an ordinary trading-vessel—one of those engaged in the profitable employment of running the blockade. In this business she visited St. George's five times between January, 1863, and February, 1864.* A letter from a Mr. Walker is, indeed, printed in the VIIth Volume of the United States' Documents,† in which he says that he had employed the Harriet Pinckney in the beginning of July to bring a cargo of coal from Halifax; not, however, for the Florida, but to supply some steamer with the means of running the blockade; and, as he expresses it, to save that steamer "the loss of a moon." This shows that the intention was not to supply the Florida with coal; and that the visit of the Florida to Bermuda was not in any way connected with the voyage of the Harriet Pinckney; still less was there anything to suggest the slightest suspicion of such a kind to the Colonial Authorities. Besides which, the anxiety of Captain Maffit to obtain coal from other quarters shows plainly that he had no expectation of a specific cargo being sent out for his vessel.

The charge of any violation of neutrality on the occasion of the last mentioned visit, appears wholly to fail.

Leaving Bermuda on the 25th of July, the Florida arrived at Brest on the 23rd of August. This part of her history is touched upon lightly and cautiously in the Case of the United States; yet the indulgence alleged to have been granted to this vessel in British ports is but trifling as compared with that which was extended to her in the French port; and the events which occurred there are important as showing that the French Government entertained notions more liberal than our own on the subject of hospitality to be extended to belligerent vessels. She had sustained considerable injury to her copper, and much of her machinery required renewing, and workmen and materials had to be brought from England, and these repairs were likely to require a period of several months for their accomplishment. A considerable part of her crew, the time for which they had engaged having expired, desired their discharge. From the despatches of Mr. Dayton, the United States' Minister at Paris, to Mr. Secretary Seward, it appears that Mr. Dayton began by remonstrating against any assistance being given to the Florida at all. But the French Government answered that, having recognized the Confederate States as belligerents, they could not refuse them the ordinary assistance rendered to ships of war in need of repairs. Next, Mr. Dayton insisted that, as the Florida was a good sailing-vessel, no repair should be allowed to be done to her machinery. But to this, M. Drouyn de Lhuys answered, "that if she were deprived of her machinery, she would be *pro tanto* disabled, crippled, and liable, like a duck with its wings cut, to be at once caught by the United States' steamers. He said it would be no fair answer to say the duck had legs and could walk or swim. He said that, in addition to this, the officers of the port had reported to the Government that the vessel was leaking badly, that she made water at so much per hour (giving the measurement) and unless repaired she would sink."‡

There being no commercial dock at Brest, Captain Maffit applied for the use of a Government dock. M. Dayton remonstrated; but M. Drouyn de Lhuys replied that, where there was no commercial dock, as at Brest, it was customary to grant the use of any accommodation there to all vessels in distress, upon payment of certain known and fixed rates; that they must deal with this vessel as they would with one of the United States' ships, or the ships of any other nation; and that to all such these accommodations would be granted at once."§

Lastly, permission having been asked to ship new hands, in the place of those whose time had expired, M. Dayton strongly opposed it. He thus states the result:—

"M. Drouyn de Lhuys informed me that this Government, after much conference (and, I think, some hesitation), had concluded not to issue an order prohibiting an accession to the crew of the Florida while in port, inasmuch as such accession was necessary to her navigation. They had made inquiries, it would seem, and they had ascertained that the seventy or seventy-five men discharged after she came into Brest were discharged because the period for which they had shipped had expired. He said, furthermore, that it was reported to him that the Kearsarge had likewise applied for some sailors and a pilot in that port, as well as for coal, and leave to make repairs, all of which had been, and would be, if more were needed, cheerfully granted.

"I told him I was quite confident the Kearsarge had made no attempt to ship a crew there, and that, as respects a pilot, that stood on ground peculiar to itself, and had no reference to the general principle.

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* British Appendix, vol. v, pp. 5, 13.
† Ibid., p. 56.
‡ Ibid., vol. vi, p. 132.
§ Ibid.

The Florida.

At Brest.

"The determination which has been reached by the French authorities to allow the shipment of a crew, or so large a portion of one, on board of the Florida while lying in their port is, I think, wrong, even supposing that vessel a regularly commissioned ship of war. I told M. Drouyn de Lhuys, that, looking at it as a mere lawyer, and clear of prejudices which my official position might create, I thought this determination an error. He said, however, that in the conference they had reached that unanimously, although a majority of the Ministry considering the question were lawyers."*

From a report by the British Consul at Brest, on the subject of the reception and stay of the Florida at that port, it appears that—

"Captain Maffit, the Commander of the Florida, was informed by the Admiral of the Port (Préfet Maritime), Vice-Admiral Count de Gueyton, that he was at liberty to effect the repairs of the ship and provide her with coal and provisions, the same as any merchant-ship. * * * *

"The commercial resources of Brest proving insufficient to effect the repairs of the Florida, application was made to the Port Admiral to allow her to enter the Government dockyard, and permission for her to do so was granted, it being stipulated that all expenses should be reimbursed by the agent, M. Aumaître, and that her powder-magazine should be cleared before entering the dock. To effect the latter operation, a Government barge was furnished for the purpose of removing the ammunition; and this barge was, later, moored in the bay.

"On the 9th of September, 1863, the Florida entered the Government dock, and remained there for general repairs for a period of about five weeks.

"The Florida completed her repairs in the dockyard, and afterwards took moorings in the merchant harbour of Brest, where she was slowly refitted. On the 27th of December she was moved to the roadstead.

"It appears that some of the mechanism of the more heavy guns of the Florida had never been regulated, and her Commander desiring to have this done, an application was made to the Port Admiral for permission to land the guns for that purpose; but this was at once and positively refused, on the ground that such an act might be interpreted as equivalent to allowing a reinforcement of arms.

"But, it appears, her small-arms were allowed to be landed, in order to be repaired by a gunmaker of Brest, named Kock; this permission was granted, on the agent, M. Aumaître, giving a guarantee to the authorities of the Custom-house that they should be reshipped on board the Florida.

"No arms or ammunition were furnished to the Florida while at Brest.

"Through M. Aumaître, the agent, M. Rainals ascertained that thirty-five seamen claimed and obtained their discharge from the Florida here; that they were, in part, replaced by others chiefly natives of Belgium, Germany, Italy, and Southern Austria, brought to Brest by railway direct from Paris, in numbers never exceeding four at a time, and that they were quietly sent on board in similar numbers.

"The Federal corvette Kearsarge reappeared in Brest waters on the 3rd of January, 1864; and, after steaming about the bay to within a mile of the town, again proceeded to sea.

"The Florida, being ready for sea, left Brest between 9 and 10 o'clock on the evening of the 9th of February, 1864, in charge of a pilot; and at a distance of about thirty miles from that port, passed through the dangerous passage Du Raz, inside the Saints, landing the pilot at Audierne."†

I cannot help surmising that, if all this had happened in one of Her Majesty's ports; if a Government dockyard had been placed at the disposal of a Confederate cruizer; if such cruizer had been allowed to remain six months; to have her small-arms repaired on shore; and to take in as much coal as she wanted, "like any merchant vessel," and largely to recruit her crew; this Tribunal would not have failed to find a very eloquent and indignant denunciation of such a violation of neutrality in the papers which have been presented to us.

At Martinique.

After leaving Brest on the 12th of February, 1864, the Florida visited the French Colony of Martinique, where she remained from the 26th of April to the 7th of May repairing her machinery and taking in a full supply of coal.‡ On the 12th of May she touched at Bermuda, but only to land a sick officer, and left again at once.§ On

Again at Bermuda.

the 18th of June, 1864, she again put into Bermuda, being then under the command of Lieutenant C. M. Morris.‖ Lieutenant Morris immediately wrote to Colonel Munro, the Acting Governor, stating that his vessel was in want of coals, provisions, and repairs, and requesting permission to have the necessary repairs to the propeller and blow-valve done at Her Majesty's Dockyard, as they could not otherwise be effected;¶ and Governor Munro having referred the application to Sir James Hope, the Admiral on the station, Sir James Hope directed a survey of the vessel to be made by competent officers, who, on the 20th, reported as follows:—

"We have the honour to report that, having, in obedience to your directions, been on board the Florida, and with the assistance of Messrs. Thompson and Leitch, assistant engineers, examined her machinery, we beg to make the following report:—

"1, She can proceed to sea with such repairs as can be made good here, which, as far as we are

* British Appendix, vol. vi, p. 136. † Ibid., vol. i, pp. 126, 127. ‡ Ibid., vol. i, p. 131.
§ Ibid., p. 132; United States' Documents, vol. vi, p. 355.
‖ British Appendix, vol. i, p. 132. ¶ Ibid., vol. v, p. 9.

The Florida.

At Bermuda.

able to judge, will require five days for one man, viz., a diver for two days and a fitter for three days, or three complete days in all.

"2. She can proceed to sea with safety in her present state under steam, but under sail is unmanageable with her screw up in bad weather, and her defects aloft (cross-trees) render main topmast unsafe. This could be made good in two days.

"3. Her horse-power is 200.

"Consumption of fuel going full speed	-	-	15 cwt.
"Speed	-	-	10 knots.
"Do half speed	-	-	7½ cwt.
"Speed	-	-	8 knots.

"4. We are of opinion that the Florida should be able to fetch the following places in the time and with the coal stated against each, viz.:

	Hours.	Tons.
"Wilmington	115	46
"Charleston	129	52
"Savannah	138	55
"Mobile	250	100

"We have, &c.

(Signed) "ARTHUR H. G. RICHARDSON, *Lieutenant.*

"EDWARD O. CRICHTON, *Chief Engineer.*

"Vice-Admiral Sir J. Hope,

"&c. &c. &c.

"P.S.—The Florida can stow *130 tons of coal.*"*

Upon this a stay of five working days was accorded for the completion of the necessary repairs.† Permission was given to ship 80 tons of coal.

Three heads of complaint are put forward by the United States' Government as to what was done on this occasion. Twice over it is stated that, a stay of *five* days having been granted, that stay was extended to *nine*.‡ We have here another of those inaccurate statements of fact, the effect of which may be to mislead the Tribunal. The stay of the Florida at Bermuda on this occasion was only nine days in the whole. But the earlier portion of that time was occupied in the preliminary communications and in the survey. The stay of five days was granted by the Governor on the 21st of June. The Florida left on the 27th. The total stay of nine days has thus been confounded with the stay after the granting of the five days. I should be ashamed to suggest that this misrepresentation was intentionally made; but I must repeat that those who accuse persons in authority of misconduct should take more care to be accurate as to their facts.

It is next stated that, instead of 20 tons, the Florida was allowed to take 135.§ But on reference to the report of the surveying officers, it will be seen that they estimate 46 tons as the amount necessary for the vessel, if seeking the nearest port, namely, Wilmington; 100 tons if seeking the furthest, namely, Mobile; with varying amounts if making for intermediate ports.

Lieutenant Morris assured the Governor that the port he expected to make was Mobile.‖ The Governor compromised the matter by giving permission to load 80 tons. Lieutenant Morris reported officially in writing to the Governor that he had loaded 80 tons, as appears by the letter of Governor Munro to Mr. Secretary Cardwell of the 7th of July 1864.¶ But the United States produce a voucher for 135 tons of coal shipped on this occasion.**

If it be true that Lieutenant Morris abused the confidence of Colonel Munro, and took in 135 tons instead of 80, all that this proves is that Lieutenant Morris acted in a manner unworthy of an officer aud a gentleman. Is it to be said that it was the duty of the Governor to send officers to watch the shipment of the coal, and see that Lieutenant Morris did not play a dishonourable part and abuse the trust reposed in him, and that the quantity was not exceeded? Such a proceeding would have implied a disbelief in the word of the officer commanding a ship of war, and therefore would more or less have amounted to an affront. I cannot think it was necessary.

The next complaint is, that whereas five days' work was reported by the surveyors to be all that was necessary to be done to the vessel, twenty days of carpenters' work was done to her.†† The voucher produced shows that four carpenters were employed for four days.‡‡ Looking to the small quantity of materials charged for, it is probable

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* British Appendix, vol. v, p. 11.
† Ibid., pp. 6, 11, 12.
‡ Case of the United States, pp. 360, 361.
§ United States' Case, p. 362.
‖ British Appendix, vol. v, p. 4.
¶ Ibid., vol. i, p. 133.
** United States' Documents, vol. vi, p. 359.
†† Case of the United States, p. 361.
‡‡ United States' Documents, vol. vi, p. 361.

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that, if an undue amount of time was occupied in carpenters' work, it arose from the unskilfulness of the workmen.

The number of men required for the repairs of the maintopmast is not stated in the report of the officers. The work of four men for four days may have proved absolutely necessary.

But even if a small and microscopic criticism could here discover anything to find fault with, here again the fault was that of the officer commanding the Florida, not of the Authorities. Or, is it to be said that here also a watch should have been set to measure the precise amount of work to which the carpenters should have been limited?

But complaint is made that, besides coal, the Florida was allowed to take in large supplies of provisions, clothing, and other stores, even of *medicines!** For what purpose this is stated I cannot conceive. If it is meant to be said that herein there was any breach of neutrality, such a proposition implies ignorance of the first principles of international law. All the articles enumerated are things which a belligerent has a perfect right to procure in a neutral port, and which the Governor could neither prevent the commander of such a vessel from buying, or the Queen's subjects from selling to him.

There is one other complaint, which I confess occasions me both surprise and pain. It is that, although the surveyors had reported that "the vessel was unmanageable with her screw up in bad weather," and that "her defects aloft (cross-trees) rendered the maintopmast unsafe," yet, as they had reported that "she could proceed to sea with safety in her then state under steam," the Governor ought not to have allowed the repairs necessary to render her safe when under sail.† We have here the converse of Mr. Dayton's contention with the French Government, but in a more objectionable form. When it is borne in mind that in a screw-steamer steam is but an auxiliary power, and that no such vessel is ever committed to the ocean without everything necessary to her safety under sail being in a seaworthy condition; when it is remembered that all machinery is liable to accident, especially such as is exposed to the action of the elements, and that if anything had happened to the machinery of this vessel in her then condition, she would have been exposed, with her living freight, crippled and helpless, to danger and disaster, I think the proposition which the Tribunal is asked to adopt ought not to find much favour in its sight. For myself I can only say, that I trust and believe no British Governor, placed in similar circumstances, would—let our decision be what it may, let the political consequences be what they will—be so wanting in a sense of what is due to humanity and to the honour of his country as to act otherwise than I am glad to think the Governor of Bermuda acted on this occasion.

I have only further to observe that when much is made in the Case of the United States of the fact that the Florida, instead of proceeding to the nearest port, was kept cruizing off the islands, looking out for United States' vessels, which no doubt appears to have been the case,‡ the same observation occurs as before. Such a course of conduct may have been dishonourable in Lieutenant Morris, as being in breach of the good faith he ought to have kept with the Governor, but it certainly cannot be ascribed as a fault to the latter.

No doubt the conduct of Lieutenant Morris is open to observation. He came back afterwards to the island, on the pretext of delivering up two deserters, but in fact to try and get more coal, which, however, was peremptorily refused.§ But the answer lies in a word: Lieutenant Morris was an officer bearing a commission and wearing a sword in the service of an American Government; as such, he was entitled to the presumption which attaches to such a position, and which presupposes the impossibility of acts inconsistent with the highest sense of honour and the most scrupulous good faith. To have acted on such a presumption ought not to be ascribed, by a tribunal of honourable men, to those who did so, as a want of due diligence in the ischarge of any duty they were called on to fulfil on the part of a neutral Government.

On the 5th of October, 1864, the Florida entered the port of Bahia, whereupon Mr. Wilson, the United States' Consul, forthwith addressed a letter to the President of the Province in the accustomed terms:—

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* Case of the United States, p. 361.
† Ibid., p. 362.
‡ See British Appendix, vol. i, p. 133.
§ Ibid.

"To his Excellency Antonio Joaquim da Silva Gomes, President of the Province of Bahia. The Florida.

"*Consulate of the United States of America, Bahia. October* 5, 1864, 9 A.M.

"Sir,

"This morning a steamer anchored in this port bearing the flag adopted by those who are involved in the rebellion against the Government of the United States of America, and I am informed that the said vessel is the Florida, which is engaged in capturing vessels navigating under the flag of the United States of America, and in destroying them by making bonfires of them and their cargoes.

"The vessel in question is not commissioned by any recognized Government whatever, and her officers and crew are composed of persons of various nationalities, who are not subject to any international or civilized law, and are consequently not entitled to the privileges and immunities conceded to vessels navigating under the flag of a civilized nation. I therefore protest, in the name of the United States of America, against the admission of this vessel to free practice, by which she might be enabled to supply herself with coal, provisions, tackle, or utensils of any kind whatever, or receive on board any persons whatever; finally, against any assistance, aid, or protection which might be conceded to her in this port, or in any other belonging to this province.

"I likewise claim that the piratical cruizer which, in combination with the pirate Alabama, violated the sovereignty of the Imperial Government of Brazil, by capturing and destroying vessels belonging to citizens of the United States of America, within the territorial waters of Brazil, near the island of Fernando de Noronha, in April 1863, be detained with all her officers and crew, in order to answer for so flagrant a violation of the sovereignty of the Government of Brazil and of the rights of citizens of the United States within the jurisdiction of the Brazilian Government.

"I avail, &c.

(Signed) "THOMAS F. WILSON, *Consul of the United States.*"*

The President replies,—

"In reply to the Consul, I have to inform him that, as the said vessel belongs to the Confederate States, in whom the Imperial Government recognized the character of belligerents, all the assistance required by humanity may be furnished her, which does in no wise constitute assistance for warlike purposes, as laid down by international law, and does not conflict with that neutrality which this Government studiously seeks to preserve, and has always preserved, in the contest between the States of North America. The Undersigned cannot, therefore, admit the first portion of the claim of the Consul, in the general manner in which it was presented, and particularly in relation to those articles considered as contraband of war in conformity with instructions issued on that subject by the Imperial Government, and according to which the said vessel will only be permitted to remain in this port for the length of time absolutely indispensable.

"In regard to the second part of his note, it is my duty to observe to the Consul that, even if it were fully established that the Florida had previously violated neutrality, such a proceeding would scarcely authorize us to refuse her permission to enter the ports of the Empire, and would never warrant us to commit the acts required by the Consul, which would be equivalent to a hostile rupture, without the intervention of the Supreme Government of the State, which is one competent to authorize such a rupture."†

Before daybreak on the morning of the 7th the Florida was surprised in the port of Bahia and taken by the United States' war-steamer Wachusett and carried off as a prize.

She sank shortly after her arrival in Chesapeake Bay, in consequence, as was asserted, of her having sprung a leak during her voyage, and of her having been injured whilst at anchor by a United States' transport.

Mr. Seward appears at first to have been disposed to think that the Brazilian Government, in "furnishing of shelter and a haven to pirates," was as much to blame as the Captain of the Wachusett, as we find him, on hearing what had occurred, writing thus to Mr. Webb:—

"Sir,

"*Department of State, Washington, November* 11, 1864.

"In the years 1862 and 1863, remonstrances were addressed by us to the Government of Brazil against the policy, different as it was from that of all other American States, in regard to the furnishing of shelter and a haven to pirates who were engaged in depredating upon the peaceful commerce of the United States. The correspondence came to a close without having produced any satisfactory result, and not without leaving a painful presentiment that a continuance of measures so injurious to the United States would sooner or later affect the harmonious relations heretofore existing between the two countries.

"We have just now heard of the capture of the Florida by the Wachusett, at Bahia, and of the consequent hostilities adopted by the Brazilian forces in that port; but we have no particular information of the circumstances which preceded the collision, and our information concerning the transaction itself is incomplete. At the same time, we are absolutely without knowledge of any correspondence that it may have elicited between yourself and the Brazilian Government.

"In this stage of the matter the President thinks it proper that you should inform the Minister of Foreign Affairs that we are not indisposed to examine the subject upon its merits carefully, and to

* British Appendix, vol. i. p. 146. † Ibid., p. 147.

consider whatever questions may arise out of it, in a becoming and friendly spirit, if that spirit shall be adopted by his Imperial Majesty's Government."*

The Government of Brazil protested immediately in strong terms against this violation of its sovereignty and the neutrality of its waters.

The following letter was immediately written by Senhor Barbosa da Silva, the Brazilian Chargé d'Affaires at Washington, to Mr. Seward:—

"*Imperial Legation of Brazil, Washington,*
(Translation.) "*December* 12, 1864.

"The Undersigned, Chargé d'Affaires *ad interim* of His Majesty the Emperor of Brazil, has just received orders from his Government to address himself, without delay, to that of the United States of North America about an act of the most transcendant gravity, done on the morning of the 7th day of October last, in the port of the capital of the Province of Bahia, by the war-steamer Wachusett, belonging to the navy of the Union, an act which involves a manifest violation of the territorial jurisdiction of the Empire, and an offence to its honour and sovereignty.

"On the 4th day of the month referred to there entered that port, where already had been lying for some days the Wachusett, the Confederate steamer Florida, for the purpose, declared by her Commander to the President of the province, to supply herself with alimentary provisions and coal, and to repair some tubes of her machinery.

"The President, proceeding in accordance with the policy of neutrality which the Empire resolved to adopt on the question in which unfortunately these States are involved, and, in conformity with the instructions in this respect issued by the Imperial Government on the 23rd of June of the year last past, assented to the application of the Commander of the Florida, and fixed the term of forty-eight hours for taking in supplies, and fixing, in dependence on the final examination by the Engineer of the Arsenal, the determination of the residue of the time which, peradventure, should be deemed indispensable for the completion of the repairs.

"The same authority at once took, with the greatest impartiality, all the measures necessary to avoid any conflict between the two hostile steamers.

"The Florida was placed under cover of the batteries of the Brazilian corvette D. Januaria, on the inshore side, at the request of her Commander, who, reposing on the faith with which, without doubt, the chief authority of the province could not fail to inspire him, considered himself sheltered from any attack of his adversary, and in this confidence not only stayed a night on shore, but gave liberty to a great part of the crew of his vessel.

"It behoves me to say that, as soon as the Confederate steamer entered the port of Bahia, the American Consul, Wilson, addressed to the President a despatch claiming that the Florida should not be admitted to free pratique, and that on the contrary she should be detained, alleging for this, that that vessel had, in concert with the Alabama, violated the neutrality of the Empire by making captures in 1863, near the Island of Fernando de Noronha.

"Such exaggerated pretensions, founded on facts not proven, which had already been the subject of discussion between the Imperial Government and the Legation of the United States, could not be even listened to.

"If the President should have refused the hospitality solicited by the Commander of the Florida he would have infringed not only the duties of neutrality of the Empire, but also those of humanity, considering that steamer, coming from Teneriffe, had been sixty-one days at sea, was unprovided with food, and with machinery in the worst condition.

"Afterwards, the President having stated to the same Consul that he hoped, from his honour and loyalty toward a friendly nation, that he would settle with the Commander of the Wachusett that he should respect the neutrality and sovereignty of the Empire, he was answered affirmatively, the Consul pledging his word of honour. Things were in this condition, the term of forty-eight hours being to expire at 1 o'clock of the afternoon of the 7th, when about dawn of that day, the Commander of the steamer Wachusett, suddenly leaving his anchorage, passed through the Brazilian vessels of war and approached the Florida.

"On passing across the bows of the Brazilian corvette D. Januaria, he was hailed from on board that he must anchor: but, as he did not attend to this intimation, and continued to approach the Florida, at the same time firing a gun and some musketry, the Commander of the Naval Division of the Empire stationed in those waters sent an officer on board the Wachusett and informed her commander that the ships of the division and the forts would open fire upon her if she should attack the Florida. The Brazilian officer was not allowed to make fast to the Wachusett, but the officer of the deck hailed him, saying in reply that he accepted the intimation given, that he would do nothing more, and that he was going to return to his anchorage. The Commander of the Brazilian division then thought proper to ratify his intimation by firing a gun, upon which a complete silence followed between the two ships Wachusett and Florida.

"At the time this was passing, the corvette D. Januaria, on board which the Commander of Division had hoisted his flag, lay head to flood, the steamer Florida anchored B.B., side by side of her, and quite close to the shore, and between her and the corvette the Wachusett stopped her wheels.

"The Commander of Division then observing—notwithstanding the darkness of the night—that the Wachusett, from the position in which she was, kept moving onward and was passing ahead of the corvette, in a course E.B., became convinced that, in fact, she was steering for her anchorage, thus complying with the promise made.

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* British Appendix, vol. i, p. 152.

"But a few moments afterwards, perceiving that the Florida was in motion, the Commander discovered that the Wachusett was taking her off in tow by means of a long cable. The Florida.

"Surprised at such an extraordinary attempt, the Commander immediately set about stopping this, and redressing at the same time, as behoved him, the offence thus done to the dignity and sovereignty of the Empire.

"But availing himself of the darkness of the night, and of other circumstances, the Commander of the Wachusett succeeded in carrying his prize over the bar, and escaping the just punishment he deserved.

"The Consul, Wilson, preferred to abandon his post, withdrawing on board the Wachusett.

"The Government of his Majesty, as soon as it had official information of the event, addressed to the Legation of the United States at Rio Janeiro a note, in which, giving a succinct exposition of the fact, it declared that it had no hesitation in believing that it would hasten to give to it all proper assurances that the Government of the Union would attend to the just reclamation of the Empire as promptly and fully as the gravity of the case demanded.

"In correspondence with this expectative note the worthy Representative of the United States was prompt in sending his reply, in which he declares he is convinced that his Government will give to that of the Empire the reparation which is due to it.

"Such are the facts to which the Undersigned has received order to call all the attention of the Honourable William H. Seward, Secretary of State of the United States.

"The principles of international law which regulate this matter, and in respect of which there is not the least divergence among the most distinguished publicists, are common and known to all. The Undersigned would fail to recognize the high intelligence of the Honourable Mr. Seward, if, perchance, he should enter in this respect into fuller developments.

"He limits himself then only to recall a memorable example, in which these principles, invariably sustained by the United States, had entire application. In 1793, the great Washington then being President of the United States, and the illustrious Jefferson, Secretary of State, the French frigate l'Embuscade captured the English ship Grange, in Delaware Bay, thus violating the neutrality and the territorial sovereignty of the United States. The American Government remonstrated energetically against this violation, and required from the Government of the French Republic not only the immediate delivery of the captured vessel, but also the complete liberation of all the persons found on board. This reclamation was promptly satisfied. Much more grave, certainly, is the occurrence in the port of the province of Bahia, which makes the subject of the present note. By the special circumstances which preceded and attended it, this act has no parallel in the annals of modern maritime war.

"The Commander of the Wachusett not only gravely offended the territorial immunities of the Empire, passing beyond the laws of war by attacking treacherously, during the night, a defenceless ship, whose crew, much reduced, because more than sixty men were on shore with the Commander and several officers, reposed unwary beneath the shadow of the protection which the neutrality of the Empire guaranteed to them; and so open was the violation, so manifest the offence, that the enlightened American press was almost unanimous in condemnation of the inexcusable proceeding of Commander Collins.

"On this occasion, reminding the United States, whose antecedents are well known and noted in history by the energetic defence of, and respect for, neutral rights, of those unshaken principles, the Undersigned cannot consider the event which occurred at Bahia otherwise than as the individual act of the Commander of the Wachusett, not authorized or approved by his Government, and that it will consequently give to the Government of His Majesty the Emperor the explanations and reparation which, in conformity with international laws, are due to a Power which maintains friendly and pacific relations with the United States.

"The just reclamation of the Imperial Government being thus presented, the Undersigned awaits the reply of the Honourable Mr. Seward, and, fully confiding in his exalted wisdom, and in the justice of the Government of the United States, he has not even for a moment doubted but that it will be as satisfactory as the incontestable right which aids the Empire, and the vast gravity of the offence which was done to it, may require."*

Mr. Seward's answer is remarkable for its haughty tone, and still more as showing the view which the United States' Government persisted in taking as to the inadmissibility of the Confederate States to the character of belligerents, notwithstanding that all the great maritime States had agreed throughout, in conformity with principle and precedent, in according to them the status of belligerency:—

"*Department of State, Washington, December* 20, 1864.

"I have the honour to acknowledge the receipt of your note, which sets forth the sentiments of the Imperial Government of Brazil concerning the capture of the Florida by the United States' war-steamer Wachusett in the port of Bahia.

"You will, of course, explain to your Government that, owing to an understanding between you and myself, your note, although it bears the date of the 12th December, was not submitted to me until the 21st instant.

"Jealousy of foreign intervention in every form, and absolute non-intervention in the domestic affairs of foreign nations, are cardinal principles in the policy of the United States. You, have, therefore, justly expected that the President would disavow and regret the proceedings at Bahia. He will

* British Appendix, vol. i, p. 153.

suspend Captain Collins, and direct him to appear before a court-martial. The Consul at Bahia admits that he advised and incited the captain, and was active in the proceedings. He will therefore be dismissed. The flag of Brazil will receive from the United States' Navy the honour customary in the intercourse of friendly maritime Powers.

"It is, however, not to be understood that this Government admits or gives credit to the charges of falsehood, treachery, and deception which you have brought against the captain and the Consul. These charges are denied on the authority of the officers accused.

"You will also be pleased to understand that the answer now given to your representation rests exclusively upon the ground that the capture of the Florida was an unauthorized, unlawful, and indefensible exercise of the naval force of the United States within a foreign country, in defiance of its established and duly recognized Government.

"This Government disallows your assumption that the insurgents of this country are a lawful naval belligerent; and, on the contrary, it maintains that the ascription of that character by the Government of Brazil to insurgent citizens of the United States, who have hitherto been, and who still are, destitute of naval forces, ports, and Courts, is an act of intervention, in derogation of the law of nations, and unfriendly and wrongful, as it is manifestly injurious to the United States.

"So, also, this Government disallows your assumption that the Florida belonged to the aforementioned insurgents, and maintains, on the contrary, that that vessel, like the Alabama, was a pirate, belonging to no nation or lawful belligerent, and therefore that the harbouring and supplying of these piratical ships and their crews in Brazilian ports were wrongs and injuries for which Brazil justly owes reparation to the United States, as ample as the reparation which she now receives from them. They hope, and confidently expect, this reciprocity in good time, to restore the harmony and friendship which are so essential to the welfare and safety of the two countries.

"In the positions which I have thus assumed, the Imperial Government will recognize an adherence to the rights which have been constantly asserted, and an enduring sense of injuries which have been the subjects of earnest remonstrance by the United States during the last three years. The Government of Brazil is again informed that these positions of this Government are no longer deemed open to argument.

"It does not, however, belong to the captains of ships of war of the United States, or to the commanders of their armies, or to their Consuls residing in foreign ports, acting without the authority of Congress, and without even Executive direction, and choosing their own time, manner, and occasion to assert the rights and redress the wrongs of the country. This power can be lawfully exercised only by the Government of the United States. As a member of the family of nations, the United States practise order, not anarchy, as they always prefer lawful proceedings to aggressive violence or retaliation. The United States are happy in being able to believe that Brazil entertains the same sentiments. The authorities at Bahia are understood to have unsuccessfully employed force to overcome the Wachusett and rescue the Florida, and to have continued the chase of the offender beyond the waters of Brazil out upon the high seas. Thus, in the affair at Bahia, subordinate agents without the knowledge of their respective Governments, mutually inaugurated an unauthorized, irregular, and unlawful war. In desisting from that war on her part, and in appealing to this Government for redress, Brazil rightly appreciated the character of the United States, and set an example worthy of emulation.

"The disposition of the captured crew of the Florida is determined upon the principles which I have laid down. Although the crew are enemies of the United States, and, as they contend, enemies of the human race, yet the offenders were, nevertheless, unlawfully brought into the custody of this Government, and therefore they could not lawfully be subjected here to the punishment which they have deserved. Nor could they, being enemies, be allowed to enjoy the protection of the United States. They will, therefore, be set at liberty, to seek a refuge wheresoever they may find it, with the hazard of recapture when beyond the jurisdiction of this Government.

"The Florida was brought into American waters, and was anchored, under naval surveillance and protection, at Hampton Roads. While awaiting the representation of the Brazilian Government, on the 28th November, she sunk, owing to a leak which could not be seasonably stopped. The leak was at first represented to have been caused, or at least increased, by a collision with a war-transport. Orders were immediately given to ascertain the manner and circumstances of the occurrence. It seemed to affect the army and the navy. A Naval Court of Inquiry and also a Military Court of Inquiry were charged with the investigation. The Naval Court has submitted its Report, and a copy thereof is herewith communicated. The Military Court is yet engaged. So soon as its labours shall have ended, the result will be made known to your Government. In the meantime it is assumed that the loss of the Florida was a consequence of some unforeseen accident, which cast no responsibility upon the United States."*

When this correspondonce, together with that which passed on the occasion of the Sumter, the Alabama, and the Florida, in 1862 and 1863, and which I have already referred to, is borne in mind, it is somewhat surprising that Brazil should be held up for our special admiration in contrast to the defective neutrality of Great Britain. Our worthy Brazilian Colleague will, I doubt not, appreciate the compliment thus paid to the country of which he is the distinguished representative.

* British Appendix, vol. i, p. 155.

I proceed to consider the facts relating to the Alabama, which, I am glad to say, can be brought into a much shorter compass than those relating to the Florida. We are now in possession of the whole history of this vessel, partly through the published journal of her commander; but in deciding whether Her Majesty's Government were wanting in due diligence in not seizing her, the Tribunal can look only to the facts as they existed at the time of her escape, and the amount of available evidence then forthcoming to justify and support her seizure.

There is no doubt that, from the beginning, the Alabama was a vessel intended for war, and constructed and adapted accordingly, although, as is stated in the Case of the United States, "she was designed as a scourge of the enemy's commerce rather than for battle."* We now know that from the beginning she was intended for the Confederate service. The fact that she was ordered by Bullock expressly for the Confederate States is no doubt true, but at the time in question this was wholly unknown to the British authorities.

Commenced in October or November 1861, by Messrs. Laird, the well-known ship-builders of Liverpool, the vessel, known then only by her number (290), was launched on the 15th May, 1862.

She had already attracted the attention of Mr. Dudley, whom we find writing about her to Mr. Secretary Seward on the day following her launch:—

"In a previous despatch I mentioned the fact that Messrs. Laird and Co. were building a gun-boat at Birkenhead, which I believed was intended for the Confederacy. This boat was launched yesterday; she will be, when finished, a very superior boat." He then gives a description of her, and winds up by saying, "There is no doubt but what she is intended for the rebels. This was admitted by one of the leading workmen in the yard; he said she was to be the sister to the Oreto, and for the same purpose and service."†

After this, Mr. Dudley remains quiet for a month; but on the 18th of June writes again:—

"The gun-boat building for the Confederates by Messrs. Lairds will soon be completed. She made a trial trip last Thursday. None of the press were invited. No one was admitted on board without a ticket. They were issued only to the persons actively engaged in aiding the rebellion. All the active persons and houses engaged in fitting out ships, &c., were represented on her. The New York papers have published articles stating that information of ships fitting out at this port is sent to our Government. These pieces have been copied in the newspapers here, and the effect has been to make the people much more careful and guarded. It is now difficult to obtain information about this vessel. They will not admit any one except those connected with the yard to go in."

After giving a full description of the vessel, he adds:—

"No pains or expense has been spared in her construction, and, when finished, she will be a very superior boat of her class. Indeed, they say there will be no better afloat. Her trial trip was entirely satisfactory. She will be finished and ready for her armament in about ten days or two weeks. I have not yet learned what it is to be. The platforms for the guns that are being made are such that the gun can be used on both sides of the vessel."‡

On the 21st of June, Mr. Dudley, who had been to London to see Mr. Adams, the United States' Minister, on the subject of this vessel, wrote, on the suggestion of

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* Page 365.

† United States' Documents, vol. vi, p. 373.

‡ Ibid., p. 374.

the latter, a letter to be forwarded by him to Her Majesty's Government. Writing to Mr. Seward on the 27th of June, Mr. Dudley says:—

"Being entirely satisfied in my own mind that this vessel was intended as a privateer for the rebel government, and that it was my duty to use every effort to prevent her sailing, I went up to London to confer with Mr. Adams. At his instance I drew up and addressed to him a note, a copy of which is inclosed, marked No. 1. He inclosed a copy of this, accompanied with an energetic note from himself to Earl Russell. Mr. Adams thinks there is a better feeling on the part of the Government toward us, and that they will now do what they can to conciliate us, and will stop the fitting out of this vessel. It is to be hoped that they will do it, as she would do much mischief to our commerce if she got out in some quarter distant from our cruizers. One of the Lairds, an active member of this firm, is a member of Parliament. This vessel is ready for sea, and if not prevented will sail before the end of next week. Captain Bullock will command her. She will enter upon the business as a privateer at once, and not attempt to run into a Southern port. It is said that her armament will consist of eleven guns, all of heavy calibre."*

Mr. Dudley's letter to Mr. Adams, under date of the 21st of June, was as follows:—

"The gun-boat now being built by the Messrs. Laird and Co., at Birkenhead, opposite Liverpool, and which I mentioned to you in a previous despatch, is intended for the so-called Confederate Government in the Southern States. The evidence I have is entirely conclusive to my mind. I do not think there is the least room for doubt about it. Beaufort and Caddy, two of the officers from the privateer Sumter, stated that this vessel was being built for the Confederate States. The foreman in Messrs. Laird's yard says she is the sister to the gun-boat Oreto, and has been built for the same parties and for the same purpose; when pressed for a further explanation he stated that she was to be a privateer for the 'Southern Government in the United States.' The captain and officers of the steamer Julia Usher, now at Liverpool, and which is loaded to run the blockade, state that this gun-boat is for the Confederates, and is to be commanded by Captain Bullock.

"The strictest watch is kept over this vessel; no person except those immediately engaged upon her is admitted into the yard. On the occasion of the trial trip made last Thursday week, no one was admitted without a pass, and these passes were issued to but few persons, and those who are known here as active Secessionists engaged in sending aid and relief to the rebels.

"I understand that her armament is to consist of eleven guns, and that she is to enter at once, as soon as she leaves this port, upon her business as a privateer.

"The vessel is very nearly completed; she has had her first trial trip. This trial was successful, and entirely satisfactory to the persons who are superintending her construction. She will be finished in nine or ten days. . . . .

"When completed and armed she will be a most formidable and dangerous craft; and, if not prevented from going to sea, will do much mischief to our commerce. The persons engaged in her construction say that no better vessel of her class was ever built."†

Transmitting this letter to Earl Russell on the 23rd of June, Mr. Adams, after adverting to the affair of the Oreto, goes on to say:—

"I am now under the painful necessity of apprising your Lordship that a new and still more powerful war steamer is nearly ready for departure from the port of Liverpool on the same errand. This vessel has been built and launched from the dockyard of persons, one of whom is now sitting as a Member of the House of Commons, and is fitting out for the especial and manifest object of carrying on hostilities by sea. It is about to be commanded by one of the insurgent agents, the same who sailed in the Oreto. The parties engaged in the enterprise are persons well known at Liverpool to be agents and officers of the insurgents in the United States, the nature and extent of whose labours are well explained in the copy of an intercepted letter of one of them which I received from my Government some days ago, and which I had the honour to place in your Lordship's hands on Thursday last.

"I now ask permission to transmit, for your consideration, a letter addressed to me by the Consul of the United States at Liverpool, in confirmation of the statements here submitted, and to solicit such action as may tend either to stop the projected expedition, or to establish the fact that its purpose is not inimical to the people of the United States."‡

The evidence which was conclusive to Mr. Dudley's mind, and left no doubt on it, and on which Mr. Adams asked for the seizure of the vessel, was wholly insufficient to justify such a proceeding. The statements of the two officers of the Sumter, and those of the captain and officers of the Julia Usher, then leaving Liverpool in order to run the blockade, and which Mr. Dudley could only produce at second hand, would have been unavailable in an English Court of Justice. The unsupported statement of a single workman from the shipbuilders' yard, even if such workman should be willing to reproduce it in the shape of evidence on oath, would have fallen short of what probably would have been deemed judicially requisite. The assertion of Mr. Adams "that the parties engaged in the enterprize were well known at Liverpool to be agents and officers

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* United States' Documents, vol. vi, p. 377. † Appendix to British Case, vol. i, p. 179.
‡ British Appendix, vol. i, p. 177.

of the insurgents," carried the case no further. It amounted only to a statement of general notoriety. A fact does not the less require to be proved by positive evidence because it may be generally reported.

The "intercepted letter" referred to by Mr. Adams was a letter from a Captain Caleb Huse, a Captain of Confederate artillery, on subjects connected with the supply of artillery and rifles.* The only parties in this country referred to in it are Fraser, Trenholm, and Co., who are mentioned as having placed the Bahama at his disposal for the transport of some batteries of artillery. It is stated in the United States' Case that the officers who were to serve in the Alabama were in England awaiting her completion and were paid their salaries monthly at Fraser, Trenholm, and Co.† But it is not stated, as I think it should have been, that this was not known at the time even by Mr. Dudley, much less by the British Government. The fact first came to light in the following April, when Yonge came forward to make disclosures.

Earl Russell having in due course referred the letters of Mr. Adams and Mr. Dudley to the Department of the Customs, the following Report was received by the Commissioners from the Surveyor of the port of Liverpool, under date of the 28th of June :—

"Sir, "*Liverpool, June* 28, 1862.

"I most respectfully beg to report that the vessel to which these papers refer has not escaped the notice of the Customs officers, but, as yet, nothing has transpired concerning her which appeared to demand a special Report

"The officers have at all times free access to the building-yards of the Messrs. Laird, at Birkenhead, where the said vessel is now lying, and there has been no attempt on the part of her builders to disguise what is most apparent to all—that she is intended for a ship of war.

"Agreeably with your directions I have personally inspected her, and find that she is rightly described in the communication of the United States' Consul, except that her engines are not on the oscillating principle. Her dimensions are as follows: length, 211 feet 6 inches; breadth, 31 feet 8 inches; depth, 17 feet 8 inches, and her gross tonnage by the present rule of admeasurement is $682\frac{31}{100}$ tons.

"She has several powder canisters on board, but neither guns nor carriages as yet.

"The current report of that vessel is that she has been built for a foreign Government, and that is not denied by the Messrs. Laird, with whom I have communicated upon the subject, but they do not appear disposed to reply to any question with reference to the destination of the vessel after she leaves this port, and we have no other reliable source of information.

"It will be in your recollection that the current report of the gun-boat Oreto was, that she had been built for a foreign Government, which vessel recently left this port under a British flag, without any guns or ammunition on board, as previously reported.

"I beg to add that any further information that may be obtained concerning the vessel referred to will be immediately reported, agreeably with your directions.

"Very respectfully,
(Signed) "E. MORGAN, *Surveyor.*"‡

The reports carrying the case no further, the Solicitor of the Customs advised the Board:—

"At present there is not sufficient to show that the vessel in question falls within the provisions of the 7th section of the Foreign Enlistment Act, or to give the Board of officers of this revenue power to interfere in this case. The officers at Liverpool have acted discreetly in keeping a watch upon her, and should continue to do so, immediately reporting to the Board any circumstances that they may consider to call for directions, or advisable to bring under the Board's notice; but the officers ought not to move in the matter without the clearest evidence of a distinct violation of the Foreign Enlistment Act, nor unless at a moment of great emergency, the terms of the Act being extremely technical, and the requirements as to intent being very rigid. It may be that the ship, having regard to her cargo as contraband of war, might be unquestionably liable to capture and condemnation, yet not liable to detention under the Foreign Enlistment Act, and the seizors might entail upon themselves very serious consequences.

"*June* 30, 1862." (Signed) "F. J. HAMEL.‡

The Commissioners of Customs concurred in opinion with their legal adviser. In their Report to the Lords of the Treasury, they add:—

"With reference to the statement of the United States' Consul, that the evidence he has in regard to this vessel being intended for the so-called Confederate Government in the Southern States is entirely conclusive to his mind, we would observe that, inasmuch as the officers of Customs of Liverpool would not be justified in taking any steps against the vessel unless sufficient evidence to warrant her detention should be laid before them, the proper course would be for the Consul to submit such evidence as he possesses to the Collector at that port, who would thereupon take such measures as

* British Appendix, vol. i, p. 178. † Ibid., p. 366. ‡ Ibid., p. 183.

The Alabama.

At Liverpool.

the provisions of the Foreign Enlistment Act would require. Without the production of full and sufficient evidence to justify their proceedings, the seizing officers might entail on themselves and on the Government very serious consequences."*

In forwarding these Reports to Mr. Adams, Earl Russell, in a note of the 7th July to Mr. Adams, suggests to Mr. Adams "to instruct the United States' Consul at Liverpool to submit to the Collector of Customs at that port such evidence as he may possess tending to show that his suspicions as to the destination of the vessel in question were well founded."†

Mr. Adams accordingly wrote to Mr. Wilding, the American Vice-Consul at Liverpool, inclosing a copy of Earl Russell's note, requesting him to "communicate as soon as may be any evidence which he could readily command in aid of the object designated."

Referring to the requisition thus made, Mr. Dudley, in a despatch to Mr. Seward of the 9th July, writes:—

"I do not think the British Government are treating us properly in this matter. They are not dealing with us as one friendly nation ought to deal with another. When I, as the Agent of my Government, tell them, from evidence submitted to me, that I have no doubt about her character, they ought to accept this until the parties who are building her and who have it in their power to show if her destination and purpose are legitimate and honest, do so. It is a very easy matter for the Messrs. Laird and Co. to show for whom they are building her, and to give such information as to her purpose as to be satisfactory to all parties. The burden of proof ought not to be thrown upon us. In a hostile community like this it is very difficult to get information at any time upon these matters, and if names are to be given it would render it almost impossible. The Government ought to investigate it and not call on us for proof."‡

Notwithstanding the view thus expressed that his belief as to her destination was sufficient to call for the seizure of the vessel, Mr. Dudley, on the same day, addressed the following communication to the Collector of Customs:—

"Sir, "*Liverpool, July* 9, 1862.

"In accordance with a suggestion of Earl Russell in a communication to Mr. Adams, the American Minister in London, I beg to lay before you the information and circumstances which have come to my knowledge relative to the gun-boat now being fitted out by Messrs. Laird, at Birkenhead, for the Confederates of the Southern United States of America, and intended to be used as a privateer against the United States.

"On my arrival, and taking charge of the Consulate at Liverpool in November last, my attention was called by the Acting Consul and by other persons to two gun-boats being or to be fitted out for the so-called Confederate Government: the Oreto, fitted out by Mr. Miller and Messrs. Fawcett, Preston and Co., and the one now in question. Subsequent events fully proved the suspicion with regard to the Oreto to be well founded; she cleared from Liverpool in March last for Palermo and Jamaica, but sailed direct for Nassau, where she now is receiving her armament as a privateer for the so-called Confederate Government; and my attention was called repeatedly to the gun-boat building by Mr. Laird by various persons, who stated that she also was for a Confederate privateer, and was being built by the Messrs. Lairds for that express purpose.

"In May last two officers of the Southern privateer Sumter, named Caddy and Beaufort, passed through Liverpool on their way to Havana and Nassau, and while here stated that there was a gun-boat building by Mr. Laird, at Birkenhead, for the Southern Confederacy; and not long after that a foreman employed about the vessel in Mr. Laird's yard stated that she was the sister of the Oreto, and intended for the same service, and when pressed for an explanation further stated that she was to be a privateer for the Southern Government in the United States.

"When the vessel was first tried, Mr. Wellsman, one of the firm of Fraser, Trenholm, and Co. (who are well known as agents for the Confederate Government), Andrew and Thomas Byrne, and other persons, well known as having been for months actively engaged in sending munitions of war for said Government, were present, and have accompanied her on her various trials, as they had accompanied the Oreto on her trial trip and on her departure.

"In April last the Southern screw-steamer Annie Childs, which had run the blockade out of Charleston, and the name of which was changed at this port to the Julia Usher, was laden with munitions of war, consisting of a large quantity of powder, rifled cannon, &c., by Messrs. Fraser, Trenholm, and Co., for the Southern Confederacy, and left Liverpool to run the blockade under the command of a Captain Hammer, and having on board several of the crew of the privateer Sumter, to which I have before referred.

"For some reason unknown this vessel came back and is now here. Since her return a youth named Robinson, who had gone in her as a passenger, has stated that the gun-boat building at Laird's for the Southern Confederacy was a subject of frequent conversation among the officers while she (the Julia Usher) was out. That she was all the time spoken of as a Confederate vessel; that Captain Bullock was to command her; that the money for her was advanced by Fraser, Trenholm, and Co.; that she was not to make any attempt to run the blockade, but would go at once as a privateer; that she was to mount eleven guns; and that if the Julia Usher was not going, the six men from the Sumter, who were on board the Julia Usher, were to join the gun-boat. This youth, being a native of New

* British Appendix, vol. i, p. 182. † Ibid., p. 184.
‡ United States' Documents, vol. vi, p. 382.

Orleans, was extremely anxious to get taken on board the gun-boat, and wished the person he made the communication to, to assist him and see Captain Bullock on his behalf. He has, I understand, been removed to a school in London. With reference to his statement, I may observe that Captain Hammer referred to is a South Carolinian, has been for many years in Fraser, Trenholm, and Co.'s employ, is greatly trusted by them, and is also intimate with Captain Bullock, so that he would be likely to be well informed on the subject: and as he had no notion at that time of returning to Liverpool, he would have no hesitation in speaking of the matter to his officers, and the persons from the Sumter. I may also state that Captain Bullock referred to is in Liverpool; that he is an officer of the Confederate Navy, that he was sent over here for the express purpose of fitting out privateers and sending over munitions of war; that he transacts his business at the office of Fraser, Trenholm, and Co.; that he has been all the time in communication with Fawcett, Preston, and Co., who fitted out the Oreto, and with Laird's, who are fitting out this vessel; that he goes almost daily on board the gun-boat, and seems to be recognized as in authority.

"A Mr. Blair, of Paradise Street, in this town, who furnished the cabins of the Laird gun-boat, has also stated that all the fittings and furniture were selected by Captain Bullock, and were subject to his approval, although paid for by Mr. Laird.

"The information on which I have formed an undoubting conviction that this vessel is being fitted out for the so-called Confederate Government, and is intended to cruize against the commerce of the United States, has come to me from a variety of sources, and I have detailed it to you as far as practicable. I have given you the names of persons making the statements, but as the information in most cases is given to me by persons out of friendly feeling to the United States, and in strict confidence, I cannot state the names of my informants; but what I have stated is of such a character that little inquiry will confirm its truth.

"Everything about the vessel shows her to be a war vessel; she has well constructed magazines; she has a number of canisters of a peculiar and expensive construction for containing powder; she has platforms already screwed to her decks for the reception of swivel guns. Indeed, the fact that she is a war vessel is not denied by Messrs. Laird, but they say she is for the Spanish Government. This they stated on the 3rd of April last, when General Burgoyne visited their yard, and was shown over it and the various vessels being built there by Messrs. John Laird, junior, and Henry H. Laird, as was fully reported in the papers at the time.

"Seeing the statement, and having been already informed from so many respectable sources that she was for the so-called Confederate Government, I at once wrote to the Minister in London to ascertain from the Spanish Embassy whether the statement was true. The reply was a positive assurance that she was not for the Spanish Government. I am therefore authorized in saying that what was stated on that occasion, as well as statements since made that she is for the Spanish Government, are untrue.

"I am satisfied beyond a doubt that she is for a Confederate war-vessel.

"If you desire any personal explanation or information, I shall be happy to attend you whenever you may request it."*

Of the statements contained in the foregoing letter the greater part could not have been made available in an English Court. For the reasons I have already mentioned the loose statements made to Mr. Dudley by persons unnamed; the unauthorized statements of Caddy and Beaufort, on their way through Liverpool; the loose conversations and equally unauthorized statements of the officers on board the Annie Childs, reported by the youth Robinson, who had been removed to a school in London, nobody knew where, would all have been inadmissible according to English procedure. The fact that particular persons, supposed to be connected with the Confederates, had gone out in the vessel on her trial trip was equally worthless. But there were other facts which were of a different stamp and deserved more attention than they appear to have received.

The Collector returned for answer, that he should immediately submit Mr. Dudley's communication to the London Board, adding, however, his own opinion that the statement made by that gentleman "was not such as could be acted upon by the officers of the revenue, unless legally substantiated by evidence."† Forwarding Mr. Dudley's communication to the Board of Customs, Mr. Edwards incloses a report from Mr. Morgan, the Surveyor, saying, that he has inspected the steamer; that she is in the same state as regards her armament as on the date of his former report, having no guns or carriages on board, nor were her platforms fitted to the deck. "If," says Mr. Edwards, "she is for the Confederate service, the builders and parties interested are not likely to commit themselves by any act which would subject them to the penal provisions of the Foreign Enlistment Act."‡

The Solicitor of the Customs adopted the views of the Collector, and thus advised the Board:—

"There is only one proper way of looking at this question. If the Collector of Customs were to detain the vessel in question, he would no doubt have to maintain the seizure by legal evidence in a

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* British Appendix, vol. i, p. 185. † Ibid., p. 186. ‡ Ibid., p. 184.

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Court of Law, and to pay damages and costs in case of failure. Upon carefully reading the statement, I find that the greater part, if not all, is hearsay and inadmissible, and as to a part the witnesses are not forthcoming or even to be named. It is perfectly clear to my mind that there is nothing in it amounting to *primâ facie* proof sufficient to justify a seizure, much less to support it in a Court of Law, and the Consul could not expect the Collector to take upon himself such a risk in opposition to rules and principles by which the Crown is governed in matters of this nature.

(Signed) "F. J. HAMEL.*

"*July* 11, 1862."

Acting on this advice, the Commissioners of the Customs acquainted Mr. Edwards that there did not appear to be *primâ facie* proof in the statement of the Consul sufficient to justify the seizure of the vessel, and directed him to apprize the Consul accordingly.

This having been communicated to Mr. Dudley, we find him writing to Mr. Adams on the 11th of July:—

"The Collector seems disposed to hold our Government to as strict a rule as if we were in a Court of Justice. We are required to furnish legal evidence (I take it this is his meaning, though it is involved in some obscurity), that is, that the onus is upon us to prove and establish by legal evidence that this vessel is intended as a privateer. If this is to be taken as the answer of the Government, it is hardly worth spending our time in making further application to them. They show that their neutrality is a mere pretence, and that the United States cannot expect anything like impartiality and fairness at their hands.

"When the United States' Government, through its acknowledged Representatives, say to the British Government that it is satisfied that a particular vessel, which is being built at a certain place in the Kingdom by certain parties who are their own subjects, is intended as a privateer for the rebel Government, it is the duty of that Government to call upon the parties who are fitting out the vessel, to tell them what the charge is, and require them to state for whom and what purpose she is being built, and if the charge is admitted or shown to be true, to stop her sailing. Our Government has a right, it seems to me, not only to expect but to require this much of another friendly Government. And if there was any disposition to do right and act honestly, this much at least would be accorded. I inclose a description of the inside of this vessel."†

The pretension thus put forward by Mr. Dudley in this and in his former letter, that as soon as the agent of a foreign State declares his conviction that a vessel is being built for another belligerent, it becomes the duty of the neutral Government to call on the parties engaged in building her to show that her destination is lawful, and if they do not do so, to seize her, is one which cannot be admitted. It proceeds on an entirely mistaken notion of the powers of a Constitutional Government in a free State. As I have already pointed out, by the then existing Law of Great Britain, as by that of America, a vessel could only be seized with a view to its being brought forthwith into a competent Court with a view to its condemnation; nor could the Government call on the parties interested in the vessel to show that the purpose for which she was being built was a lawful one, till they had made out in a Court of Justice at least a sufficient *primâ facie* case to call upon these parties for an answer.

But it is a very different thing to say that when persons capable of giving evidence are expressly named, and sources of information are pointed out from which the truth may be ascertained, the Authorities are to sit with their arms folded, and do nothing towards satisfying themselves whether a vessel is one the unlawful purpose of which it is their duty to frustrate by seizure; and although the British Government had no power to insist compulsorily on explanations being given by shipbuilders as to the destination of a particular vessel, yet I can see no reason why, in a case of suspicion, official application might not be made to the builders to relieve the Government from its embarrassment by stating for whom the vessel was being built. If an answer were given to such an application, its truth could generally be tested. If all explanation were refused, or if that which was given turned out on inquiry to be untrue, the evidence against the vessel would become strongly confirmed. It is true the builders of this vessel appear to have been very shy of answering inquiries about her, but I do not find that any inquiry of an official character was ever addressed to Messrs. Laird. If it had been, the high character of these gentlemen would doubtless have insured either a refusal to answer or a truthful answer. The former would have helped materially to establish a case against the vessel, the latter would have justified her immediate seizure.

But besides the omission to make any official inquiry of the builders, no attempt appears to have been made to utilize the reference to persons specified by Mr. Dudley—a subject to which I shall return presently.

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* British Appendix, vol. vi, p. 187.
† United States' Documents, vol. i, p. 386.

The Alabama.
At Liverpool.

Under these circumstances Mr. Adams hit on the happy idea of employing a solicitor to get up the case in a business-like manner; and a Mr. Squarey, an active solicitor of Liverpool, was retained for the prosecution. This gentleman, in spite of difficulties, soon succeeded in discovering evidence. "The difficulty we have had to contend with," writes Mr. Dudley to Mr. Seward, "was to get direct proof. There were men enough who knew about her, and who understood her character, but they were not willing to testify, and in a preliminary proceeding like this it was impossible to obtain process to compel them. Indeed, no one in a hostile community like Liverpool, where the feeling and sentiment are against us, would be a willing witness, especially if he resided there, and was in any way dependent on the people of that place for a livelihood."* All this no doubt was true, but then it should not be forgotten that exactly the same difficulty, arising both from the unwillingness of the witnesses to come forward and the absence of process to compel them, stood in the way of the local Authorities just as much as it did in that of Mr. Dudley and Mr. Squarey.

On the 21st of July, however, Mr. Dudley with his solicitor waited on Mr. Edwards with six depositions, one of which, that of a man named Passmore, went directly to the point to show that the vessel was intended for the Confederate service. It was shown by the affidavit of an articled clerk of Mr. Squarey that he had examined the Birkenhead Dock-master's book, and found an entry relating to a screw steamer, No. 290, the number of the vessel in question, of the registered tonnage of 500 tons, from which entry it appeared that the name of her master was Matthew J. Butcher.

Then Passmore deposed as follows:—

"I, William Passmore, of Birkenhead, in the county of Chester, mariner, make oath and say as follows:—

"1. I am a seaman, and have served as such on board Her Majesty's ship Terrible during the Crimean War.

"2. Having been informed that hands were wanted for a fighting-vessel built by Messrs. Laird and Co., of Birkenhead, I applied on Saturday, which was, I believe, the 21st day of June last, to Captain Butcher, who, I was informed, was engaging men for the said vessel, for a berth on board her.

"3. Captain Butcher asked me if I knew where the vessel was going, in reply to which I told him I did not rightly understand about it. He then told me the vessel was going out to the Government of the Confederate States of America. I asked him if there would be any fighting, to which he replied, yes, they were going to fight for the Southern Government. I told him I had been used to fighting-vessels, and showed him my papers. I asked him to make me signalman on board the vessel, and, in reply, he said that no articles would be signed until the vessel got outside, but he would make me signalman, if they required one, when they got outside.

"4. The said Captain Butcher then engaged me as an able seaman on board the same vessel, at the wages of 4*l.* 10*s.* per month; and it was arranged that I should join the ship in Messrs. Laird and Co.'s yard on the following Monday. To enable me to get on board, Captain Butcher gave me a password, the number '290.'

"5. On the following Monday, which was, I believe, the 23rd of June last, I joined the said vessel in Messrs. Laird and Co.'s yard at Birkenhead, and I remained by her till Saturday last.

"6. The said vessel is a screw-steamer of about 1,100 tons burthen, as far as I can judge, and is built and fitted up as a fighting-ship in all respects; she has a magazine and shot and canister-racks on deck, and is pierced for guns, the sockets for the bolts of which are laid down. The said vessel has a large quantity of stores and provisions on board, and she is now lying at the Victoria Wharf in the great float at Birkenhead, where she has taken in about 300 tons of coal.

"7. There are now about thirty hands on board her, who have been engaged to go out in her; most of them are men who have previously served on board fighting-ships; and one of them is a man who served on board the Confederate steamer Sumter. It is well known by the hands on board that the vessel is going out as a privateer for the Confederate Government to act against the United States under a commission from Mr. Jefferson Davis. Three of the crew are, I believe, engineers; and there are also some firemen on board.

"8. Captain Butcher and another gentleman have been on board the ship almost every day. It is reported on board the ship that Captain Butcher is to be the sailing-master, and that the other gentleman, whose name, I believe, is Bullock, is to be the fighting captain.

"9. To the best of my information and belief, the above-mentioned vessel, which I have heard is to be called the Florida, is being equipped and fitted out, in order that she may be employed in the service of the Confederate Government in America, to cruize and to commit hostilities against the Government and people of the United States of America.

(Signed) "WILLIAM PASSMORE.

"Sworn before me at the Custom-house, Liverpool, this 21st day of July, 1862.
(Signed) "S. PRICE EDWARDS, *Collector*."†

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* United States' Documents, vol. vi, p. 390.
† Appendix to British Case, vol. i, p. 189.

The Alabama.
At Liverpool.

Thus it appeared that the registered captain of the vessel, and who was in charge of her, had actually engaged a seaman expressly for the service of the Confederate States. The other depositions went strongly to show that Captain Bullock was the agent of the Confederate Government; that he had superintended the building of the vessel, selecting the timber to be used for her, and directing and giving orders to the workmen; and, this being so, that he had proposed to one Brogan, an apprentice in the shipbuilding yard of Messrs. Laird, and Co., to enter as carpenter's mate on board the vessel.

Now, if this evidence could be relied on, it established a strong case against the vessel, and afforded sufficient reason for seizing her. I by no means go the length of saying that a public prosecutor is bound to accept as trustworthy evidence the statements of witnesses furnished to him by a party interested, till he has had an opportunity of satisfying himself that the evidence is deserving of credit. But here the officer whose business it was, neither acted nor inquired. He made no inquiry in the first instance of the workman in Messrs. Laird's yard, who appears to have been willing to speak. The important statement that it had been represented to General Burgoyne, when visiting the yard, that the vessel was being built for the Spanish Government, while the Spanish Minister in London denied the fact, was not followed up. When the evidence of Passmore and Brogan was brought before him, he took no trouble to communicate with these witnesses with the view of satisfying himself of the truth of their statements.

The blame of this inaction, however, attaches rather to those under whose direction Mr. Edwards proceeded, than to himself. He cannot, I think, be justly blamed for having sought for and acted under the directions of his superiors in London in an affair of so much importance.

The legal advisers of the Customs Department of the Government did not see in the evidence submitted to them sufficient to justify the seizure of the ship. The Assistant Solicitor reports as follows:—

"In my opinion there is not sufficient evidence in this case to justify the detention of the vessel under the 59 George III, c. 69. The only affidavit that professes to give anything like positive evidence is that of the seaman Passmore; but, assuming all he states to be true, what occurred between the reputed master (Butcher) and himself would not warrant a detention under section 6, nor support an information for the penalty under that section. Nor do I think, however probable it may seem that the vessel is fitted out for the military operations mentioned, that sufficient evidence has been adduced to entitle the applicants to the interference of the Collector of Cnstoms at Liverpool. The only justifiable grounds of seizure under section 7 of the Act would be the production of such evidence of the fact as would support an indictment for the misdemeanour under that section.

"*Customs, July* 22, 1862." (Signed) "J. O'Dowd.*

This report of the Assistant Solicitor was upheld by his principal:—

"I entirely concur with Mr. O'Dowd in opinion that there is not sufficient evidence to warrant the seizure or detention of the ship by the officers of Customs. There appears to be some evidence of enlistment of individuals, and if that were sufficient to satisfy a Court, they would be liable to pecuniary penalties, for security of which, if recovered, the Customs might detain the ship until those penalties were satisfied or good bail given; but there is not evidence enough of enlistment to call upon the Customs to prosecute. The United States' Consul or any other person may do so at their own risk, if they see fit.

"*July* 22, 1862." (Signed) "F. J. Hamel.†

The Commissioners adopted the views of their advisers, and on the 22nd of July reported to the Lords of the Treasury accordingly, but accompanied their Report with the very proper suggestion that should their Lordships entertain any doubt upon the subject, the opinion of the Law Officers should be taken. The papers were forwarded by the Treasury to the Foreign Office without a moment's delay, in order that the opinion of Lord Russell might be taken, as appears from a note from the Secretary of the Treasury to the Under-Secretary of State for Foreign Affairs:—

"My dear Mr. Layard, "*Treasury, July* 22, 1862.

"As the communication may be considered pressing, I send it to you unofficially to save time. Perhaps you will ascertain from Lord Russell whether it is his wish that we should take the opinion of the Law Officers as to the case of this vessel. It is stated that she is nearly ready for sea.

"Sincerely yours,
(Signed) "Geo. A. Hamilton."‡

* Appendix to United States' Case, vol. I, p. 192. † Ibid., p. 193. ‡ Ibid., p. 188.

The depositions of Passmore and the others were transmitted also by Mr. Adams to Earl Russell, with the accompanying note:—

"My Lord, "*Legation of the United States, London, July* 22, 1862.

"I have the honour to transmit copies of six depositions taken at Liverpool, tending to establish the character and destination of the vessel to which I called your Lordship's attention in my note of the 23rd of June last.

"The originals of these papers have already been submitted to the Collector of the Customs at that port, in accordance with the suggestions made in your Lordship's note to me of the 4th of July, as the basis of an application to him to act under the powers conferred by the Enlistment Act. But I feel it to be my duty further to communicate the facts as there alleged to Her Majesty's Government, and to request that such further proceedings may be had as may carry into full effect the determination which I doubt not it ever entertains to prevent, by all lawful means, the fitting out of hostile expeditions against the Government of a country with which it is at peace.

"I avail, &c.

(Signed) "CHARLES FRANCIS ADAMS."*

The papers were submitted to the Law Officers on the 23rd, with a request for their answer at their earliest convenience.

In the mean time Mr. Squarey had procured two other important depositions: the one that of a ship's carpenter, named Roberts, who stated that he had been engaged as carpenter's mate on board this vessel, and had seen Captain Butcher by appointment, and that Captain Butcher had spoken to the boatswain about him; and that it was generally understood on board of the vessel that she was going to Nassau for the Southern Government;† the other an affidavit of Robert John Taylor, which was still more to the purpose. This man, an Englishman by birth, but living at Mobile, had been captured in attempting to run the blockade, and was now desirous of taking service, whereby to get back to Mobile. The material part of his statement was as follows:—

"Mr. Rickarby, of Liverpool, a brother of the owner, at Mobile, of the vessel in which I was captured when attempting to run the blockade, gave me instructions to go to Captain Butcher at Laird's yard, Birkenhead. I had previously called on Mr. Rickarby, and told him that I wanted to go South, as the Northerners had robbed me of my clothes when I was captured, and I wanted to have satisfaction.

"I first saw Captain Butcher at one of Mr. Laird's offices last Thursday fortnight (namely, the 3rd of July last). I told him that I had been sent by Mr. Rickarby, and asked him if he were the captain of the vessel which was lying in the dock. I told him that I was one of the men that had been captured in one of Mr. Rickarby's vessels, and that I wanted to get South in order to have retaliation of the Northerners for robbing me of my clothes. He said that if I went with him in his vessel I should very shortly have that opportunity.

"Captain Butcher asked me at the interview if I was well acquainted with the Gulf ports, and I told him I was. I asked him what port he was going to, and he replied that he could not tell me then, but that there would be an agreement made before we left for sea. I inquired as to the rate of wages, and I was to get 4*l.* 10*s.* per month, payable weekly.

"I then inquired if I might consider myself engaged, and he replied, Yes, and that I might go on board the next day, which I accordingly did; and I have been working on board up to last Saturday night."‡

These depositions were properly forwarded by Mr. Squarey to Mr. Gardner, the Secretary to the Board of Customs, together with an opinion which had been given by Mr., now Sir Robert, Collier, on the whole Case, and which was in these terms:—

"I have perused the above affidavits, and I am of opinion that the Collector of Customs would be justified in detaining the vessel. Indeed, I should think it his duty to detain her; and that if, after the application which has been made to him, supported by the evidence which has been laid before me, he allows the vessel to leave Liverpool, he will incur a heavy responsibility—a responsibility of which the Board of Customs, under whose directions he appears to be acting, must take their share.

"It appears difficult to make out a stronger case of infringement of the Foreign Enlistment Act, which, if not enforced on this occasion, is little better than a dead letter.

"It well deserves consideration whether, if the vessel be allowed to escape, the Federal Government would not have serious grounds of remonstrance.

(Signed) "R. P. COLLIER.‡

"*Temple, July* 23, 1862."

Notwithstanding this additional evidence, and the decided opinion of Mr. Collier, strange to say, the Assistant Solicitor to the Customs remained unshaken in his opinion. He reports on the 23rd:—

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* Appendix to British Case, vol. i, p. 198.
† British Appendix, vol. i, p. 189. ‡ Ibid., p. 196.

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"I have read the additional evidence, and I do not think that it materially strengthens the case of the applicants. As regards the opinion of Mr. Collier, I cannot concur in his views; but, adverting to the high character which he bears in his profession, I submit that the Board might act judiciously in recommending the Lords of the Treasury to take the opinion of the Law Officers of the Crown.

"*July* 23, 1862." (Signed) "J. O'DOWD.*

These papers were immediately submitted to the Law Officers.

On the 25th of July came a further affidavit from Mr. Squarey, that of a man named Redden, who deposed as follows:—

"I am a seaman, and have followed the sea for fifteen years. I have been boatswain on board both steamers and sailing-vessels, and belong to the Naval Reserve.

"About six weeks ago I was engaged by Captain Butcher (with whom I had previously sailed) as boatswain on board a vessel then in Messrs. Laird and Co.'s ship-building yard, but now lying in the Birkenhead float, and known by the name No. 290. The said Captain Butcher offered me 10*l.* per month, and said an agreement should be signed when we got outside. He told me that we should have plenty of money when we got home, as we were going to the Southern States on a speculation to try and get some.

"The crew now on board the said vessel consists of about forty men, but I believe that she will take to sea about 100 men, all told. It is generally understood on board that she will clear for Nassau, but not make that port. The said vessel has all her stores and coals on board ready for sea. She is fitted in all respects as a man-of-war, to carry six broadside-guns and four pivots, but has no guns or ammunition on board as yet. The rules on board are similar to those in use on a man-of-war, and the men are not allowed to sing as they do on a merchantman. The call is used on board. The said vessel is of about 1,100 tons burthen.

"I know Captain Bullock. He has been superintending the building of the said vessel in Messrs. Laird and Co.'s yard, and is, I believe, to take charge of the vessel when we get outside.

"It is generally understood on board the said vessel that she belongs to the Confederate Government.

(Signed) "HENRY REDDEN.†

Nevertheless, Mr. O'Dowd still clings to his opinion with the pertinacity with which men sometimes persist in adhering to an opinion once formed. He says:—

"I submit a reference to my former Reports, to the opinions expressed in which I feel still bound to adhere. So far from giving additional force to the application, the affidavit of Henry Redden appears to me to weaken it, as, after the lapse of several days since the date of the former affidavits, the applicants are confessedly unable to make out a better justification for detaining the vessel. It is, no doubt, difficult to procure satisfactory evidence in such a case; but, in the absence of at least a clear *primâ facie* case there cannot exist those grounds for detaining the vessel which the Foreign Enlistment Act contemplates.

"*Customs, July* 25, 1862." (Signed) "J. O'DOWD.‡

There was, however, abundant evidence to make out a *primâ facie* case; and of that opinion were the Law Officers of the Crown, who, on the 29th of July, reported as follows:—

"In our opinion, the evidence of the witnesses who have made depositions (we allude particularly to William Passmore, Edward Roberts, Robert John Taylor, and Henry Redden), coupled with the character and structure of the vessel, makes it reasonably clear that such vessel is intended for warlike use, against citizens of the United States, and in the interest of the (so-called) Confederate States. It is not, and cannot, be denied that the vessel is constructed and adapted as a vessel of war; being pierced for guns, the sockets for the bolts for which, Passmore states, are already laid down, and having a magazine, and shot and cannister racks on the deck, and a certain number of cannisters being actually on board. It is also stated in the Report of the Commissioners of Customs of July 1st that Messrs. Laird, the builders, do not deny that the vessel has been built for some 'foreign Government,' although they maintain apparently a strict reserve as to her actual destination, and as to the 'foreign Government,' in particular, for whose service she is intended. We do not overlook the facts that neither guns nor ammunition have as yet been shipped; that the cargo (though of the nature of naval stores in connection with war-steamers) may yet be classed as a mercantile cargo; and that the crew do not appear to have been, in terms and form at least, recruited or enrolled as a military crew. It is to be expected that great stress will be laid upon these circumstances by the owners and others who may oppose the condemnation of the vessel if seized by the officers of the Customs; and an argument may be raised as to the proper construction of the words which occur in the 7th section of the Foreign Enlistment Act, 'equip, furnish, fit out, or arm,' which words, it may be suggested, point only to the rendering a vessel, whatever may be the character of its structure, presently fit to engage in hostilities. We think, however, that such a narrow construction ought not to be adopted: and, if allowed, would fritter away the Act, and give impunity to open and flagrant violations of its provisions. We, therefore, recommend that without loss of time the vessel be seized by the proper authorities, after which an opportunity will be afforded to those interested, previous to condemnation, to alter the facts,

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* British Appendix, vol. i, p. 197, † Ibid., p. 198. ‡ Ibid., p. 199.

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if it may be, and to show an innocent destination of the ship. In the absence of any such countervailing case, it appears to us that the vessel, cargo, and stores may be properly condemned."*

Unfortunately, the report of the Law Officers came too late. Before the necessary orders to seize the vessel could be issued, a telegraphic message from Liverpool announced that she had gone out of dock the night before (the 28th), and had left the port that morning (the 29th). She left under the pretence of making a trial trip, but stood out to sea, and never returned.

Upon these facts it appears to me impossible to say that in respect of this vessel there was not an absence of "due diligence" on the part of the British authorities. The delay which occurred in the furnishing of the Report of the Law Officers is no doubt to be attributed to the illness of the Queen's Advocate, referred to in the Case of the United States—an illness unhappily affecting his mental faculties, and which necessitated his entire withdrawal from public life. As senior in standing of the Law Officers, the papers would be sent to him in the first instance.

From a letter from Mr. Adams to Mr. Seward, of the 1st of August, 1872, it appears that, in the interview had by the former with Lord Russell on the previous day, Lord Russell had explained to him that a delay in determining on the course to be taken with respect to the Alabama had most unexpectedly been caused by the sudden development of a malady of the Queen's Advocate, Sir John Harding, totally incapacitating him for the transaction of business, and that this had made it necessary to call in other parties, whose opinion had been at last given for the detention of the gun-boat.* Upon this, it is observed in the Argument of the United States, that no opinion of the Law Officers was signed by the Queen's Advocate after the 30th of June, whence, it is said, the United States infer that that officer "was unable to attend to his duties as early as that date," and, it is added with an ungenerous sneer, "they infer that it was not necessary to call *in* new parties, but to call *upon* the old."† The unworthy insinuation here meant to be conveyed is that Lord Russell stated that which was untrue—an insinuation which will be treated as it deserves by every one who knows him. It is obvious that Mr. Adams must, in this particular, have misunderstood his Lordship. The accompanying explanation of the circumstances attending the delay in the delivery of the opinion of the Law Officers on the occasion in question has been handed to the Tribunal by Sir Roundell Palmer, and is beyond doubt the true explanation:—

"Sir John Harding was ill from the latter part of June 1862, and did not, after that time, attend to Government business. It was not, however, known, till some weeks afterwards, that he was unlikely to recover: nor did the disorder undergo, till the end of July, such a development as to make the Government aware that the case was one of permanent mental alienation.

"Although, when a Law Officer was ill, he would not be troubled with ordinary business, it was quite consistent with probability and experience that, in a case of more than usual importance, it would be desired, if possible, to obtain the benefit of his opinion. Under such circumstances, the papers would naturally be sent to his private house: and, if this was done, and if he was unable to attend to them, some delay would necessarily take place before the impossibility of his attending to them was known.

"Lord Russell told Mr. Adams (31 July, 1862,) that some delay had, in fact, occurred with respect to the Alabama, in consequence of Sir John Harding's illness. He could not have made the statement, if the fact were not really so: because whatever the fact was, it must have been, at the time, known to him. The very circumstance, that Sir J. Harding had not already advised upon the case in its earlier stage, might be a reason why it should be wished to obtain his opinion.

"Sir J. Harding, and his wife, are both (some years since) dead: so are Sir W. Atherton (the then Attorney-General) and his wife: no information, therefore, as to the circumstances which may have caused delay, with respect to the delivery at their private houses, or the transmission and consideration, of any papers on this subject, can now be obtained from them.

"The then Solicitor-General was Sir R. Palmer, who is able to state positively that the first time he saw or heard of the papers sent to the Law Officers (*i.e.*, all three Law Officers) on the 23rd and 25th or 26th of July was on the evening of Monday the 28th of July, when he was summoned by the Attorney-General, Sir W. Atherton, to consider them in consultation, and when the advice to be given to the Government was agreed upon. Sir R. Palmer thinks it his duty to add, that no Government ever had a more diligent, conscientious, and laborious servant than Sir W. Atherton: and that it is in the last degree unlikely, that he would have been guilty of any negligence or unnecessary delay in the consideration of papers of such importance."

As I think that a Government, in the habit, according to its constitutional

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* British Appendix, vol. i, p. 201. † United States' Documents, vol. vi, p. 414.
‡ Ibid., p. 191.

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practice, of consulting its Legal Advisers before taking action on matters of importance, would be entitled to reasonable time for doing so on such an occasion as this, and would not be liable for delay occasioned by an unforeseen accident, I should not have been prepared to say, had the delay in the Report of the Law Officers thus arising been the sole cause of the delay in ordering the seizure of this vessel, that a delay arising from such an accident could properly be attributed to a want of "due diligence" in the Government. The want of "due diligence," on which my judgment in respect of the Alabama rests, is to be found further back. I entirely agree with Sir Robert Collier that it was the duty of the Collector of Customs at Liverpool, as early as the 22nd of July, to detain this vessel. When for his better guidance and protection the Collector sought the directions of his superiors,—for which I can scarcely blame him, although the case appeared clear enough,—it became, in my opinion, the duty of the Commissioners of Customs at once to direct the seizure to be made. Misled by advice which they ought to have rejected as palpably erroneous, they unfortunately refused to cause the vessel to be seized. The matter properly belonged to their Department; it was competent to them to act independently of any other Department of the State; and the case, as it seems to me, was too clear to require the opinion of the Law Officers, although, after the decision of the Commissioners, it might well be deemed proper on the part of the Heads of the Government to consult the Law Officers before acting in opposition to it.

At the same time, I must not be understood as holding that a mere error in judgment amounts to negligence. Questions present themselves in the business of life so difficult of decision that the wisest and the ablest men are apt to err in respect of them. *Humanum est errare.* In such cases the question must always be one of degree. But here I cannot help thinking that the mistake was such as to carry with it legal responsibility as its consequence. I readily admit that, in a case of doubt, a public department may properly act on the advice of its constitutional advisers, and would not be liable to the imputation of negligence if that advice should turn out to be unsound. But here I think there was no room for doubt. My judgment is founded on the view that the course to be taken was plain and unmistakable, but unfortunately was not pursued; and that there was consequently an absence of the due diligence which ought to have been exercised.

The vessel having thus escaped through want of due diligence in that department of the Government to which it specially appertained to seize her, the entire British Government, and through them the British people, become, as it appears to me, by necessary consequence, involved in a common liability. But how far, considering the fact that, while the British Government was desirous of doing its duty in respect of this vessel, the escape of it was, in the event, practically speaking the result of an unfortunate and unforeseen accident, the Tribunal should award to the United States damages to the full extent demanded, as though the result had arisen from negligence alone, is a question which may deserve serious consideration.

But it belongs rather to a different department of our labours, and I will reserve it till we enter thereupon.

After leaving Liverpool.

But, I am sorry to say, the charge of want of diligence in respect of this vessel does not stop with the fact of her escape.

On the morning of the 30th of July, a letter of the 29th, from Mr. Squarey's firm, informed the Commissioners of Customs that the vessel had come out of dock the night before, and had steamed down the river between 10 and 11 that morning, as the writers had reason to believe, on her way to Queenstown.* At that time, indeed, the Commissioners of Customs were under the belief that there were not sufficient grounds for detaining the vessel. It was, therefore, not to be expected, that on being informed she had left the Mersey and gone to Queenstown, they should take any steps to seize her at the latter place. But on the preceding day, the 29th, the opinion of the Law Officers had been given that the vessel should be seized. Had that opinion been at once communicated to the Customs, as the emergency of the case required, and the Commissioners had themselves immediately telegraphed to the Collector at Liverpool, as it would have been their duty to do, desiring him to ascertain

* British Appendix, vol. i, p. 209.

where the ship was, and if possible to follow and seize her, there would still have been an opportunity of stopping her; for it appears that she first proceeded to to Moelfra Bay on the Welsh coast, a place about fifty miles from Liverpool, and remained cruizing off the coast. On the afternoon of the 30th the tug Hercules left the Mersey, with thirty or forty men, who were to form part of the ship's crew, and found her in Moelfra Bay, where the two vessels lay alongside one another till midnight, and the war steamer remained till 3 in the morning of the 31st. On the morning of the 30th, prior to the Hercules leaving the river, the Consul called in person upon the Collector and informed him that the tug was then in port, having returned from the Alabama the evening before; that she reported that the Alabama was cruizing off Point Lynas, and that she (the tug) was then taking on board men and equipments to "convey down to the gun-boat."† The Alabama.

The Collector sent the Surveyor to the tug, and he reported that he found a considerable number of persons on deck, "some of whom admitted that they were a portion of the crew and were going to join the gun-boat." He also informed the Collector that it was said she had cruized off Point Lynas the night before.‡

It is obvious that if a telegraphic communication had been sent to the Collector at Liverpool, as, looking to the urgency of the case, it should have been, he might, by following the Hercules, have found the steamer in Moelfra Bay; and, though in these waters, as being beyond his jurisdiction, he would have had no authority to seize her, he might have called on the Collector of Customs at Beaumaris, a place eight miles off, within whose jurisdiction she was, to take the necessary steps for doing so. Knowing that she was off that part of the Welsh coast, he might also have telegraphed from Liverpool, before leaving to follow the Hercules, to the Collector at Beaumaris to look out for the vessel, and, if possible, to seize her.

Unfortunately, the Report of the Law Officers, though sent in on the 29th, was not communicated to the Commissioners of Customs till the afternoon of the 31st, by which time the vessel was beyond the reach of British jurisdiction. It followed the ordinary routine of official communication—was sent in to the Foreign Office, thence to the Treasury,§ and thence to the Department of the Customs.‖

It seems to me that the United States' Government have also reason to complain of the inactivity of the Collector at this conjuncture in another particular. When in addition to the evidence which had passed through his hands, the Collector found that the vessel, having gone out ostensibly on a trial trip, did not return, but was lying off the Welsh coast, and that, instead of having shipped her crew at Liverpool, she was having them brought off to her by the Hercules, all doubt as to the real character and destination of the ship should have been at an end; and as he might fairly presume that the men had a knowledge of the service on which they were entering, he ought not to have allowed the Hercules to leave (unless for the purpose of finding and seizing the war steamer), seeing that, under the 6th section of the Foreign Enlistment Act, he had power to seize the tug, as being about to take off to the steamer persons who had unlawfully enlisted as part of her crew.

I must say I think the complaint of the United States of a want of official activity at such a conjuncture by no means without foundation.

There is little more to be said on the subject of the Alabama. She left England without her guns or munitions of war of any kind. She received her armament, as we now know, off Terceira, it having been conveyed to her in two vessels called the Bahama and Agrippina, but without any knowledge whatever on the part of the Authorities that those vessels were leaving Liverpool for the purpose. What is stated in the British Counter-Case on this head appears to me strictly accurate:— Arming off Terceira.

"The Alabama sailed from England wholly unarmed, and with a crew hired to work the ship, and not enlisted for the Confederate service. She received her armament at a distance of more than 1,000 miles from England, and was armed for war, not within the Queen's dominions, but either in Portuguese waters or on the high seas. The guns and ammunition, which were put on board of her off Terceira, had been procured and exported from England in an ordinary merchant steamer, which loaded them as cargo and sailed with a regular clearance for Nassau. The clearance and departure of this steamer presented, so far as Her Majesty's Government is aware, no circumstance distinguishing her from ordinary blockade-runners. No information was ever given or representation made to the Government as to this ship or her cargo before she left British waters; nor does it appear that the errand on which she was employed was known to or suspected by the officials of the United States. But, even had a suspicion existed that her cargo was exported with the intention that it should be

* British Appendix, vol. i, p. 249. † Ibid., p. 205. ‡ Ibid., p. 201. ‖ Ibid., p. 205.

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used, either in the Confederate States or elsewhere, in arming a vessel which had been unlawfully fitted in England for warlike employment, this would not have made it the duty of the officers of Customs to detain her, or have empowered them to do so. Such a transaction is not a breach of English law; nor is it one which the British Government was under any obligation to prevent. Whether the cargo was sent from the same port as the ship, or from a different port, and by the same or different persons, is manifestly immaterial for this purpose. The distinction is plainly not such as to create in the one case a duty which would not arise in the other."*

The armament was, however, prepared in England, and it was part of the same scheme that the vessel, having been "equipped," that is to say, prepared to receive her armament in England, should have her armament and crew sent out and put on board out of the Queen's dominions, for the purpose of immediate warfare. It is fairly open to contention that under such circumstances the whole should be regarded as one armed hostile expedition issuing from a British port, or, at all events, that the ulterior purpose of arming, though out of British jurisdiction, gives to such an equipment of the vessel within the jurisdiction the character of an equipment with intent to carry on war.

On the whole, I concur with the rest of the Tribunal in thinking that in respect of this vessel the liability of Great Britain, in respect of want of due diligence, is established by the facts.

It would be unnecessary to pursue the history of the Alabama any further, were it not that, in respect of her after proceedings, imputations of insincere neutrality are cast upon British Authorities. As to these it becomes necessary to say a word.

At Martinique.

The first port which she put into after leaving Liverpool was at Martinique. The Agrippina, with a cargo of coal specially destined for the Alabama, was there by arrangement awaiting her arrival. What further passed is thus stated in the Argument of the United States:—†

"The Agrippina left port upon the order of Captain Semmes to get under way forthwith and proceed to a new place of rendezvous, as '*it would not do for him to think of coaling in Martinique under the circumstances.*' Martinique was under the jurisdiction of the French Government and not under that of Her Majesty."

The part of this passage printed in italics is taken from the journal of Captain Semmes set out in the sixth volume of the United States' Appendix, page 491.

The effect of this statement is to convey the impression that Captain Semmes found it would not do for him to coal at Martinique on account of the strictness of the French Authorities, as compared with the lax neutrality of ports within Her Majesty's jurisdiction. I deeply and sincerely regret to find myself bound to denounce this representation as altogether disingenuous. It was the fear of the United States' cruizers, not apprehension of French Authorities, which led Captain Semmes to seek a safer place for coaling. His journal shall speak for itself:—

"After describing his cruize and captures until October 30, he continues (p. 492):—

"'The engineer having now reported to me that we had no more than about four days of fuel on board, I resolved to withdraw from the American coast, run down into the West Indies to meet my coal-ship, and renew my supply. Being uncertain, in the commencement of my career, as to the reception I should meet with in neutral ports, and fearing that I might have difficulty in procuring coal in the market, I had arranged with my ever attentive co-labourer, Captain Bullock, when we parted off Terceira, to have a supply ship sent out to me, from time to time, as I should indicate to him in the rendezvous. The island of Martinique was to be the first rendezvous, and it was thither accordingly that we were now bound. This resolution was taken on the 30th of October.'

"After describing several other captures, and his arrival at Martinique he continues (p. 514):—

"'I found here at her anchors, as I had expected, my coal-ship the Agrippina. She had been lying here eight days. Her master, an old Scotchman, who, like most old sailors, was found of his grog, had been quite indiscreet, as I soon learned, in talking about his ship and her movements. Instead of pretending to have come in for water or repairs, or to hunt a market, or for something of the kind, he had frequently, when 'half seas over,' in the coffee-houses on shore, boasted of his connection with the Alabama, and told his brother tars that that ship might be daily looked for. Eight days were a sufficient space of time for these conversations to be repeated in the neighbouring islands; and as I knew that the enemy had several cruizers in the West Indies, I was only surprised that some one of them had not looked in upon the Agrippina before. It would not do for me to think of coaling in Martinique, under the circumstances, and so I ordered my coal-ship to get under way forthwith, and proceed to a new rendezvous—a small island on the Spanish main, where, in due time we will rejoin her. I had the satisfaction of seeing her get a good offing before nightfall, and knew that she was safe."‡

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* British Counter-Case, p. 87. † Page 202.
‡ United States' Documents, vol. vi, p. 490.

The Alabama.

The foregoing extract speaks for itself. What makes the matter still worse is that, at the time this passage in the United States' Argument was penned, a letter from the British Consul at Martinique to Earl Russell had been published in the British Appendix, from which it appears that the Consul actually remonstrated with the master of the Agrippina, and called the attention of the French Governor to the transaction, as an improper one, on which the Governor declared his intention of allowing the same facilities to the Alabama, as he had previously afforded to the Sumter.

The letter is as follows:—

"My Lord, "*St. Pierre, November* 26, 1862.

"I have the honour to report to your Lordship that the Confederate steamer Alabama, Captain Semmes, has visited this island.

"The following are the circumstances in connection with the arrival and departure of this noted cruizer:—

"I had to proceed to Fort de France on the 12th instant on official business with an English ship lying there, and, on my arrival, I heard that an English bark, the Agrippina, master, McQueen, had entered the harbour on the previous evening with a cargo of coals, shipped at Cardiff and cleared from the Custom-house there, for Jamaica; that to explain his presence at Fort de France, the master had stated that he was to receive instructions from me. I was, moreover, informed that it was reported in town that the coals on board of this vessel were destined for the Alabama.

"I immediately sent for the master and acquainted him with what I had heard; at the same time expressing my surprise and displeasure at his having presumed to connect my name with such a matter. He assured me positively that these reports were without any foundation whatever; that he had merely said that, when about to leave England, he had received from his owners a telegram desiring him to call at Martinique, where he would find a letter of further instructions addressed to my care.

"On informing him that I had received no such letter, he replied it would, no doubt, arrive by the next mail.

"The harbour regulations not allowing vessels to remain over three days without paying port charges, I gave him, at his request, and on the faith of his assurances, a draft of a letter to be addressed to the authorities to obtain permission to await the arrival of the steamer, due on the 18th of November, without expense. This demand, I may here observe, was not granted ultimately.

"On the same afternoon, having heard from the Captain of the port that the pilot, who had been on board of the Agrippina, had reported to him that the master had told another British captain, who had boarded the ship in the offing, in his presence, that his cargo was for the Alabama, I at once sent for both the master and the pilot, but they all agreed that the statements the master of the Agrippina had made was to the effect merely that he had, on a previous voyage, taken stores to the Alabama. I expressed to him my opinion that he had acted most improperly on that occasion, and I warned him of the consequences that might follow the repetition of any such illegal proceedings. No longer feeling assured of the veracity of his protestations, and hearing that a sloop was about to sail for St. Vincent, I addressed a letter to the Senior Officer of the station, in the hope that it might find him there, and procure for me the benefit of his advice.

"On my return to St. Pierre, finding everywhere the same rumours afloat concerning the Agrippina, I thought it proper to write to the master to repeat the observations I had already made to him verbally. Herewith I have the honour to inclose copies of both these letters.

"I was obliged to return to Fort de France the next day to end the inquiry, began the previous day with regard to another vessel, and I was about leaving again when the master of the Agrippina came to tell me he had a confidential communication to make. I answered that I would not refuse to hear any statement he might wish to make, but that I reserved to myself complete freedom of action as to the course I should adopt afterwards, particularly if the communication had reference to the report in circulation concerning his vessel. He still persisted in making a statement to the effect that his cargo was, in truth, for a steamer that he had expected to find at Fort de France, and which he had reason to believe was a Confederate cruizer.

"I again pointed out the illegality of a such a line of conduct, but the sequel showed that my remonstrances proved of no avail.

"I next deemed it proper to acquaint his Excellency the Governor of what I had just learned. He did not seem much surprised, and observed that, if the Alabama came into port, he would act exactly as he had done on a former occasion, in the case of the Sumter, when the French Government had altogether approved of the measures he had taken in regard to that vessel.

"Nothing new occurred until the morning of the 18th instant, when a black, rakish-looking screw-steamer was seen approaching the land, steering for Fort de France. As she passed close before this town, she showed a British blue ensign and pennant, but no one was deceived by the character she had thus assumed. She was at once put down as the Alabama, and such in effect she proved to be.

On his arrival at Fort de France, Captain Semmes sent a message to the Governor to request permission to land fifty-three prisoners whom he had on board. On the return of the officer they were landed, and sent to the United States' Consul at this port. On the same afternoon the Agrippina, whose master had gone on board of the Alabama, as soon as she came in sight, got under weigh, having taken a clearance for Demerara.

"The Alabama appeared to be still well provided with fuel, and her Commander said that he would leave during the night. But he was still at anchor on the morning of the 19th, when, about 7 A.M., a Federal war-steamer suddenly made her appearance, which proved to be the San Jacinto, Captain Ronckendoff, from Barbados and Trinidad, on a cruize in search of the Alabama. The latter hoisted the Confederate flag, on perceiving the Federal vessel, whose Commander declined to receive

The Alabama.

the Government pilot, or enter the harbour on learning that, in such case, he would have to remain in port twenty-four hours after the departure of his adversary. He was then informed, by a letter from the Governor, that he must remain at a distance of three miles from the nearest land, and that any attempt to violate the neutrality of the port would be repressed by force of arms, if necessary.

"Shortly afterwards, a small French war-steamer that was in the port was sent out, and took up a position, with steam up and her men at their quarters, between the rival ships. At the same time, the forts were manned, and twenty rounds of ammunition were served out for each gun bearing seaward; the officers in charge of those at the mouth of the bay having orders to maintain the San Jacinto at the prescribed distance from the land, and fire into whichever vessel might become the assailant.

"Meanwhile, the greatest anxiety prevailed on shore; many bearing in mind the vagaries of the Federal cruizers elsewhere, and recollecting what had occurred a year previously to the Commander of the Iroquois, when the Sumter made her escape, were of opinion that the San Jacinto would have attempted, at all risks, to run down the Alabama where she lay. No such occurrence, fortunately, took place.

"Meanwhile, the Alabama remained perfectly still, her crew being employed in painting and repairing the masts and riggings. Her captain, it seems, had at first taken the San Jacinto for another vessel of the force of his own, and he sent a message to the Governor to say that, intending to go out to engage her, he in consequence requested his Excellency to permit him to deposit, at the Public Treasury, a sum of money, about 12,000*l.* sterling, which he had on board; this request could not be granted, and arrangements were being made with a merchant who was to receive it at a certain per-centage, when, having recognized the San Jacinto, Captain Semmes sent word that he would keep the money on board, having made up his mind to run out that same night.

"He did so, in effect, and accomplished his design so successfully that his adversary did not even perceive his flight; nor was it until after remaining thirty-six hours before Fort de France after the Alabama had left that the captain of the San Jacinto could believe that she had really got away.

"The movements of the Alabama had been well calculated.

"Shortly before sunset a boat had conveyed to the San Jacinto one of the masters who had been lately released from the Alabama, and who was sent by the United States' Consul to arrange for the signals to be made from an American schooner anchored near the Alabama, in case the latter should attempt to leave during the night.

"Suspecting their intentions, Captain Semmes sent word to the captain of the port for a pilot, who came off forthwith, and at dusk he got under weigh, first running towards the inner port, and when out of sight of the schooner, altering his course so as to run out on the south side of the bay. The pilot left him, already, nearly half an hour, when the master of the schooner, on his return from the San Jacinto, finding the Alabama had gone, sent up three rockets in the direction which his crew told him she had taken.

"The San Jacinto, under all steam, ran to the south side of the bay, and not meeting the Alabama, she having already passed out, Captain Ronckendoff remained all night off the entry to the bay, within which he placed his armed boats in a line, to prevent all egress. So certain was he of the result of these measures, that, as I have already said, he was with difficulty brought to believe the escape of his adversary."*

It is thus abundantly clear that it was not because Martinique was not within British jurisdiction that Captain Semmes did not coal there.

Having thus left the port on the evening of the 19th, on the afternoon of the next day the Alabama joined the Agrippina, and the two ran together to the appointed place of anchorage, Blanquilla, described by Captain Semmes as "one of those little coral islands that skirt the South American coast, not yet fully adapted to the habitation of man."† There the Alabama took in a supply of coal, after which the Agrippina, which had still another supply of coal on board, was sent to the Arcas, small islands off the coast of Yucatan. The two vessels met there on the 23rd of December. The Alabama took in the remainder of the supply of coal, after which the Agrippina was sent to Liverpool to procure a fresh supply.‡

On the 11th of January, the Alabama encountered the United States' ship of war the Hatteras, when, after a short engagement, the latter went down, there being just time to save the crew.

At Jamaica.

After this, the Alabama with her prisoners made for Jamaica, and arrived at Port Royal on the evening of the 20th.

This was her first appearance in a British port after her departure from Liverpool on the 29th of July, 1861. It is observed in the Case of the United States that the "promised orders" of Earl Russell to detain her for a violation of British sovereignty were not there.§

Earl Russell had promised no such orders. The only orders ever spoken of were

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* British Appendix, vol. i, pp. 257–259.
† Semmes' "Adventures Afloat," p. 516. United States' Documents, vol. vi, p. 491.
‡ Semmes' "Adventures Afloat," p. 519. United States' Documents, *ubi supra*.
§ Case of the United States, page 382.

those sent to Queenstown and to Nassau, as recommended by the Law Officers immediately on the escape of the Alabama from the Mersey, before any transfer to the Confederate States was known to have been made.* At the time the Alabama was at Jamaica she was a commissioned ship of war, and as such, in the opinion of Her Majesty's Government, protected from seizure.

The same question arises in respect to the Alabama as arises in respect of the Florida, namely, whether her commission as a ship of war of the Confederate States gave her immunity from seizure for the breach of British law when she was again found in a British port. But this question it is unnecessary to consider if the British Government is liable, as we are all agreed it is, in respect of this vessel, by reason of the want of due diligence in not preventing her departure.

The morning after the arrival of the Alabama at Jamaica, Captain Semmes called on Commodore Dunlop, the officer in command at the station, who reported to the Admiral:—

"Sir, "*Aboukir, at Jamaica, January* 23, 1863.

"I have the honour to inform you that, on the evening of the 20th, a screw-steamer, apparently a man-of-war, was seen off this port about sunset, under French colours. After dark the vessel entered the harbour, and upon being boarded proved to be the screw gun-vessel Alabama, under the so-called Confederate States' flag.

"2. On the morning of the 21st her Commander, Captain Semmes, called on me and asked for permission to land 17 officers and 101 men, the crew of the late United States' gun-vessel Hatteras, which had engaged the Alabama 25 miles south-east of Galveston, Texas, during the night of the 11th January, and was sunk. The action, according to Captain Semmes' account, lasted from 13 to 15 minutes, when the Hatteras, being in a sinking state, ceased firing, and the crew were removed on board the Alabama, which there was just time to effect before the Hatteras went down.

"5. Captain Semmes then stated that he had six large shot-holes at the water-line, which it was absolutely necessary should be repaired before he could proceed to sea with safety, and asked permission to receive coal and necessary supplies. The necessity of the repairs was obvious, and I informed Captain Semmes that no time must be lost in completing them, taking in his supplies, and proceeding to sea, in exact conformity with the spirit of Earl Russell's despatch. Captain Semmes gave me his word of honour that no unnecessary delay should take place, adding, 'My interest is entirely in accordance with your wishes on this point, for if I remain here an hour more than can be avoided I shall run the risk of finding a squadron of my enemies outside, for no doubt they will be in pursuit of me immediately.'

"6. Owing to the delay in receiving the Lieutenant-Governor's answer to my letter relative to landing the prisoners from Spanish Town, it was not until the evening of the 21st that the permission to do so reached Captain Semmes, and too late for them to be landed that night. The crowded state of the vessel previous to the landing of the prisoners on the morning of the 22nd made it difficult to proceed with the necessary repairs, and no doubt caused some unavoidable delay. As soon as these repairs are completed, the Alabama will proceed to sea."†

The Governor at once consented to the landing of the prisoners, observing that "common humanity would dictate such a permission being granted, as otherwise fever or pestilence might arise from an over-crowded ship, to say nothing of the horrors which would ensue should the Alabama again go into action with them on board." Governor Eyre added that, "of course, once landed, no person could be re-embarked against their will from British soil."‡ The prisoners were accordingly landed.

Assuming that the Alabama was properly received as a belligerent vessel, no question can arise as to the propriety of allowing the necessary repairs to be done. "The fractures made by six large shot or shell near the water-line of the Alabama," says Commodore Dunlop in his Report to the Admiral, "required extensive repairs."§

I presume it can hardly be said that the ship ought to have been forced to go to sea without these "large fractures" having been stopped up.

She had anchored in the port, the Commodore reports, after dark on the evening of the 20th of January; she commenced repairing the damages received in the action with the Hatteras the next morning; but the Commodore adds that the repairs "could not be completed by the unskilful workmen hired here before late in the afternoon of the 25th, and the Alabama sailed at 8·30 P.M. of the same evening." It cannot, therefore, be said that she was permitted to stay too long in the port. She received, the Commodore states, "a supply of provisions and coal," but it does not appear what was the quantity. No complaint has ever been made, that I am aware of, of any excess

* See British Appendix, vol. i, pp. 202, 203, 212, and 249.

† British Appendix, vol. i, p. 264. ‡ Ibid., p. 265. § Ibid., p. 269.

The Alabama.

having been allowed. Commodore Dunlop certainly appears to have been quite alive to his duty of enforcing the regulations. He concludes his report by saying:—

"In conclusion, I have only to state that the Confederate vessel was treated strictly in accordance with the instructions contained in Earl Russell's letter of the 31st January, 1861, and exactly as I shall act towards any United States' man-of-war that may hereafter call here.

"Two United States' ships of war, the Richmond and Powhattan, arrived here in 1861, coaled and provisioned, and remained in port, the Richmond four days, and the Powhattan three days; the San Jacinto was also here, and remained four hours."*

I am therefore unable to concur in an opinion expressed by the President of this Tribunal in thinking that "the reception of the Alabama at Jamaica far exceeded the measure of what the duties of neutrality would admit of." If, by this, reference is intended to be made to the fact that a young officer, in the absence of his superior, thoughtlessly allowed the band of a Queen's ship to play a Southern national air, a circumstance afterwards fully explained, and for which he was severely reprimanded, or that the officers on the station went on board of the Alabama, and treated her captain and officers as officers of a man-of-war, or to the possible fact that the inhabitants of the island may have shown some kindness towards, or sympathy with, the Southerners, I can only protest against such facts being made a ground for fixing a liability on the British Government, when no fault can be fixed on the local Authorities. If the British Government has been in any respect wanting in due diligence, and injury has thence resulted to American citizens, the British people are ready to make reparation. But to call in aid, as founding a liability on the part of Great Britain, the fact that officers of Her Majesty's ships, or the inhabitants of a West Indian colony, may have shown civilities to the officers of a Confederate ship—as why should they not?—or have exhibited sympathy for the cause of the South, when the Authorities have strictly done their duty, does seem to me, I must say, to be going a great deal too far, indeed, further than the United States themselves. For neither in their Case nor Argument have the latter gone so far as to assert that, saving in the matter of not seizing the vessel, there was any breach of neutrality in what passed at Jamaica.

At the Cape of Good Hope.

But the same exception is also taken to what passed at the Cape. It is necessary therefore to review the facts.

The Alabama arrived in Saldanha Bay on the 29th of July, 1863. It appears from a despatch of the Admiral on the station, Sir Baldwin Walker, to the Admiralty, of August the 19th, that, on receiving information of her being there, he immediately gave orders to Captain Forsyth, of Her Majesty's ship Valorous, to hold himself in readiness to proceed to any of the parts of the Colony in which the Alabama might anchor, in order to preserve the rules of strict neutrality.† On the 5th of August, having received a telegram that the Alabama was off Table Bay, the Admiral ordered the Valorous to proceed thither. As the Alabama was standing into Table Bay, she fell in with and captured a United States' vessel, called the Sea Bride, and a question arose whether the capture had not been made within the waters of the Colony. Mr. Graham, the United States' Consul, immediately called the attention of the Governor, Sir Philip Wodehouse, to the capture, alleging it to have been unlawful by reason of its having been made within 4 miles of the shore.

He writes:—

"I believe there is no law defining the word 'coast' other than international law. That law has always limited neutral waters to the fighting distance from land, which, upon the invention of gunpowder, was extended to the distance of three nautical miles from land on a straight coast, and by the same rule, since the invention of Armstrong rifled cannon, to at least six miles.

"But all waters inclosed by a line drawn between two promontories, or headlands, are recognized by all nations as neutral, and England was the first that adopted the rule, calling such waters the 'King's Chambers.' By referring to 'Wheaton's Digest,' page 234, or any other good work on international law, you will find the above rules laid down and elucidated.‡

Mr. Graham also sent affidavits of the Captain, the steward, and the cook of the Sea Bride giving the bearings of the vessel at the time of the capture to prove that the vessel when captured, was within the waters of the Colony.

Captain Semmes having been called upon for an explanation, answered:—

"In reply, I have the honour to state that it is not true that the barque referred to was captured

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* British Appendix, vol. i, p. 269. † Ibid., p. 306. ‡ Ibid., p. 302.

The Alabama.
At the Cape.

in British waters, and in violation of British neutrality; she having been captured outside all headlands, and a distance from the nearest land of between five and six miles. As I approached this vessel I called the particular attention of my officers to the question of distance, and they all agree that the capture was made from two to three miles outside of the marine league."*

The Governor referred the matter to Captain Forsyth, who, after taking the evidence of the Port Captain, of the light-house keeper of the Green Point light, of the Collector of Customs, of the signal man at the Lion's Rump telegraph station, and of a boatman, all of whom had seen the position of the two vessels, reported that he had come to the conclusion that the Sea Bride was beyond the limits assigned when captured by the Alabama.†

The decision of the Governor, which, of course, was in accordance with the opinion of Captain Forsyth, having been announced to Mr. Graham, this gentleman loses all sense of propriety, and, forgetting that he is addressing Her Majesty's Representative, writes:—

"Your decision in the case of the Sea Bride was duly received at 4 o'clock P.M. on Saturday. In communicating that decision you simply announce that the vessel was, in your opinion, and according to the evidence before you, a legal prize to the Alabama: but you omit to state the principle of international law that governed your decision, and neglect to furnish me with the evidence relied upon by you.

"Under these circumstances, I can neither have the evidence verified or rebutted here, nor am I enabled to transmit it as it stands to the American Minister at London, nor to the United States' Government at Washington. An invitation to be present when the *ex parte* testimony was taken was not extended to me, and I am therefore ignorant of the tenor of it, and cannot distinguish the portion thrown out from that which was accepted. If your decision is that the neutral waters of this Colony only extend a distance of three miles from land, the character of that decision would have been aptly illustrated to the people of Cape Town had an American war-vessel appeared on the scene and engaged the Alabama in battle. In such a contest, with cannon carrying a distance of six miles (three over land), the crashing buildings in Cape Town would have been an excellent commentary on your decision.

"But the decision has been made, and cannot be revoked here, so that further comment at present is, therefore, unnecessary. It can only be reversed by the Government you represent, which it probably will be when the United States' Government shall claim indemnity for the owners of the Sea Bride."‡

Referring to the Tuscaloosa, he ends by saying:—

"The capture of the Sea Bride in neutral waters, together with the case of the Tuscaloosa, also a prize, constitute the latest and best illustration of British neutrality that has yet been given."

The offensive tone which the United States' Consuls allowed themselves to assume towards British authorities is not a little remarkable.

The Sea Bride having been put in charge of a prize crew, while the officer in charge was below, the vessel was, through inadvertence, allowed to be brought within two miles of the shore, and this also was forthwith brought under the notice of the Governor by Mr. Graham, who insisted that the vessel should be seized. But it appeared from Mr. Graham's own witnesses that the officer, coming on deck, stamped his foot as if vexed at seeing the vessel where she was, and immediately ordered her to be kept further off. The Governor therefore treated it as an act of inadvertence, especially as it was afterwards apologized for.§

Prior to coming into Table Bay, Captain Semmes had written from Saldanha Bay to the Governor:—

"An opportunity is offered me by the coasting schooner Atlas to communicate with the Cape, of which I promptly avail myself.

"I have the honour to inform your Excellency that I arrived in this bay on Wednesday morning last for the purpose of effecting some necessary repairs. As soon as these repairs can be completed I will proceed to sea, and in the meantime your Excellency may rest assured that I will pay the strictest attention to the neutrality of your Government."‖

On the announcement of the Alabama being in Saldanha Bay, Mr. Graham, the United States' Consul, wrote to the Governor, insisting on her being seized:—

"From reliable information received by me, and which you are also doubtless in possession of, a war-steamer called the Alabama is now in Saldanha Bay, being painted, discharging prisoners of war, &c.

"The vessel in question was built, in England, to prey upon the commerce of the United States of America, and escaped therefrom while on her trial trip, forfeiting bonds of 20,000*l.*, which the British Government exacted under the Foreign Enlistment Act.

"Now, as your Government has a Treaty of Amity and Commerce with the United States, and has

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* British Appendix, vol. i, p. 315. † Ibid., p. 311. ‡ Ibid., p. 304.
§ Ibid., pp. 316, 317, and 329. ‖ Ibid., p. 308.

The Alabama.

At the Cape.

not recognized the persons in revolt against the United States as a Government at all, the vessel alluded should be at once seized and sent to England, from whence she clandestinely escaped. Assuming that the British Government was sincere in exacting the bonds, you have doubtless been instructed to send her home to England, where she belongs. But if, from some oversight, you have not received such instructions, and you decline the responsibility of making the seizure, I would most respectfully protest against the vessel remaining in any port of the Colony another day. She has been at Saldanha Bay four [six] days already, and a week previously on the coast, and has forfeited all right to remain an hour longer by this breach of neutrality. Painting a ship does not come under the head of 'necessary repairs,' and is no proof that she is unseaworthy; and to allow her to visit other ports after she has set the Queen's Proclamation of Neutrality at defiance would not be regarded as in accordance with the spirit and purpose of that document."*

Mr. Graham received for answer:—

"His Excellency has no instructions, neither has he any authority, to seize or detain that vessel; and he desires me to acquaint you that he has received a letter from the Commander, dated the 1st instant, stating that repairs were in progress, and as soon as they were completed he intended to go to sea. He further announces his intention of respecting strictly the neutrality of the British Government."

"The course which Captain Semmes here proposes to take is, in the Governor's opinion, in conformity with the instructions he has himself received relative to ships of war and privateers belonging to the United States and the States calling themselves the Confederate States of America visiting British ports.

"The reports received from Saldanha Bay induce the Governor to believe that the vessel will leave that harbour as soon as her repairs are completed; but he will, immediately on receiving intelligence to the contrary, take the necessary steps for enforcing the observance of the rules laid down by Her Majesty's Government."†

Called upon afterwards to advise as to the propriety of what had taken place with reference to the Alabama at the Cape, the Law Officers, Sir R. Palmer, Sir R. Collier, and Sir R. Phillimore, the latter so deservedly held up as an authority by the United States, on the 19th of October advised:—

"With respect to the Alabama herself, we are clearly of opinion that neither the Governor nor any other authority at the Cape could exercise any jurisdiction over her; and that, whatever was her previous history, they were bound to treat her as a ship of war belonging to a belligerent Power."‡

It strikes me that this Tribunal should hesitate before it decides that three such legal authorities were wrong. Or are we to suppose that an "insincere neutrality" lurks beneath their opinion, though given in the course of official duty?

On his arrival in Table Bay, on the 5th of August, Captain Semmes wrote to the Governor, informing him that he had come in for supplies and repairs, and requesting to be allowed to land his prisoners, thirty-three in number, lately captured on board two ships destroyed by him at sea. The Governor gave permission to land the prisoners, but desired that Captain Semmes would "state the nature and extent of the supplies, and repairs required, that he might be enabled to form some estimate of the time it would be necessary for the Alabama to remain in the port."

Captain Semmes replies:—

"In the way of supplies I shall need some provisions for my crew, a list of which will be handed you to-morrow by the paymaster, and as for repairs my boilers need some iron-work to be done, and my bends require caulking, being quite open. I propose to take on board the necessary materials here, and to proceed with all dispatch to Simon's Bay, for the purpose of making these repairs."§

On the morning of the 6th the paymaster of the vessel called on the Governor, with the merchant who was to furnish the supplies, and leave was given to the vessel to remain till the next day, the 7th. In a despatch to the Duke of Newcastle Sir Philip Wodehouse states:—

"On the night of the 5th Her Majesty's ship Valorous had come round from Simon's Bay. During the night of the 6th the weather became unfavourable; a vessel was wrecked in the bay, and a heavy sea prevented the Alabama from receiving her supplies by the time arranged. On the morning of the 8th, Captain Forsyth, of the Valorous, and the Port Captain, by my desire, pressed on Captain Semmes the necessity for his leaving the port without any unnecessary delay; when he pleaded the continued heavy sea and the absence of his cooking apparatus, which had been sent on shore for repairs, and had not been returned by the tradesman at the time appointed, and intimated his own anxiety to get away. Between 6 and 7 A.M. on the 9th he sailed, and on his way round to Simon's Bay captured another vessel, but on finding that she was in neutral waters, immediately released her."‖

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* British Appendix, vol. i, p. 300. † Ibid., p. 301. ‡ Ibid., p. 323.
§ Ibid., p. 314. ‖ Ibid., p. 312.

With reference to the latter circumstance, Sir B. Walker in his despatch to the Admiralty, says:—

"During his passage to this port Captain Semmes chased another American vessel, the Martha Wentzel, standing in for Table Bay. On my pointing out to him that he had done so in neutral waters, he assured me that it was quite unintentional, and, being at a distance from the land, he did not observe that he had got within three miles of an imaginary line drawn from the Cape of Good Hope to Cape Hanglip, but on discovering it he did not detain the vessel. This explanation I considered sufficient."*

Having arrived at Simon's Bay on the 9th, the vessel was caulked, and had other slight repairs done. She took in no coal on this occasion. She left on the 15th. "Captain Semmes," says the Admiral, "was guarded in his conduct, and expressed himself as most anxious not to violate the neutrality of these waters."†

The Alabama again put into Simon's Bay on the 16th of September to coal and have repairs done. It has never been suggested that, either in respect of the stay of the vessel on either occasion, or the amount of repair, or the quantity of coal, any indulgence was allowed to her in excess of the Queen's regulations.‡

Courtesies and sympathy may have been shown by the inhabitants to the officers and crew of the ship. But, as I have already observed, these are things which a neutral Government cannot prevent, and for which it would be simply absurd to say it could be responsible. Probably, as was very sensibly remarked by a Cape newspaper, the "Argus," cited by Captain Semmes in his journal when speaking of the sympathy shown by the inhabitants, "It was not, perhaps, taking the view of either side, Federal or Confederate, but in admiration of the skill, pluck, and daring of the Alabama, her captain, and her crew, who afford a general theme of admiration all the world over."§

In the Eastern Seas.

From the Cape of Good Hope the Alabama proceeded to the Eastern Seas. She touched at Singapore in December 1863, and visited the Cape on her way back to European waters in March 1864. It is mentioned in the Case of the United States,‖ as a fresh instance of the violation of the duties of Great Britain as a neutral, that having taken in coal at Singapore on the 23rd of December, she was allowed to commence coaling again at Cape Town on the 21st of March—two days too soon. But I can hardly suppose this will be seriously insisted on. Moreover, it appears from the British Counter-Case,¶ that the charge, such as it is, resting on no better foundation than Captain Semmes' journals, is founded on a miscalculation of dates. The Alabama seems to have taken in her supply of coal at Singapore, not on the 23rd, but on the 22nd of December; and although she arrived at Table Bay on the 20th of March, she did not commence coaling till the 22nd, when the period of three months, prescribed by the Regulations, had exactly elapsed. Indeed, she could not have done so earlier, had it been wished, on account of a heavy gale that was then prevailing.

At Cherbourg.

The career of the Alabama was now drawing to a close. On the 11th of June, 1864, she entered the port of Cherbourg. The United States' war steamer, the Kearsarge, appeared shortly afterwards in the neighbouring waters. A challenge ensued between the Commanders of the two vessels, and on the morning of the 19th of June the Alabama steamed out of Cherbourg to encounter her formidable opponent. The fire of the Kearsarge proved too heavy for the Alabama, and the latter sank under it, and went down, affording to the victors the opportunity for the boastful taunt—which even the peaceful occasion of this arbitration could not restrain—that "thus this British-built, British-armed, and British-manned cruizer went down under the fire of American guns."**

As if everything connected with this vessel must give birth to controversy, the sinking of the Alabama gave rise to a discussion, not uninteresting in a juridical point of view, though beside the purpose of the present inquiry. As the Alabama was rapidly sinking, an officer in one of her boats came to the Kearsarge, said they had surrendered, and that the ship was going down, and asked for assistance to save the crew. The Deerhound, a steam-yacht belonging to an English gentleman, who had gone out of Cherbourg to witness the combat, coming up at the moment, was begged by the captain of the Kearsarge to help to save the people of the Alabama. The boats of the Deerhound having been lowered succeeded in saving Captain Semmes and many of the crew, who were struggling in the water.††

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* British Appendix, vol. i, p. 307. † Ibid. ‡ Ibid., p. 325.
§ United States' Documents, vol. vi. p, 497. ‖ Pages 316, 386. ¶ Page 117.
** Case of the United States, p. 387. †† British Appendix, vol. i, p. 384.

The Alabama.

Others were saved by the Alabama's boat, with the before-mentioned officer in her. All the persons saved were taken on board the Deerhound, and were carried by the owner, Mr. Lancaster, into Southampton, and there set free.

They were claimed as prisoners by the United States' Government on the ground that, the Alabama having surrendered, her crew were necessarily prisoners. If saved they could only be saved as prisoners, or, as the alternative, they should have been left to drown.

Mr. Adams having written complaining that the owner of the Deerhound had taken away the persons thus saved, Lord Russell answered:—

"I have the honour to state to you, in reply, that it appears to me that the owner of the Deerhound, of the Royal Yacht Squadron, performed only a common duty of humanity in saving from the waves the Captain and several of the crew of the Alabama. They would otherwise, in all probability, have been drowned, and thus would never have been in the situation of prisoners of war.

"It does not appear to me to be any part of the duty of a neutral to assist in making prisoners of war for one of the belligerents."*

The alternative is thus sternly put by Mr. Seward in a despatch to Mr. Adams:—

"The Earl argues that if those persons had not been so taken from the sea they would in all probability have been drowned, and thus would never have been in the situation of prisoners of war. Earl Russell further observes, in that connection, that it does not appear to him to be any part of the duty of a neutral to assist in making prisoners of war for one of the belligerents.

"I have to observe, upon these remarks of Earl Russell, that it was the right of the Kearsarge that the pirates should drown, unless saved by humane exertions of the officers and crew of that vessel, or by their own efforts, without the aid of the Deerhound. The men were either already actually prisoners, or they were desperately pursued by the Kearsarge. If they had perished, the Kearsarge would have had the advantage of a lawful destruction of so many enemies; if they had been recovered by the Kearsarge, with or without the aid of the Deerhound, then the voluntary surrender of those persons would have been perfected, and they would have been prisoners. In neither case would they have remained hostile Confederates.

"The Deerhound, by taking the men from the waves and conveying them within a foreign jurisdiction, deprived the United States of the lawful benefits of a long and costly pursuit and successful battle.

"I freely admit that it is no part of a neutral's duty to assist in making captives 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 convey them away from under the conqueror's guns."†

Possibly, in strictness of law, Mr. Seward was right in contending that a belligerent is entitled to the death of his enemy, and that a neutral cannot interfere to save the latter from destruction. But it is idle to propound legal theories in such a case: the instinct of humanity will be certain to prevail over all considerations of legal right—God forbid that it should not!—and the neutral who has rescued a sinking fellow-creature from impending death may be excused if he does not deliver up as a prisoner the man whom he has saved from perishing.

Be this as it may, the British Government had but one answer to make to the demand that these persons should be given up as prisoners, namely, that, however they had reached British soil, when on it they were entitled to the protection of its laws, and that the Government, which had had nothing to do with the manner of their escape, even if it had the will, had not the power to deliver them up.

* United States' Appendix, vol. iii, p. 263.

† Ibid., p. 273.

Immediately connected with the Case of the Alabama is that of the Tuscaloosa.

This vessel, originally called the Conrad, was a merchant-vessel of the United States. She was taken by the Alabama when off the coast of Brazil, being then loaded with a cargo of wool.

Captain Semmes, the Commander of the Alabama, put an officer and ten men on board of her, with two small rifled 12-pounder guns, gave her the name of Tuscaloosa, and, bringing her to the Cape, where she arrived on the 7th of August, 1863, requested that she might be admitted to the harbour of Simon's Bay as a tender of the Alabama, in other words, as a ship of war.

The Admiral on the station, Sir Baldwin Walker, learning that the so-called tender had never been condemned in a prize court, conceived doubts as to the legality of considering her in the light of a tender. He, therefore, wrote to the Governor, Sir Philip Wodehouse, requesting him to obtain the opinion of the Law Officers as to whether the vessel ought not to be looked upon as a prize, and as such prohibited from entering the Bay.*

The Attorney-General of the Colony reported that the Tuscaloosa could not be looked upon as a prize, on the ground that she purported to be a ship of war, and there was no legal proof to satisfy the local Government that such was not her true character; that Captain Semmes, as commanding a ship of war of the Confederate States, had authority to convert a captured vessel into a ship of war, and so to invest her with all the rights and immunities accorded to such vessels, and that it was not for the local Authorities, but for the courts of the captor, to determine her real character, while no means existed in the Colony for determining whether she had or had not been legally condemned.†

Having afterwards found that the vessel had her cargo of wool still on board, and that her armament was only what has been stated, Sir B. Walker felt still more doubtful as to the real character of the vessel. Writing to the Governor on the 9th of August, he says:—

"The admission of this vessel into port will, I fear, open the door for numbers of vessels captured under similar circumstances being denominated tenders, with a view to avoid the prohibition contained in the Queen's instructions; and I would observe that the vessel the Sea Bride, captured by the Alabama off Table Bay a few days since, or all other prizes, might be in like manner styled tenders, making the prohibition entirely null and void.

"I apprehend that to bring a captured vessel under the denomination of a vessel of war, she must be fitted for warlike purposes, and not merely have a few men and two small guns on board her (in fact nothing but a prize crew) in order to disguise her real character as a prize.

"Now this vessel has her original cargo of wool still on board, which cannot be required for warlike purposes, and her armament and the number of her crew are quite insufficient for any services other than those of slight defence.

"Viewing all the circumstances of the case, they afford room for the supposition that the vessel is styled a 'tender,' with the object of avoiding the prohibition against her entrance as a prize into our ports, where, if the captors wished, arrangements could be made for the disposal of her valuable cargo, the transhipment of which, your Excellency will not fail to see, might be readily effected on any part of the coast beyond the limits of this Colony.

"My sole object in calling your Excellency's attention to the case is to avoid any breach of strict neutrality."‡

The Attorney-General, however, on being again referred to, reported that "if the vessel received the two guns from the Alabama or other Confederate vessel of war, or if the person in command of her has a commission of war, or if she be commanded by an officer of the Confederate navy, in any of these cases there will be a sufficient setting forth as a vessel of war to justify her being held to be a ship of war: if all of these points be decided in the negative, she must be held to be only a prize and ordered to leave forthwith."§

* British Appendix, vol. i, p. 308. † Ibid., p. 309. ‡ Ibid., p.310. § Ibid., p. 311.

The Tuscaloosa.

The Admiral on this gave way, and the Tuscaloosa was treated as a ship of war, and as such admitted into the harbour and allowed to obtain provisions. She left the bay on the 14th of August,* and Captain Semmes having contrived to dispose of her cargo of wool at a place on the coast beyond the precincts of the Colony, dispatched her on a cruize to Brazil.†

Whilst thus occupied she is said to have done some mischief to United States' vessels.

The Tuscaloosa again put into Simon's Bay on the 26th of December, 1863.‡

In the meantime, the Government having reported to the Secretary of State for the Colonies what had happened on the occasion of her former visit, the Duke of Newcastle had deemed it right to take the opinion of the Law Officers of the Crown as to the law applicable to such a case.

On the 19th of October the Law Officers reported as follows:—

"Upon the point raised with regard to the vessel called the Tuscaloosa, we are not able to agree with the opinion expressed by the Attorney-General of the Cape Colony, that she had ceased to have the character of a prize captured by the Alabama merely because she was, at the time of her being brought within British waters, armed with two small guns, in charge of an officer, and manned with a crew of ten men from the Alabama, and used as a tender to that vessel, under the authority of Captain Semmes.

"It would appear that the Tuscaloosa is a barque of 500 tons, captured by the Alabama off the coast of Brazil on the 21st of June last, and brought into Simon's Bay on or before the 7th of August, with her original cargo of wool (itself, as well as the vessel, prize) still on board, and with nothing to give her a warlike character (so far as appears from the papers before us) except the circumstances already noticed.

"We therefore do not feel called upon, in the circumstances of this case, to enter into the question whether, in the case of a vessel duly commissioned as a ship of war, after being made prize by a belligerent Government, without being first brought *infra præsidia* or condemned by a Court of Prize, the character of prize, within the meaning of Her Majesty's orders, would or would not be merged in that of a national ship of war. It is enough to say that the citation from Mr. Wheaton's Book by the Colonial Attorney-General does not appear to us to have any direct bearing upon this question.

"Connected with this subject is the question as to the cargoes of captured vessels, which is noticed at the end of Sir Philip Wodehouse's despatch of the 19th August last. We think that, according to the true interpretation of Her Majesty's Orders, they apply as much to prize cargoes of every kind which may be brought by any armed ships or privateers of either belligerent into British waters as to the captured vessels themselves. They do not, however, apply to any articles which may have formed part of any such cargoes, if brought within British jurisdiction, not by armed ships or privateers of either belligerent, but by other persons who may have acquired or may claim property in them by reason of any dealings with the captors.

"We think it right to observe that the third reason alleged by the Colonial Attorney-General for his opinion assumes (though the fact had not been made the subject of any inquiry) that 'no means existed for determining whether the ship had or had not been judicially condemned in a Court competent of jurisdiction;' and the proposition that, '*admitting her to have been captured by a ship of war of the Confederate States*, she was entitled to refer Her Majesty's Government, in case of dispute, to the Court of her States, in order to satisfy it as to her real character,' appears to us to be at variance with Her Majesty's undoubted right to determine, within her own territory, whether her orders, made in vindication of her own neutrality, have been violated or not.

"The question remains, what course ought to have been taken by the authorities at the Cape, first, in order to ascertain whether this vessel was, as alleged by the United States' Consul, an uncondemned prize, brought within British waters in violation of Her Majesty's neutrality; and secondly, what ought to have been done if such had appeared to be really the fact? We think that the allegations of the United States' Consul ought to have been brought to the knowledge of Captain Semmes while the Tuscaloosa was still within British waters; and that he should have been requested to state whether he did or did not admit the facts to be as alleged. He should also have been called upon (unless the facts were admitted) to produce the Tuscaloosa's papers. If the result of these inquiries had been to prove that the vessel was really an uncondemned prize, brought into British waters in violation of Her Majesty's orders made for the purpose of maintaining her neutrality, it would, we think, deserve very serious consideration whether the mode of proceeding in such circumstances, most consistent with Her Majesty's dignity and most proper for the vindication of her territorial rights, would not have been to prohibit the exercise of any further control over the Tuscaloosa by the captors; and to retain that vessel under Her Majesty's control and jurisdiction until properly reclaimed by her original owners."§

It will be observed that in the foregoing opinion of the Law Officers, the question whether the Tuscaloosa should, under the circumstances, have been detained for the purpose of being restored to her original owners is suggested as one deserving, should the like case recur, of very serious consideration; it is by no means one on which a positive opinion was intended to be given. The Governor and the Admiral, however,

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* British Appendix, vol. i, p. 313. † United States' Documents, vol. vi, p. 499.
‡ British Appendix, vol. i, p. 330. § Ibid., vol. ii, p. 323.

considered it as establishing not only that they ought to have detained the Tuscaloosa, when formerly within their jurisdiction, but as imposing on them the duty of doing so now that, having returned to the Cape, she was again within their power. They accordingly took possession of her. Her Commander, Lieutenant Low, thereupon addressed the following protest to the Governor:— The Tuscaloosa.

"*Tuscaloosa, Simon's Bay, Cape of Good Hope,*
"Sir, "*December* 28, 1863.

"As the officer in command of the Confederate States' ship Tuscaloosa, tender to the Confederate States' steamer Alabama, I have to record my protest against the recent extraordinary measures which have been adopted towards me and the vessel under my command by the British authorities of this colony.

"In August last the Tuscaloosa arrived in Simon's Bay. She was not only recognized in the character which she lawfully claims to be, viz., a commissioned ship of war belonging to a belligerent Power, but was allowed to remain in the harbour for the period of seven days, taking in supplies and effecting repairs, with the full knowledge and sanction of the authorities.

"No intimation was given that she was regarded merely in the light of an ordinary prize, or that she was considered to be violating the laws of neutrality. Nor, when she notoriously left for a cruise on active service, was any intimation whatever conveyed that on her return to the port of a friendly Power, where she had been received as a man-of-war, she would be regarded as a 'prize,' as a violator of the Queen's Proclamation of Neutrality, and consequently liable to seizure. Misled by the conduct of Her Majesty's Government, I returned to Simon's Bay on the 26th instant, in very urgent want of repairs and supplies; to my surprise I find the Tuscaloosa is now no longer considered as a man-of-war, and she has, by your orders, as I learn, been seized for the purpose of being handed over to the person who claims her on behalf of her late owners.

"The character of the vessel, viz., that of a lawful commissioned man-of-war of the Confederate States of America, has not been altered since her first arrival in Simon's Bay; and she having been once fully recognized by the British authorities in command in this colony, and no notice or warning of change of opinion or of friendly feeling having been communicated by public notification or otherwise, I was entitled to expect to be again permitted to enter Simon's Bay without molestation.

"In perfect good faith I returned to Simon's Bay for mere necessaries, and in all honour and good faith in return I should, on change of opinion or of policy on the part of the British authorities, have been desired to leave the port again.

"But, by the course of proceedings taken, I have been (supposing the view now taken by your Excellency's Government to be correct) first misled, and next entrapped.

"My position and character of my ship will most certainly be vindicated by my Government. I am powerless to resist the affront offered to the Confederate States of America by your Excellency's conduct and proceedings.

"I demand, however, the release of my ship; and, if this demand be not promptly complied with, I hereby formally protest against her seizure, especially under the very peculiar circumstances of the case."*

Upon this proceeding being reported to the Government at home, the opinion of the Law Officers was again taken. It was felt that what had been done could not be properly upheld. It was obviously one thing to have seized the Tuscaloosa on the former occasion, as a prize brought into a port of Her Majesty; a very different thing, after she had been treated as a ship of war, and allowed to go free, to let her come again into port in the like character without notice of any hostile intention, and then to seize and practically condemn her. Assuming—of which, however, I must say I entertain very serious doubts—the right and power of the Government to take such a course, it savours too much of perfidy to be a course which Her Majesty's Government could pursue with a due regard to honour and good faith. Orders were therefore sent out by the Secretary of State for the Colonies "to restore the vessel to the Lieutenant of the Confederate States who lately commanded her; or, if he should have left the Cape, then to retain her until she can be handed over to some person who may have authority from Captain Semmes, of the Alabama, or from the Government of the Confederate States, to receive her."†

The order to restore this vessel has been reflected upon in the Case of the United States;‡ but I cannot but think that the decision come to by the Government was, under the circumstances, perfectly right: not only for the reason assigned, but also because, whatever might have been the power of the British Government to seize this vessel while still retaining the character of a prize, she had now been invested with that of a vessel of war belonging to a belligerent, and was therefore no longer amenable to the municipal jurisdiction.

The question is, however, of no practical importance whatsoever.

The Tuscaloosa never was delivered up. Lieutenant Low having left the Cape when the order of the Duke of Newcastle came out, she remained in the custody of

* British Appendix, vol. i, p. 333. † Ibid., p. 342. ‡ Page 273.

the local authorities till the end of the war, and was then delivered up to the United States. No claim of damages can arise, therefore, with regard to her in this respect.*

A serious question of law, however, presents itself in respect of whatsoever damage may have been done by the Tuscaloosa, while cruizing in the interval between her leaving the Cape and her return to it. This liability may be asserted on two grounds: first, it may be said that, the Alabama having been enabled to make war on the commerce of the United States through the want of due diligence on the part of the British Government, and the Tuscaloosa having been taken by the Alabama and converted into a ship of war employed in the same warfare, the mischief done by her must be looked upon as the consequence of such original default of the Government and must be answered for accordingly; a proposition obviously involving very serious consequences, as leading to a liability of a most extensive and unlimited character. Secondly, it may be said that the Tuscaloosa ought to have been seized and delivered up to her original owners, when first found at the Cape, and that the British Government must, as having allowed her to go free, be held liable for any damage afterwards done by her. But this argument of course assumes, first, that the Government had the power and right to seize this vessel; secondly, that it was under any obligation to do so; thirdly, that if such an obligation existed, it rendered the Government liable to do more than compensate the original owners, and involved them in liability towards the United States' Government.

The question, though of some legal interest, is otherwise but of small importance by reason of the very small amount of damage done by this vessel. On the whole I am disposed to think, though not without some doubt as to whether the damage may not be too remote to found a legal liability, that the mischief done by the Tuscaloosa being the direct consequence of the equipment of the Alabama, on the principle that "omne accessarium sequitur suum principale," those who are answerable for the one must be answerable also for the other. I acquiesce, therefore, in the decision of the rest of the Tribunal in respect of this vessel.

* British Appendix, vol. i, p. 363.

Case of the Georgia. The Georgia.

The case of the Georgia is one in which not even the desire to establish great principles of neutrality at the expense of Great Britain can, as it appears to me, find matter on which to found a charge of want of due diligence.

This vessel was built at Dumbarton, on the Clyde, and was evidently originally intended as a blockade runner, which may account for the interesting fact, thrice repeated in the American Case and Argument, that she was christened by a young lady, the daughter of Captain North, who was in some way connected with the Insurgent service.

The Georgia was evidently not constructed as a vessel of war, though afterwards applied to that purpose. The vigilance of the Government having been aroused by the escape of the Florida and the Alabama, the building of ships of war for the Confederate service had become a matter of extreme difficulty, and recourse was had to the contrivance of converting ships, originally built as blockade-runners, into vessels of war.

She was registered on the 20th of March, 1863, as the property of a Mr. Thos. Bold, a merchant of Liverpool, on his declaration that he was the sole owner.* She was advertised at the Sailors' Home at Liverpool as about to sail for Singapore; seamen were engaged for her as bound to that port, and her crew signed articles for a voyage to Singapore, or any intermediate port, for a period of two years.†

On the 1st of April this vessel, the name of which had been changed to the Japan, cleared out in ballast for a voyage to Point de Galle and Hong Kong.‡ Her crew, the number of which, as appears from the deposition of Thomas Mahon, one of them, was about 50,§ but which, according to the report of the Chief Officer of Customs, was in fact 48,‖ though magnified by Mr. Dudley into 70 or 80,¶ having been hired at Liverpool by the firm of Jones and Co., of that place, were sent by steamer to the Clyde. They had shipped for a two years' voyage to Singapore, there and back, and beyond all question had shipped in the honest belief that the ship was bound for that place. The vessel sailed on the 2nd of April from Greenock, but appears only to have dropped further down the river, and not to have finally left till the 6th or 7th. Mr. Dudley, on the 3rd of April, writing to Mr. Seward on the subject of this vessel, adds:—

"My belief is that she belongs to the Confederates, and is to be converted into a privateer; quite likely to cruize in the East Indies, as Mr. Young, the Paymaster from the Alabama, tells me it has always been a favourite idea of Mr. Mallory, the Secretary of the Confederate Navy, to send a privateer in these waters. I sent a man from here to Glasgow to accompany these men, to endeavour to find out the destination of the vessel, &c. He has not been successful yet in his efforts. He has been on board, and writes that she has no armament, and he is still there watching her. I have directed him, before he returns, to visit the yards in the Clyde, and to go down to Stockton and Hartlepool."**

From a letter from Mr. Adams to Mr. Seward, of the 9th, it appears that that gentleman "had long been in possession of information about the construction and outfit of this vessel in the Clyde; but," he adds, "nothing has ever been furnished me of a nature to base proceedings upon."†† Neither had there been, assuredly, up to this time, anything which would have justified Mr. Adams in applying to Her Majesty's Government to seize this vessel, or the Government in seizing her.

The measuring surveyor, who had surveyed her on the 17th of January, and had been on board on two subsequent occasions for the purpose of completing his survey, stated that she "appeared to him to be intended for commercial purposes, her framework and plating being of the ordinary size for vessels of her class."‡‡ The Collector of Customs, upon an inquiry being afterwards directed by the Government, reported:—

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* British Appendix, vol. i, p. 424. † Ibid., p. 426. ‡ Ibid., p. 404. § Ibid., 413.
‖ Ibid., p. 404. ¶ United States' Documents, vol. vi, p. 509. ** Ibid.
†† United States' Documents, vol. ii, p. 667. ‡‡ British Appendix, vol. i, p. 404.

"I have questioned the officer who performs Tide Surveyor's duty afloat, and who visited her on the evening of the 1st instant, to see that the stores were correct. He informs me he saw nothing on board which could lead him to suspect that she was intended for war purposes. I can testify that she was not heavily sparred; indeed, she could not spread more canvas than an ordinary merchant-steamer. I beg to add, when the Tide Surveyor was on board, the joiners were fitting doors to the cabins."*

The vessel left ostensibly for the purpose of trying her engines, and an intention was professed of returning to land the joiners who were on board.

But while thus leaving in the disguise of a peaceful merchant-vessel trying its engines, the Japan was intended to be converted into a ship of war, and was not to return to Greenock. When she got well away from Greenock, the joiners, who had been fitting-up cabin doors when she left, were employed to fit-up a magazine, and were afterwards landed lower down in the Clyde. Up to this time, no information had been furnished, or communication made, to Her Majesty's Government on the subject of this vessel.

Having left the Clyde, the Japan proceeded to the coast of France, where, as we know, she was joined by the small steamer Alar, which brought out to her her armament of guns and munitions of war.

Let us pause here for a moment, to see whether, thus far, there was anything in respect of which negligence could be, with the slightest show of reason, imputed to Her Majesty's Government.

It is certain that, though the attention of Mr. Underwood, the United States' Consul at Glasgow, had been for some time fixed on this vessel, there was nothing on which it was thought that the action of the Government could be invoked.

It is said, indeed, in the Argument of the United States, that the reason was that he "had not and could not, with his means of information, produce 'such evidence as would support an indictment for misdemeanour;' and nothing short of that, Mr. Adams had been informed in the July previous, would, in the opinion of the Solicitor of the Customs at London, furnish 'justifiable ground of seizure.'" But, whatever might have been said in the preceding July, at this time there was everything to encourage Mr. Adams, if he had possessed any ground for asking for the interposition of the Government, to take that course. During the last three months he had made representations to the British Government on the subject of three different vessels, the Georgiana, the Phantom, and the Southerner, in regard to which, at the time of his first communication he had no evidence to produce beyond the statements or suspicions of the United States' Consuls at London or Liverpool; and inquiries had been instantly made in each case, and in regard to the latter two vessels, Mr. Adams was writing at this very time (April 6) to express his satisfaction at the steps which had been taken.† He was, moreover, in correspondence with Earl Russell on the subject of another vessel, the Alexandra, which was seized on the 5th April by order of the Government, a fact of which he was informed on the same day, and at which he also wrote to testify his "lively satisfaction."‡ He knew too that, on no better authority than public report, the Government had of themselves instituted an inquiry in the month of March with a view to ascertaining whether vessels of war were being built at Glasgow for the Confederates, the result of which inquiry had been communicated to him on the 21st of March.§ The reason why Mr. Adams made no communication to the Government relative to this vessel was, as he expressly stated when writing to Mr. Seward three days later than the date of the vessel's departure, that "nothing had been furnished to him of a nature to base proceedings upon."

Upon what, then, can any charge of negligence against Her Majesty's Government be founded in respect of this vessel? Simply upon the old allegation of the notoriety of the fact that it was being fitted out as a vessel of war for the service of the Confederate Government. And how is this notoriety attempted to be established? Solely by an anonymous letter, purporting to be addressed to Lord Palmerston, published in the "Daily News" of the 12th of February, 1863, in which the vessel is spoken of.‖ The letter is a very long one, and not written in a style to command much attention, the changes being rung on "pirates" and "slaveholders" in a very sensational style. The probability is, that this letter was never seen by any of Her Majesty's Ministers; still more so that, if it was, it was not read through. If it is

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* British Appendix, vol. i, p. 404. † Ibid., vol. ii, p. 71. ‡ Ibid., p. 231.
§ United States' Documents, vol. ii, p. 203. ‖ Ibid., vol. vi, p. 503.

meant to be suggested that the author was writing upon facts notorious to the world, and not from his own private sources of knowledge, it is only necessary to turn to the letter to see that this could not have been so. The writer is personally familiar with the whole subject of vessels built for, or in the interest of, the Confederates, and was doubtless some official connected with the United States. But what form did the notoriety, of which this anonymous writer was the organ, take in respect of the Japan, afterwards the Georgia? Did it treat her as a vessel of war, as the passages in the American Case and Argument would lead us to suppose? Not so. Her destination was expected to be of an humbler kind—that of a blockade-runner. This is what is said by "Anonymous" respecting this vessel:—

"Mr. Peter Denny, of Dumbarton, has constructed two fine screw-steamers. They are lying in the Clyde. Report, of a somewhat authentic kind, says one of them is partly owned by the 'Chinese' and partly by individuals at Nassau, New Providence. It is publicly announced that she is soon to be employed on the line between Nassau and Charleston. Her name is the Virginia. The term 'Chinese' is in general use in the building-yards of the Clyde and the Mersey to designate the Confederates, and the 'Emperor of China' has no other signification, in this connection, than to personify Jefferson Davis. The 'Chinese' have been striving very hard to purchase the sister-vessel to the Virginia, through one of their agents at Liverpool, but Mr. Denny built and lost the Memphis, and he requires the 'Celestials' to pay cash down before he parts with his property."*

It need hardly be pointed out that, being "employed on a line," with reference to a vessel, means being employed in carrying goods or passengers backwards and forwards between two or more given places.

There was, therefore, nothing in this letter, any more than in the facts, to lead to any supposition on the part of the Government that the Japan was intended for a ship of war.

But let us follow the vessel. Having left the Clyde, the Japan first made towards the Isle of Man, then suddenly changed her course, and went North, through the North Channel, then down the west coast of Ireland, passed Cape Clear, then steered eastward, and then made straight for Ushant, Ushant Light being the first light sighted. She then kept on and off near the French Coast.†

In the meantime a small steamer called the Alar, of London, having taken the armament of the Georgia on board at Newhaven, as well as some twenty to thirty men, who were to form an addition to her crew, set sail from Newhaven on the 5th of April, having cleared out for Alderney and St. Malo. Keeping clear, however, of both these places, she steered straight for the west coast of France; which, however, owing to accidents which happened to her machinery, she did not reach till Wednesday the 8th. The Georgia was then sighted far away to the westward, and the machinery of the Alar having again broken down, the former vessel came and took her in tow, and took her into the narrow passage between Ushant and the mainland. There the transhipment of the guns and munitions of the Georgia from the Alar took place, the whole being finally accomplished by the afternoon of Thursday the 9th, when the Georgia stood out to sea, while the Alar returned, but her machinery having again broken down, she was obliged to put into Plymouth.‡

Prior to the Alar parting company with the Georgia, a Captain Lamont, or Dupont, who had come out in the Alar, assumed the command of the Georgia, and, having called the crew together, informed them that the vessel was not bound for Singapore, but was intended for the Confederate service, to "sink, burn, and destroy vessels belonging to the United States." He then proposed to them to sign articles to serve for three years. Part of the crew agreed to sign articles accordingly, but some seventeen refused, were paid their wages then due, and returned in the Alar.

In the meantime, Mr. Dolan, the Collector of Customs at Newhaven, had, the day after the Alar left Newhaven, written to the Commissioners of Customs respecting her:—

"Honourable Sirs, "*Custom-House, Newhaven, April* 6, 1863.

"The steam-ship Alar, of London, 85 tons, owned by H. P. Maples, sailed on Sunday morning, 5th instant, at 2 A.M., bound according to the ship's papers, viz., the accompanying content, for Alderney and St. Malo. On Saturday, at midnight, thirty men, twenty of whom appeared to be British sailors, ten mechanics, arrived by train. Three gentlemen accompanied them, Mr. Lewis, of Alderney, Mr. Ward, and Mr. Jones. The men appeared to be ignorant of their precise destination; some said they were to get 20*l.* each for the trip. A man, rather lame, superintended them. Shortly after midnight, a man arrived from Brighton on horseback, with a telegram, which, for purposes of secresy,

* United States' Documents, vol. vi, p. 505. † British Appendix, vol. i, p. 412.
‡ Ibid., pp. 409, 412.

had been sent there and not to Newhaven, it is suspected. Mr. Staniforth, the agent, replied to my inquiries this morning that the Alar had munitions of war on board, and that they were consigned by * to a Mr. Lewis, of Alderney. His answers were brief, and with reserve, leaving no doubt on my mind, nor on the minds of any here, that the thirty men and munitions of war are destined for transfer at sea to some second Alabama. The private telegram to Brighton intimated, very probably, having been reserved for the last hour, where that vessel would be found. Whether the shipment of the men, who all appeared to be British subjects, can, if it should be hereafter proved that they have been transferred to a Federal or Confederate vessel, be held as an infringement of the Foreign Enlistment Act, and whether the clearance of the Alar, if hereafter proved to be untrue, can render the master amenable under the Customs Consolidation Act, is for your consideration respectfully submitted.

(Signed) R. J. DOLAN, *Collector*."†

Thus, Alderney was supposed to be the place to which the Alar had gone. Similar information appears to have reached Mr. Adams, though we are not informed from what quarter. On the 8th of April he writes to Earl Russell:—

"My Lord, "*Legation of the United States, London, April* 8, 1863.

"From information received at this Legation, which appears entitled to credit, I am compelled to the painful conclusion that a steam-vessel has just departed from the Clyde with the intent to depredate on the commerce of the people of the United States. She passed there under the name of the Japan, but is since believed to have assumed the name of the Virginia. Her immediate destination is the Island of Alderney, where it is supposed she may yet be at this moment. A small steamer called the Alar, belonging to Newhaven, and commanded by Henry P. Maples, has been loaded with a large supply of guns, shells, shot, powder, &c., intended for the equipment of the Virginia, and is either on the way or has arrived there. It is further alleged, that a considerable number of British subjects have been enlisted at Liverpool, and sent to serve on board this cruizer.

"Should it be yet in the power of Her Majesty's Government to institute some inquiry into the nature of these proceedings, in season to establish their character, if innocent, or to put a stop to them, if criminal, I feel sure that it would be removing a heavy burden of anxiety from the minds of my countrymen in the United States.

"I pray, &c.,

(Signed) "CHARLES FRANCIS ADAMS."†

This was the first communication received by the Government on the subject of this ship. Not a moment was lost by the Government in instituting inquiries, and a letter was dispatched the same day to the Lieutenant-Governor of Guernsey, Major-General Slade, from the Home Office, to whose department the Channel Islands belong:—

"Sir, "*Whitehall, April* 8, 1863.

"I am directed by Sir George Grey to transmit to you herewith, as received through the Foreign Office, a copy of a letter from the United States' Minister at this Court, respecting a steam-vessel named either the Japan or the Virginia, reported to have left the Clyde for Alderney, where she is to receive on board an armament conveyed to that island by a small steamer, the Alar, belonging to Newhaven, and is to be eventually employed in hostilities against the United States; and I am to request that you will make immediate inquiry into the truth of the allegations contained in that communication.

"I have to call your attention to the Statute 59 Geo. III, cap. 69. Section 7 appears to be applicable to this case, if the information which has been given to the Minister of the United States of America should turn out to be correct. In that case the Law Officers of the Crown should be instructed to take, without delay, the proper proceedings authorized by the law of Alderney, to enforce the provisions of the Act in question, and the Officers of Customs may be called upon to assist, if necessary.

"Sir George Grey will be glad to be informed of the result of the inquiry, and of any steps that may be taken in consequence.

"I have, &c.

(Signed) "H. WADDINGTON."‡

On receipt of this letter General Slade immediately sent a ship of war to Alderney; but, as neither the Japan nor the Alar had gone to Alderney, of course neither of them was to be found there.

I should have thought it difficult under these circumstances to raise an accusation of negligence against Her Majesty's Government. Nevertheless, the Government are charged in the American Case with neglect in not having, on the receipt of Mr. Adams's letter of the 8th, dispatched ships of war from Portsmouth and Plymouth to seize the two vessels. "The sailing and the destination," it is said, "were so notorious as to be the subject of newspaper comment."§ A single newspaper, the "Liverpool Journal of Commerce," of April 9, is referred to in support of this assertion. I turn to it, and I find it there stated, indeed, that the vessel had sailed, but "for *unknown destinations*."‖ The only direction, therefore, given to the Government inquiry was Alderney. To that island it is said to have been incumbent on the Government to send ships of war from Portsmouth and Plymouth, because "Alderney and the Channel Islands were

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* Blank in original. † British Appendix, vol. i, p. 405. ‡ Ibid., p. 401.
§ Case of the United States, p. 398. ‖ United States' Documents, vol. ii, p. 668.

on the route to St. Malo *and Brest;* and it is not at all probable, scarcely possible, that the Alar and the Georgia would not have been discovered."* There is in this statement a geographical confusion pardonable only in parties writing from the other side of the Atlantic. Brest and St. Malo are on different sides of the French coast, and at least 150 miles apart, and according as a vessel was bound to the one or the other, she would steer a totally different course. But still more startling is the statement that Alderney and the Channel Islands would have been in the course of a vessel coming round the west coast of Ireland, and bound for Ushant and the north-west part of the French coast, as the Georgia undoubtedly was. To a vessel coming round Cape Clear, and intending to make her way towards the Bay of Biscay, or to stand out into the Atlantic, Alderney would have been from 250 to 300 miles out of her way!

Independently of the absurdity of supposing that the Georgia would have come to Alderney at all—more especially as she would there have been exposed to seizure, as being in a British port, if any suspicion should have arisen respecting her real character—when it was much easier for her to take in her armament off the French coast, I must express my surprise that it should be deliberately stated, by those who know that she never went to or near Alderney at all, and that no other destination of the vessel was known or surmised, to which ships could have been sent after her, that, by reason that Earl Russell, "instead of directing action to be taken by the navy, directed inquiries to be made by the Treasury and Home Office, the Georgia escaped."

Is it to be said that without having the least idea of any other destination than Alderney, the Government were to send ships of war in all directions in quest of two vessels, neither of which could possibly be known to any officer in Her Majesty's navy? Even had the spot where the two vessels were to meet been known, it would scarcely have been possible for a ship from Plymouth—much less from Portsmouth—which is more than 100 miles further off, to have overtaken them.

The letter from Mr. Adams was not written till the 8th, and would appear from Mr. Hammond's letter to that gentleman of the same date, to have been received in the afternoon of that day. Had instructions been telegraphed to Plymouth that afternoon, it would have taken some short time to carry the orders into execution. Steamships are not ready to start at five minutes' notice. From Plymouth to Ushant is some 120 miles; and, on the 9th, the Georgia had left the French coast and was on her way upon the ocean. But for the delay occasioned by the breaking down of the Alar's machinery she would have been gone several hours sooner.

There is a homely, but expressive, English saying that "Any stick serves to beat a dog with," but one must have a most determined intention to beat the creature to make such a case as this a ground of complaint.

It has been sought to fix the British Government with the responsibility for damage done by this vessel on the ground that, until the 23rd of June, Bold continued to be on the register as owner. It is true that it was not until this date that Bold informed the Collector of Customs that he had parted with the vessel, and returned the certificate of registry. No such consequence, however, as is contended for, at all follows. The ownership of a British vessel may be transferred, though the evidence of it, as afforded by the register, remains incomplete; and it would be absurd to suppose that Mr. Bold, if the true owner, lent his vessel to the Confederate Government, or failed to take care to be paid for her before he parted with her. The delay in cancelling the registration was, no doubt, for the purpose of delaying as long as possible the disclosure of the real transaction.

Mr. Squarey, the Liverpool Solicitor engaged for the United States, being consulted on this point, gave the following very sensible advice:—

"It does not appear to me the engagement of the crew can be treated as an offence against the Act, because the only legal contract binding upon the crew was that appearing upon the articles. The men were not liable to do anything except what they had agreed to do by the articles; and from the statements of the men whom I saw, it did not appear that they knew when they shipped that it was expected or intended that they should serve on board a man-of-war or privateer. As regards the liability of the British registered owner to make good to the owners of the American vessel destroyed the loss sustained by them, I conceive it must depend upon the question whether those in command of the vessel at the time can be considered to have been the agents of the British owner. If they were such agents, and there was any evidence to show that the destruction of the American ship could be considered as an act within the scope of their authority, I have no doubt that the owners would be liable; but it appears to me that the circumstances to which I have previously referred go very far to rebut the presumption that such agency existed, and to prove that, in destroying the American vessel, the

* American Case, pp. 398, 399.

officers and crew were acting, not for the British owner, but for the Government of the so-called Confederate States. In such case I do not think that any liability could be established against the British owner, for it is now well established that the mere fact of being on the register of the ship does not involve liability for the acts or engagements of the master and crew, and that such liability is in fact a question depending upon express or implied agency in every case.

"Although, therefore, I do not see how a British owner is to be made liable, there is, in my opinion, a case which justifies the American Government in bringing the matter before the notice of the British Government, and requiring explanations from that Government of the circumstances under which a British vessel is found to be engaged in the destruction of vessels belonging to American citizens."*

It appears to me, therefore, beyond all question clear that no charge of negligence can by possibility attach to Her Majesty's Government in respect of this ship. And I confess it was not without surprise that I heard one member of this Tribunal say that, but that Mr. Adams had declared in favour of the British Government on this occasion, he should have been prepared to pronounce "a more severe" judgment. If such views are to prevail, the responsibility of neutrals will be a serious thing indeed.

It only remains to be added in respect of this vessel that a prosecution was instituted by the Government, under the Foreign Enlistment Act, against Jones and Highatt, two members of the firm of Jones and Co., of Liverpool, by whom the men had been engaged to serve on board the Japan, and as to whom it was alleged that they had engaged the men for the purpose of their enlisting in the Confederate service when the true character of the vessel was declared. The case was tried before me at Liverpool, when both defendants were found guilty by the jury, but points of law were reserved involving considerable difficulty, particularly that the men, at the time they were engaged at Liverpool, were not aware of the ulterior purpose which the defendants were alleged to have had in view.

On the defendants being brought up for judgment, the defendants having consented to abandon the points reserved, and to forego an intended application for a new trial, an arrangement was come to between the Counsel for the Crown and the Counsel for the defendants that a fine of 50*l.* should be imposed on each of them. The punishment might, at first sight, appear inadequate, but looking to the legal difficulties, it was on the whole, I think, a prudent arrangement; it having been better that the law should be vindicated, though with a less degree of punishment, than that the chance of a defeat should be risked.

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* British Appendix, vol. i, p. 428.

Case of the Shenandoah.

This vessel, originally known as the Sea King, was a screw-steamer built at Glasgow in the year 1863, for the purpose of being employed in the China trade.* She had been seen by Mr. Dudley at Glasgow in 1863, who represented her as well adapted for warlike purposes, and thought she was likely to be bought for such purpose by the Confederates.† But in this he was mistaken. She was bought by private owners; Messrs. Robertson and Co., of London, acted as managing owners.‡

She had from the beginning two 12-pounder carronades, such as merchant-vessels are in the habit of carrying as signal guns, but nothing more.§

In November 1863, she left London on a voyage first to New Zealand, taking out troops for Her Majesty's Government to Auckland, and from thence to Hankow for a cargo of tea, and with the latter she returned to London. She was a vessel built entirely for commercial purposes, and was in no respect whatever adapted for war.

In September 1864 she was sold by her owners, in the ordinary way of business, to a Mr. Richard Wright, a shipowner of Liverpool. On the 7th of October, 1864, Wright granted a certificate of sale to Mr. P. S. Corbett, the master of the ship, empowering him to sell her within six months from the date of the certificate, at any port out of the United Kingdom, for a price not less than 45,000*l.*‖

After this the vessel cleared out, as for a trading voyage "to Bombay, calling at any ports or places on the passage, and any other ports or places in India, China, or Japan, or the Pacific or Atlantic Oceans, trading to or from, as legal freights might offer, until the return of the ship to a final port of discharge in the United Kingdom or continent of Europe; the voyage not to exceed two years."¶ A crew was hired, and signed articles for the voyage in question, and the vessel sailed as if upon it, without any suspicion on the part of the crew, or of any one not in the secret, that she was intended for any other destination.

The vessel underwent no change prior to her leaving; no equipment of her for the purpose of receiving any armament took place; she remained, as she had been from the beginning, fitted for commercial purposes only. She was wholly unadapted to receive guns. She had on board only the two small 12-pounder guns she had always had, such as merchant-vessels of her class always carry as signal guns. She had no arms or munitions of war.

When afterwards examined at Melbourne by Captain Payne, the latter reported that, "everything indicated that she was nothing more than an ordinary merchant-ship. He could not discover any magazine; there were no stands for small-arms, cutlasses, or pistols; no shot racks were fitted, nor could he see any shell room aloft. "There is nothing" he says, "to protect her machines from shot and shell; in fact, her boilers and the principal part of her machinery are above the water line. Her bunkers certainly are between the machinery and the ship's side, but from their small dimensions they would offer but small resistance to shot. The most vulnerable part, viz., the boilers, is left quite unprotected."** "I am altogether of opinion," adds Captain Payne, "that there is nothing in her build, armament (with the exception of two Whitworth guns), and equipment that should call for more special notice than that she is an ordinary merchant-vessel armed with a few guns."

It is plain therefore that, till the Whitworth guns in question were put on board, there was nothing whatever on board the Sea-King to attract attention, or to excite the slightest suspicion about her. That this was so is shown by the fact that the crew fully believed that she was really bound for the voyage to the East.

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* British Appendix, vol. i, p. 724.
† United States' Documents, vol. vi, p. 554.
‡ British Appendix, vol. i, p. 494.
§ Ibid., p. 725.
‖ Ibid., p. 495.
¶ Ibid., p. 496.
** Ibid., p. 557.

But it appears that the Mr. Richard Wright who had bought the vessel, was the father-in-law of Mr. Prioleau, the managing partner of the firm of Fraser, Trenholm, and Co., of Liverpool; whereupon we are gravely told, in the Case of the United States, that "the acquisition, by a near connection of a member of their firm, of a fast-going steamer, capable of being so converted, and the proposition to send her to sea in ballast, with nothing on board but two mounted guns and a supply of provisions and coal, ought of itself to have attracted the attention of the British officials; and that the omission to take notice of the fact is a proof of want of the due diligence required by the Treaty."*

Not the slightest intimation, however, is given as to what notice should have been taken, or what could possibly have been done. There was nothing that could, in any way, have justified the detention of the vessel. In the foregoing statement we have, therefore, as it seems to me, an unwarrantable assumption.

The Sea King left the port of London on the 9th October, and proceeded to Madeira, where she arrived on the 18th† In the meantime a small steamer called the Laurel had left Liverpool, having cleared for Matamoras and Nassau. She took out cases marked as machinery,‡ but in reality containing two 33-pounder Whitworth guns, and four 8-inch smooth-bore guns of 55 cwt. each, together with shells, small arms, and ammunition for the use of the Sea King.

Mr. Dudley was somehow informed that the cases contained guns and gun-carriages, and believing they were intended to be mounted on the decks of the Laurel, wrote to Mr. Adams that he apprehended she was intended as a privateer. At the same time he admitted that he had no evidence to implicate her except the taking on the guns in cases.§ It is plain, therefore, that Mr. Dudley did not surmise any connection between the two vessels, one of which was starting from London, the other from Liverpool, and I am at a loss to see how any could possibly have been surmised.

Lieutenant Waddell, the future captain of the Sea King, and the other officers, and seventeen men who were to form part of her crew, were also passengers in the Laurel.

Before the Laurel left Liverpool, Mr. Dudley began to suspect that the guns put on board her were intended for another vessel, as they were more in number than would be required for a vessel of her size;‖ but he was evidently altogether without any definite information about her.

The Sea King arrived at Madeira about the 18th of October; the Laurel about the same time. The following day both vessels proceeded to some small islands called the Desertas, where the guns and warlike stores intended for the Sea King were transferred to her from the Laurel.¶ Either then, or prior to leaving England, Corbett, acting on the power of attorney received from the owner, Wright, sold the vessel to the Confederate Government. According to his account the sale took place on the 19th.** On that day, the captain and officers took possession of her as a Confederate ship. Captain Corbett informed the crew that he had sold the ship to the Confederate Government, that she was henceforth to be a cruizer in their service, and that he had delivered her up to them.

Every effort was made, by persuasion and offers of large bounties and high wages, to induce the former crew to enter the Confederate service on board the vessel; but, with the exception of two or three, all the rest, forty-two in number, refused, and were conveyed in the Laurel to Teneriffe, from whence they afterwards returned to London. The Confederate flag having been hoisted in the Sea King, she cruized thenceforward under the name of the Shenandoah.

It must be, indeed, a stern stickler for neutral responsibility who could say that up to this point there had been anything for which blame could be attributed to Her Majesty's Government. Not the slightest suspicion had attached to this ship, which was only known as a merchant-vessel, prior to her leaving England. But besides this, no offence whatever had been committed against British law.

The ship had not been either "fitted out," "equipped," or "armed," within the United Kingdom or within Her Majesty's dominions. Built as a merchant-vessel, she had been sold, as she stood, to the Confederate Government; and neither by the municipal law of Great Britain, any more than by that of the United States, nor by international law, was such a sale in any way illegal.

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* United States' Case, p. 113.
† British Appendix, vol. i, p. 485.
‡ Ibid., p. 493.
§ United States' Documents, vol. vi, p. 556.
‖ Ibid, p. 558.
¶ British Appendix, vol. i, pp. 478–482, 486–489.
** Ibid., p. 481.

The Argument of the United States itself admits that "if the Shenandoah at this point of her history stood alone, and there had been no other cause of complaint against Her Majesty's Government, the United States could not now hold Great Britain responsible for her original escape and armament."

No question, therefore, can arise as to the responsibility of Great Britain in respect of any damages done by this vessel prior to her arrival at Melbourne.

The first that was heard of the Shenandoah by Her Majesty's Government was from a letter of the 30th of October from Mr. Grattan, the British Consul at Teneriffe. On the Laurel arriving at that place, the master, J. F. Ramsay, on presenting himself at the Consular Office, stated that he wished to land 43 passengers, who were to proceed to England by the next Liverpool steamer, and that these persons were the master and crew of the British steamer Sea King, of London, which vessel had heen wrecked off the Desertas. The Laurel continued her voyage on the 22nd instant. The master, on getting up steam, and not before, landed the above-mentioned seamen.

The master of the Sea King, P. S. Corbett, did not call at the Consular Office, as is usual in such cases, either for the purpose of making a protest or to claim assistance. Therefore, on the 25th instant, Consul Grattan sent to desire his attendance, and demanded the certificate of registry of his vessel, in pursuance of instructions contained in paragraph No. 13 of the Board of Trade Instructions. On handing in his certificate Corbett informed Mr. Grattan that his vessel had not been wrecked, but that she had been sold in London, and delivered to her owners on the high seas; and that himself and his crew had landed here for the purpose of returning to England as passengers in the West Coast of Africa mail-steamer, due at the port on the 31st instant.

The Consul, having been struck by the discrepancy between the statements of the two masters, made inquiries of some of the former crew of the Sea King, and having taken their depositions, and being of opinion that they contained evidence sufficient to substantiate a charge against the master, Corbett, of an infringement of the Foreign Enlistment Act, sent him in custody to England, at the same time forwarding the depositions of the men in a despatch to Earl Russell.*

I will conclude the narrative as to what further happened in relation to Corbett before I pursue the further history of the Shenandoah.

On the arrival of the depositions in England, the Law Officers at first advised that no prosecution could be sustained against Corbett, as all the facts had taken place on the high seas, and a British ship on the high seas could not properly be considered as "within Her Majesty's dominions, or a place belonging to or subject to Her Majesty."† Two further affidavits having been afterwards furnished by Mr. Adams, of men who had been engaged by the defendant in London, and who spoke to language of a suspicious character then used by him, the Law Officers, on being again consulted, thought that there was sufficient evidence on which to found a prosecution; and they further thought that as the ship had left the country as a British ship, she might, *primâ facie*, be considered as such, that is, till a sale and transfer of property in her was shown; and that it might be deserving of serious consideration whether her deck might not be considered as "a place belonging to Her Majesty," within the language of the Act.‡ A prosecution against Corbett was accordingly instituted by the Government, for a breach of the 2nd section of the Foreign Enlistment Act, in endeavouring to procure men to enlist and serve, or to embark and go out of Her Majesty's dominions to enlist and serve, in the Confederate service. The case came on before myself and a special jury, at Westminster Hall, in December 1865. The witnesses for the prosecution were six sailors who had formed part of the crew of the Sea King, and who deposed that, after Captain Corbett had informed the crew that he had sold the ship to the Confederate Government, he endeavoured to persuade the men to enlist, pointing out to them the advantage of so doing in the way of pay and prize-money. There was, however, considerable inconsistency in the evidence of these men, some of them ascribing to the defendant what others put into the mouth of Captain Waddell, and *vice versâ*. The men appear to have had a strong feeling against the Captain, by reason of their intended voyage to the East having come to an abrupt termination, and to their not having received as much wages as they expected for the time they had been out.

The first mate, the steward, and the chief engineer of the crew of the Sea King, one of the crew of the Laurel, and two or three Confederate sailors who had joined the

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* British Appendix, vol. i, p. 477. † Ibid., p. 483. ‡ Ibid., p. 490.

Confederate ship, all of whom had witnessed all that passed, denied positively that Corbett had taken any part in persuading the men to sign articles, but attributed to Captain Waddell, exclusively, the language which the witnesses for the prosecution had represented as spoken by Corbett.

It having been objected on the part of the defendant that, while, in order to constitute an offence under the enactment in question, the act complained of must have been done within Her Majesty's dominions, what was here alleged to have been done by the defendant had taken place in Spanish waters; it was answered by the Solicitor-General that, if the act had been done on board a British vessel, that would be sufficient to satisfy the statute, and that, though he could not deny that a sale of the vessel had taken place, yet that, so long as the British crew remained on board, the vessel could not be considered as having been delivered up to the purchasers and must still be looked upon as a British ship. I was, however, clearly of opinion that the defendant Corbett having openly announced the sale of the ship and that he had delivered her over to Waddell, and the latter having assumed the command, and, with his officers, taken possession of her, the delivery had been completed and the property effectually transferred. I, however, desired the opinion of the jury on this point, as well as on the questions whether the defendant had endeavoured to induce the men to enlist in the Confederate service, as crew of the Sea King; and, if so, whether, when he engaged the men in London, he had the ulterior design of inducing them to enlist when beyond the Queen's dominions. The jury thought the evidence too conflicting upon which to convict the defendant, and, it being very doubtful whether the witnesses for the Crown were not confounding what had been said by Waddell with what was said by Corbett, I think the jury acted wisely on the whole in acquitting the defendant.*

I have adverted to these circumstances in justice to the Government and the Solicitor-General who conducted the prosecution. No public prosecutor could have discharged his duty more honestly or zealously, or with a greater desire to obtain a conviction if it could legitimately and properly be done.

At Melbourne.

I return to the Shenandoah. Nothing more was heard of her by Her Majesty's Government till she arrived at Melbourne on the 25th of January, 1865.

Before relating the events which occurred during her visit at this port, it may be well briefly to describe the locality, some knowledge of which is necessary to a thorough appreciation of the facts. Port Philip, at the north-easterly end of which Melbourne is situated, is a bay of irregular oval shape, some 60 or 70 miles in circuit, opening into the sea by a narrow entrance to the south-west, called the Heads. The harbour of Melbourne, situated as has been said at the opposite end, is called Hobson's Bay, and forms the estuary of the Yarra-Yarra. Melbourne itself is about two miles inland up the Yarra-Yarra; on either side of Hobson's Bay are two suburbs of Melbourne, named respectively Williamstown and Sandridge. They are each connected with the town by a railway, and a steam ferry runs between the two, from one railway pier to another across the bay, which is here two and a-half miles wide. Williamstown is the place where shipping operations are for the most part carried on, and where seafaring men principally frequent. It should be added that the Governor had, at the time of the arrival of the Shenandoah, a small military force at his disposal, but no vessel of war of any kind; the Bombay, which is spoken of in the Argument of the United States as such, being merely a contract steam-packet belonging to the Peninsular and Oriental Company, with a naval agent on board in charge of the mails. The authorities were therefore dependent upon the Customs officers and the ordinary water police for the surveillance of the harbour.

Immediately on the arrival of the Shenandoah her Commander, Waddell, wrote to Sir C. H. Darling, the Governor, to announce his arrival:—†

Confederate States' steamer of war Shenandoah,
Port Philip, January 25, 1865.

"Sir,

"I have the honour to announce to your Excellency the arrival of the Confederate States' steamer Shenandoah, under my command, in Port Philip, this afternoon, and also to communicate that the steamer's machinery requires repairs, and that I am in want of coals,

"I desire your Excellency to grant permission that I may make the necessary repairs and supply of coals to enable me to get to sea as quickly as possible.

"I desire also your Excellency's permission to land my prisoners. I shall observe the neutrality.

"I have, &c.,

(Signed) "JAS. J. WADDELL.

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* See Reports of the Trial, printed in United States' Documents, vol. iv, pp. 618, *et seq.*

† Appendix to British Case, vol. i, p. 500.

The Shenandoah.

At Melbourne.

The conduct of the Governor and of the Executive Council of the Colony seems to have been marked by the most anxious desire to do what was strictly right.

The Commissioner of Trade and Customs was directed to communicate with the Commander of the Shenandoah in the name of the Governor,* requesting him to inform the Government of Victoria of the nature and extent of the repairs of which he stated his vessel to be in need; and informing him that permission would be granted for the Shenandoah to remain in the waters of the Colony a sufficient time to effect her repairs, and to receive the provisions or things necessary for the subsistence of her crew—but not beyond what would be necessary for immediate use; and that when the Government of Victoria were in possession of the nature and extent of the supplies and repairs which were necessary, he should be informed of the time which his vessel would be permitted to remain in the waters of the Colony; and that, as to that part of his letter which referred to prisoners, he must communicate to the Government the names of the prisoners, and any other particulars relating to them which he might be willing to supply.

The application of Lieutenant Waddell to land his prisoners was also directed to be communicated to the United States' Consul.

Mr. Blanchard, the Consul of the United States at Melbourne, protested against the Shenandoah being admitted to the privileges of a belligerent, maintaining that, as she had been sold at sea to the Confederate Government, a sale under such circumstances was unlawful; that, being a British-built merchant-ship, she could not be converted into a war-vessel of the Confederate States on the high seas, but only by proceeding to, and sailing in such a character from, one of the ports of the Confederacy; and that, "not being legally a man-of-war, she was but a lawless pirate, dishonouring the flag under which her status was to be established and under which she decoyed her victims."

Having consulted the Law Officers of the Colony, who advised that the vessel purported to be, and in their opinion should be treated as, a ship of war belonging to a belligerent Power, the Governor and Council decided that, whatever might be the previous history of the Shenandoah, the Government of the Colony was bound to treat her as a ship of war belonging to a belligerent Power.

It is clear that the Law Officers of the Colony were perfectly right. Even had there been any foundation for the notion of Mr. Blanchard that the sale of the vessel on the high seas was invalid, the Shenandoah arrived at the Colony as a commissioned ship of a belligerent Power, which, according to the usage of maritime nations, was a sufficient ground for her reception as a vessel of war. It is to be observed that no question can arise in respect of this vessel as to its having been the duty of the British Government to seize her in spite of the commission of the Confederate States. She had neither been equipped, nor armed, nor specially adapted, wholly or in part, for warlike use, in British territory, nor was the sale of her to a belligerent on the high seas any violation of the rights of Great Britain as a neutral. To have seized her would therefore have been utterly unjustifiable.

A question, it appears, arose as to whether the officer in command should not be required to show his commission, and the majority of the Council decided that there was no necessity for doing so. And nothing having then occurred to lead to any doubt as to the vessel being commissioned by the Confederate Government, or as to the honour of the officer who commanded her, to have demanded to see the commission he professed to bear would have implied an unworthy suspicion.

What followed is thus related in a narrative signed by the gentlemen who were at that time Chief Secretary, Minister of Justice, Commissioner of Trade and Customs, and Attorney-General of the Colony:—

"On receiving the communication from the Governor, Lieutenant Waddell employed Messrs. Langlands, Brothers, and Co., ironfounders, of Melbourne, to examine the vessel and to undertake the repairs, and they, on the 30th January, reported that it was absolutely necessary to put the Shenandoah on the Government slip, as the diver who inspected the vessel had reported that the lining of the outer stern-back was entirely gone, and would have to be replaced; and that, as three days would elapse before the vessel was slipped, it would take ten days from date to accomplish the repairs.

"It may be here remarked that the slip (termed the 'Government slip' in the Report of Messrs. Langlands, Brothers, and Co.) was not in possession of, or under the control of the Government, the fact being that, although it was originally built by the Government, yet it had been for many years leased, and at that time was under lease to Mr. Enoch Chambers.

* Appendix to British Case, vol. i, p. 511.

"This Report was submitted to the Commissioner of Trade and Customs, who wrote, by direction of his Excellency the Governor, for a list of the supplies required for the immediate use of the vessel, and stated that his Excellency had appointed a Board, consisting of Mr. Payne, Inspector and Secretary of the Steam Navigation Board; Mr. Elder, the Superintendent of the Marine Yard at Melbourne; and Mr. Wilson, the Government Marine Engineer, to go on board the Shenandoah, and to examine and report whether that vessel was then in a fit state to go to sea, or what repairs were necessary.

"Lieutenant Waddell furnished a list of the supplies he required, and permission was given for the shipment on board of reasonable quantities of the supplies asked for.

"The Board appointed by his Excellency had the vessel examined by a diver, and then reported—

"1st. That the Shenandoah was not in a fit state to proceed to sea as a steam-ship.

"2nd. That repairs were necessary.

"3rd. That the part or parts requiring repair being the inner stern-post bearing of the screw-shaft, the extent of the damage could not be ascertained without the vessel being slipped.

"His Excellency, on the receipt of this report, gave permission for the vessel to be placed on the patent slip, and he requested the Commissioner of Trade and Customs to make arrangements for obtaining daily reports of the progress of repairs and provisioning of the Shenandoah, and directed every precaution to be taken against the possibility of the Commander of that vessel in any way extending its armament, or rendering the present armament more effective; and these instructions were carefully acted on.

"On the 6th of February, 1865, an application was made for permission to land some surplus stores from the Shenandoah, which was refused on the advice of the Attorney-General.

"The repairs of the Shenandoah not having been proceeded with, the Commissioner of Trade and Customs wrote on the 7th of February to Lieutenant Waddell, stating that his Excellency desired that a day should be named for proceeding to sea; and that he was directed to say that, after carefully considering the question of the position of Great Britain as strictly neutral in the present contest, the use of appliances—the property of the Government—could not be granted, nor any assistance rendered by it, directly or indirectly, towards effecting the repairs of the Shenandoah.

"Lieutenant Waddell replied that he could not name a day for proceeding to sea till the vessel was taken on the slip, when the injury could be ascertained, and the time estimated for its repair, the recent gales having prevented him from lightening the ship to the necessary draught preparatory to going on the slip, in which matter he had been guided by those in charge of the slip. He hoped the weather would permit the engineer in charge of the slip to take the Shenandoah on the slip the following morning.

"The vessel was not hauled up on the slip until the morning of the 10th, when the Board appointed by the Governor had another inspection, and they then reported as follows:—

"1st. That the *lignum vitæ* staves forming the bearing of the forward end of the outer length of the screw shaft were entirely displaced.

"2nd. That the inner stern-post bracket in which the staves of *lignum vitæ* were fitted, forming also the support for the foremost end of the screw frame, was fractured on the starboard side to the extent of about 4 inches,

"3rd. That these repairs (necessary to render the steam-ship seaworthy), could be effected in or about five clear working days from that date."*

It thus appears that on the 3rd of February, the Commissioner of Trade and Customs was instructed by the Governor to make arrangements for obtaining daily reports of the progress of the repairs and provisioning of the Shenandoah, and communicated to him the information so obtained; and to take every precaution in his power against the possibility of the Commander of that vessel in any degree extending his armament, or rendering the present armament more effective.†

Thus matters stood when, on the 10th of February, the United States' Consul wrote to the Governor, inclosing a deposition on oath of one John Williams, who had been a prisoner on board the Shenandoah, and who, having been one of the crew of the ship D. Godfrey, captured by the Shenandoah, had escaped from the latter by swimming ashore on the 6th. In this deposition Williams stated that fifteen or twenty men had joined the ship since her arrival in port, and were concealed in various parts of her, and that three others, who were wearing the ship's uniform, had also come aboard since her arrival.‡ To this was added, on the 13th, the affidavit of one Madden, another of the crew of the D. Godfrey, who stated that "when he left the vessel on the 7th, there were men hid in the forecastle of the ship, and two working in the galley, all of whom came on board the vessel since she arrived in the port; and that the officers pretended they did not know these men were hid."§

The proceedings of the Governor and Council on the 13th of February, are marked by the same attention to their duty in the matter as before, as appears from the following minute of their proceedings:—‖

"The further Report of the Board of Survey on the Shenandoah, after viewing that vessel on the slip, is submitted and considered.

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* British Appendix, vol. v, p. 60.
† Appendix to British Case, vol. i, p. 529.
‡ Ibid., p. 606.
§ Ibid., p. 608.
‖ Ibid., p. 520.

"His Excellency states to the Council that, in consequence of a letter which he had received from the United States' Consul, dated the 10th instant and inclosing a testimony on oath of one John Williams, he had deemed it his duty to refer it for the consideration of the Law Officers of the Crown; as, presuming the statements therein contained to be correct, it would appear that the Commander of the Shenandoah was taking advantage of the aid and comfort which had been afforded to him in this port, to increase the number of his crew by enlisting British subjects, in contravention of the Foreign Enlistment Act.

"In consequence of this reference, the Law Officers of the Crown had directed the attendance of the man John Williams, and that he had, with other men, attended that morning at the Crown Law Offices, and had made statements to the effect that a number of men representing themselves to be Englishmen had gone on board the Shenandoah since her arrival in this port, with the intention of joining her, and were now concealed on board.

"The Law Officers being of opinion that there was sufficient evidence to take steps for prosecuting, had instructed the police to lay informations against these men for a misdemeanour, and to apply for a warrant for their apprehension.

"On consultation with the Council, it was not considered necessary by his Excellency to take any further steps in the matter until the result of the police-officer proceedings were known; but Mr. Francis is instructed again to inquire, by letter, when Lieutenant Waddell would be ready to proceed to sea.

"A Report from the detective police at Sandbridge, of this day's date, on matters relating to the Shenandoah, is laid upon the table of the Council; and as, from information which had reached the Government, some suspicion had been attached to the movements of a vessel called the Eli Whitney, now lying in the bay, the Honourable the Commissioner of Trades and Customs undertakes that her movements shall be carefully watched.

"The Honourable the Attorney-General then submits to his Excellency depositions taken on oath by eleven persons before the Consul of the United States in Melbourne, which depositions have been placed in his hands by the Consul."

The Eli Whitney was watched accordingly, and if any intention of using her as a means of shipping the men had been entertained, it was abandoned.

On the 13th of February a warrant was granted by a magistrate at Williamstown, for the apprehension of a man known as James Davidson, or "Charley" who was stated to be concealed on board the Shenandoah. The Superintendent of Police, who was charged with the execution of the warrant, went on board the ship, and Captain Waddell not being on board, saw the officer in charge, told his business, and requested to see the man on board to execute his warrant. This was refused. He showed his warrant, which the officer looked at, saying, "That is all right, but you shan't go over the ship." The next morning the police officer returned to the ship, and stated that, information having been sworn that persons had joined the vessel from Melbourne, and were now on board, he had come with a warrant. Captain Waddell replied: "I pledge you my word of honour as an officer and a gentleman that I have not any one on board, nor have I engaged any one, nor will I while I am here." The Superintendent answered that he understood that the persons he wanted were wearing the uniform of the Confederate States, and were working on board, but this Captain Waddell distinctly denied. The Superintendent asked to go over the ship and see if the men he wanted were on board. This being refused, he said that he must execute his warrant even if he had to use force. To which Waddell replied that he would use force to resist; that he dare not allow his ship to be searched; it was more than his Commission was worth; and that such a thing would not be attempted to a ship of war of any other country; that a great slight had been put upon him by sending any one to the ship with a warrant. On the Superintendent again asking if the Captain refused to allow him to look for the man for whom he had a warrant, Waddell answered, that he "did refuse it, and would fight his ship rather than allow it."*

The Governor having called the attention of the Council to the circumstances, and to the necessity of considering what steps should be taken, by the advice of the Council directed the Commissioner of Trade and Customs to write to Captain Waddell and to request him to reconsider his determination, and further to inform him that, pending his reply, the permission which had been granted to him to repair and take in supplies had been suspended. The Governor then issued a direction that, on receipt of an instruction to that effect from the Chief Commissioner of Police, none of Her Majesty's subjects in the Colony should render any aid or assistance to, or perform any work in respect of the so-called Confederate steam-ship Shenandoah, or in launching the same. The Chief Commissioner of Police was instructed to send some police to Williamstown, to take care that the direction above-mentioned was duly observed.†

On the 14th, a letter was addressed to Captain Waddell, informing him that the Government conceived it had a right to expect that those who were receiving in the

* British Appendix, vol. i, pp. 524, 525. † Ibid., p. 524.

port the assistance claimed as a belligerent, should not oppose proceedings intended to enforce the maintenance of neutrality. He was therefore appealed to, to reconsider his determination, and was informed that, pending his answer, the permission granted to him to repair and take in supplies was suspended, and that Her Majesty's subjects had been duly warned accordingly.*

Captain Waddell replied on the same day in the following terms:—

"I have to inform his Excellency the Governor that the execution of the warrant was not refused, as no such person as the one therein specified was on board; but permission to search the ship was refused. According to all the laws of nations, the deck of a vessel of war is considered to represent the majesty of the country whose flag she flies, and she is free from all executions, except for crimes actually committed on shore, when a demand must be made for the delivery of such person, and the execution of the warrant performed by the police of the ship. Our shipping articles have been shown to the Superintendent of Police. All strangers have been sent out of the ship, and two commissioned officers were ordered to search if any such have been left on board. They have reported to me that, after making a thorough search, they can find no person on board except those who entered this port as part of the complement of men.

"I, therefore, as commander of the ship, representing my Government in British waters, have to inform his Excellency that there are no persons on board this ship except those whose names are on my shipping articles, and that no one has been enlisted in the service of the Confederate States since my arrival in this port, nor have I in any way violated the neutrality of the port.

"And I, in the name of the Government of the Confederate States of America, hereby enter my solemn protest against any obstruction which may cause the detention of this ship in this port.

"I have, &c.

(Signed) "JAS. J. WADDELL.

"To the Hon. Jas. G. Francis, "*Lieutenant Commanding, Confederate States' Navy.*†

"Commissioner of Trade and Customs, Melbourne."

It appears from a report of the Superintendent of Police that, in order to carry out the instructions of the Government, he proceeded to Williamstown on the afternoon of the 14th, took possession of the slip on which the Shenandoah was placed, and cleared the yard of the workmen employed on the vessel. The effect of this determined course of proceedings soon showed itself. At about 10 P.M. four men were seen to leave the vessel in a boat pulled by two watermen. They were pursued by the water police, and brought back to the Superintendent. On being questioned, they said they had been on board a few days, unknown to the Captain, and that as soon as he found they were on board, he ordered them to go ashore.‡ The men were detained, and the American Consul was communicated with respecting them. Towards morning tug steamers came to tow the vessel off, but were ordered away by the Superintendent, who also took steps for preventing the vessel being furnished with a pilot. The four men were taken before a magistrate on the 16th. One, being an American, was discharged; the three others, one of whom was the man Davison ("Charley"), were committed for trial. Two of them, after awaiting their trial in prison for a month, were sentenced to a further imprisonment of ten days; the other, being a mere youth, was, on that account, discharged.§ The vessel still remained on the slip.

On the 15th of February, the lessee of the slip wrote to the Chief Secretary, stating that his manager had informed him that should a gale of wind occur, he would either be compelled to launch the ship, or run a great risk of her sustaining serious damage in consequence of her unsafe position on the cradle.‖ This being so, and all motive for searching the ship being now at an end, the man against whom the warrant had been directed having been taken, and there being no reason for supposing that there were other Melbourne men secreted in the vessel, it was thought advisable that the order suspending the permission to repair should be revoked, and the necessary repairs to the ship be allowed to be completed, the Commander being informed that he was expected to use every dispatch in getting to sea by the time previously fixed.

Captain Waddell having written to complain of the ship having been seized, was informed, in reply, that the ship had not been seized, but that further progress with the repairs had been arrested by reason of his refusal to allow the ship to be searched. He was also reminded of the four men having been caught leaving the ship, notwithstanding his statement that there was no stranger on board; but he was at the same time informed that, as the man against whom the warrant had been issued was now in custody, and he (Captain Waddell) had given his assurance that no persons other

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* British Appendix, vol. i, p. 643. † Ibid., p. 644. ‡ Ibid., p. 527.
§ Ibid., vol. v, p. 62. ‖ Ibid., vol. i, p. 528.

than those on her shipping articles were now on board the ship, the work might proceed. In acknowledging this communication Captain Waddell took the opportunity of observing as follows, with reference to the four men :— The Shenandoah. At Melbourne.

"The four men alluded to in your communication are no part of this vessel's complement of men; they were detected on board by the ship's police after all strangers were reported out of the vessel, and they were ordered and sent out of the vessel by the ship's police immediately on their discovery, which was after my letter had been dispatched informing his Excellency the Governor that there were no such persons on board. These men were here without my knowledge, and I have no doubt can be properly called stowaways, and such they would have remained but for the vigilance of the ship's police, inasmuch as they were detected after the third search, but in no way can I be accused, in truth, of being cognizant of an evasion of the Foreign Enlistment Act."*

On the evening of the 15th, the repairs having been completed, the vessel was launched from the slip and anchored in the bay, where she proceeded to re-ship her stores and coal, of which latter article she was allowed to take in a further supply of 250 tons.†

She finally quitted Port Philip on the morning of the 18th of February.

Blame has been cast on the Governor for having allowed the repairs of the vessel to be completed and the vessel to be launched, or coal to be supplied to her, in consequence of the attitude of defiance assumed by Captain Waddell in refusing to suffer his ship to be searched.

The position was however an embarrassing one.

It was very doubtful how far the police officer, after having received the word of honour of Captain Waddell, as an officer and a gentleman, that the man against whom he had a warrant was not on board, had done right in insisting on searching the ship, and in threatening to use force in order to execute the warrant. The position taken by Captain Waddell that a ship of war of another nation is not subject to local jurisdiction is undoubtedly true. Upon a request of Sir C. Darling to be informed as to the propriety of executing a warrant under the Foreign Enlistment Act on board a Confederate ship of war, the Law Officers of the Crown, on being consulted, advised as follows :—

"It appears to us that, in the circumstances stated, his Excellency the Governor acted with propriety and discretion; and there does not appear to us, at present, to be a necessity for any action on the part of Her Majesty's Government.

"With respect to his Excellency's request, that he may receive instructions as to the propriety of executing any warrant under the Foreign Enlistment Act on board a Confederate (public) ship of war, we are of opinion that, in a case of strong suspicion, he ought to request the permission of the Commander of the ship to execute the warrant; and that, if this request be refused, he ought not to attempt to enforce the execution: but that, in this case, the Commander should be desired to leave the port as speedily as possible, and should be informed that he will not be re-admitted into it."‡

There can be no doubt as to the soundness of this advice. While a ship of war is thus exempt from local jurisdiction, the right of the local authority to withhold the accommodation of the port is equally undoubted; and the exercise of this power, applied here in the first instance, might no doubt have been prolonged. But, the honour of the Commander of the ship having been pledged, ought the search of the vessel to have been further insisted on? By the comity of nations the word of a commissioned officer is held to be sufficient guarantee for the truth of anything to which it is officially pledged. The rule is a sound one. The best security for honourable conduct is unhesitating confidence whenever honour is pledged. It is of infinitely greater moment than such a rule should be maintained than that a "Charley" should be arrested and undergo a month's imprisonment. Any vapouring language, or, in Transatlantic phrase, "tall talk" of Captain Waddell might be excused owing to the impropriety of the police-officer's threat of using force to search the ship under his command.

It is true that the fact to which the word of the Commander had been pledged turned out to be otherwise. But Captain Waddell explained this by saying that the men had secreted themselves in the bottom of the vessel, and had only been discovered on a third search. Now it is well known that men do contrive to secrete themselves in ships so as to elude search. A striking instance occurred in the case of the United States' ship the Kearsarge. When that ship left Cork in November 1863, 16 men contrived to hide themselves in her, nor was their presence in her known to Captain

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* British Appendix, vol. i, p. 646. † Ibid., vol. v, p. 85.
‡ Appendix to British Case, vol. i, p. 558.

The Shenandoah. At Melbourne.

Winslow, her commander, till the day after the vessel had gone to sea, notwithstanding that search had been made, and other men, found concealed on board, had been sent out of the ship just before her departure.* It should be added that Williams and Madden having stated in their depositions that certain of the subordinate officers of the ship had been aware of the presence of "Charley" in the forecastle of the ship, these officers immediately published in the "Melbourne Argus" declarations signed by them denying in the most positive terms the statements affecting them. Sir Roundell Palmer puts the pertinent question: "Can it be imputed as a want of due diligence to the Government of Melbourne (whose good faith and vigilance had otherwise been so manifestly proved) that although not entirely satisfied with Captain Waddell's demeanour or conduct, they accepted the solemn assurances of not one, but several, officers of the same race and blood, and with the same claims to the character of gentlemen as the officers of the United States?"

The matter was further complicated by the fact that the owner of the slip had reported that the position of the vessel on the cradle was one of danger; and that, if a gale of wind should arise, a disaster would probably ensue. It is obvious that, if such a thing had happened, it would have been very awkward for all parties. The wisest thing, therefore, as it appeared to the Governor and his Council, was to allow things to be completed and to get rid of this unpleasant visitor as early as possible. That the conduct of Captain Waddell in augmenting his crew from the Colony, as it afterwards turned out that he did, in spite of his solemn promise to observe neutrality in this respect, was conduct disgraceful in an officer and a gentleman, there can be no doubt; but, as I have before observed, no Governor or other Authority can be blamed for trusting to the word of any one bearing the commission of an officer. I am bound to respect, but I certainly cannot share, the opinion of some of my colleagues that Sir C. Darling showed any indulgence to the Commander of the Shenandoah, in further extending to him the privileges of a belligerent, inconsistent with what, as the Governor of a neutral Government, he was fully empowered and entitled, in the exercise of his judgment and discretion, to extend. Still less can I think that, even if there was any error of judgment in this respect, and the Governor of Melbourne was, under the circumstances, —as I heard it two or three times said in the course of the discussion, too civil ("trop poli") to Captain Waddell, that the British nation is therefore to incur a liability to a claim of some 6,000,000 dollars. If such a conclusion is to be arrived at upon such facts, I shall be half disposed to agree with M. Staempfli that there is, indeed, no such thing as international law, but that we are now creating it for the first time.

Supply of coal.

I pass on to another subject of complaint, namely, the supply of coal which the Shenandoah was allowed to receive and which is said to have been excessive—an assertion which, I confess, I have heard with no little surprise. It is true that the Shenandoah still had, on her arrival at Melbourne, if reliance is to be placed on a journal kept by a midshipman on board, 400 tons of coal in her bunkers; it is true that she was there allowed to take in 250 tons more.

But international law, as we have seen, imposes no limitation on the quantity of the supplies which a belligerent vessel may obtain in a neutral port. The only restriction in this case would therefore arise from the Government Regulation that no vessel should be allowed to take more than sufficient to convey her to her nearest port. Now the nearest port of the country of the Shenandoah was some 13,000 to 14,000 miles from Melbourne; aud all the coal which could possibly have been stowed in the vessel would have fallen infinitely short of what she must have consumed on such a voyage if she had had recourse to her steam power. It is true we are told that she was an excellent sailer. Mr. Evarts informed us, I believe, on the authority of a midshipman's journal, afterwards published under the title of "The Cruize of the Shenandoah," that her speed under canvas was at times equal to 16 knots an hour; but it did not occur to that distinguished counsel tell us how the Governor and his Council could possibly know that fact, unless, indeed, they were to know it by intuition. Although, from the vessel's build and appearance she might be thought likely to be a fast vessel, all they knew of her was that she was a screw steamer, adapted to sail or steam.

The argument that a vessel is not to be allowed coal because she is not likely to use it, strikes me, I must say, as a very singular one. If she does not use it, what harm can arise to any one from her having it on board? "Yes, but," says Mr. Evarts, "this coal was to enable her to have an advantage over the whalers when among the ice." But here we must have recourse again to the intuitive powers of the Governor

* See United States' Documents, vol ii, .p. 429.

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and his Council. For how else, in the name of common sense, were they to know that the intention of Captain Waddell was to go among the icebergs in pursuit of the whaling-vessels? Captain Waddell knew his business too well to let his intentions in this respect be known. Nor is it at all reasonable to say that, because a vessel can both sail and steam, she is not entitled to have whatever is necessary for navigation in both forms. The Government Regulations, which allow a vessel to have the quantity of coal necessary to take her to the nearest port, make no distinction (any more than does international law) between vessels depending wholly upon steam, and others navigating both by steam and sail. The Regulation must be taken to have reference to the quantity of coal which would be required to take the vessel to her nearest port, if she had to depend on steam alone.

It would be absurd to suppose that, in every case, the local authority is to enter upon a nice calculation of the sailing power of the particular vessel, and allow a greater or less quantity of coal according to the estimate that may be formed of the rate of speed under canvas. A vessel is entitled to the advantage of all her motive power, however derived. Either may fail. A vessel under sail may carry away her masts. In this instance, had the Shenandoah been going homewards this might have happened when she was thousands of miles from home. It seems to me, therefore, that it was not a question for the local Government whether this vessel was a good sailer or not. The only question was, what amount of coal she was at liberty to have according to the regulation. Referring to that, and looking to the immense distance between her and her nearest port, no one, as it seems to me, can reasonably say that she was allowed a single ton too much.

Melbourne a base of naval operations.

But it is said that, by taking in coal at Melbourne, with the ulterior purpose of making war on the whaling-vessels of the United States, this vessel was enabled to make the port of Melbourne a "base of naval operations."

As I have already observed, when the law on this subject was under discussion, the application of such a rule in favour of the United States to the prejudice of Great Britain would be a flagrant injustice, seeing that, as I then showed, ships of war of the United States obtained many thousand tons of coal, under exactly the same circumstances, that is to say, when they had particular "naval operations" in immediate view. If this doctrine is to hold, every time a vessel, having a particular belligerent purpose in view, takes in coal, and proceeds on such purpose, the port will be at once converted into a base of naval operations. The same reasoning would of course apply, and, in the same degree, to repairs.

This proposition is, to my mind, utterly unreasonable, as being altogether inconsistent with any idea that ever has been, or properly can be, attached to the term, "base of operations;" and is, moreover, in the most flagrant degree unjust, if it is to have the effect of imposing on the neutral any responsibility to the other belligerent. For it is obviously inconsistent with common justice that the neutral State shall suffer for that to which it is not only no party, but of which it has also no knowledge. By the common practice of nations, as well as by the regulations of the Government, a belligerent vessel is allowed to have the benefit of necessary repairs, and to take a supply of coal without the Local Government being entitled to inquire into her ulterior destination. No such inquiry is prescribed by the Regulations in question, or by those made by any other nation; nor has any publicist ever suggested that such a proceeding should be adopted. No such inquiry could with propriety, be made; nor could the Commander of the ship be called upon to answer it if made. The knowledge of his intended course might expose him to the attack of an enemy. No such question, so far as I am aware, was ever put to a belligerent vessel during the whole course of the war. None such was ever put to a ship of the United States when applying for coal at a British port. This being so, to say that, the local government being in ignorance of the destination of the vessel, a responsibility is to be incurred because the belligerent, in obtaining this accommodation, has an ulterior operation in view, as to which, by some violent distortion of language, the port may be said to be thus rendered a base, but of which ulterior operation the neutral knows nothing, appears to me to be an outrage not only on the first principles of justice, but also upon the plainest dictates of common sense.

Thus far I am unable to discover anything but a desire on the part of the local Government to comply with the Queen's Regulations, and to discharge their duty, faithfully and conscientiously, in preventing any breach of neutrality on the part of the commander of the Shenandoah in the enlisting of men; nor does it appear to me

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that any blame can reasonably or justly attach to them in respect of permitting necessary repairs to be done to the ship, or as to the time allowed for that purpose, or as to the quantity of coal which the vessel was suffered to take on board.

The only question which presents any real difficulty is whether sufficient care was exercised to prevent men from enlisting in the Shenandoah immediately prior to her departure.

For, it is an undoubted fact that, on the night before the vessel left, which it will be remembered was on the morning of the 18th, a considerable number of men contrived to get on board and sailed away in the Shenandoah, as part of her crew.

In addition to the suspicious circumstances connected with the secretion of the man "Charley" and the other three men, it appears that a detective named Kennedy, having been directed to make inquiries, on the 13th of February, reported as follows:—

"That twenty men have been discharged from the Shenandoah since her arrival at this port.

"That Captain Waddell intends to ship forty hands here, who are to be taken on board during the night, and to sign articles when they are outside the Heads.

"It is stated that the Captain wishes, if possible, to ship foreign seamen only, and all Englishmen shipped here are to assume a foreign name.

"McGrath, Finlay, and O'Brien, three Melbourne boarding-house keepers, are said to be employed in getting the requisite number of men, who are to receive 6*l.* per month wages, and 8*l.* bounty, &c.

"Peter Kerr, a shipwright living in Railway Place, Sandridge, stated about a fortnight ago, in the hearing of several persons, that Captain Waddell offered him 17*l.* per month to ship as carpenter. A waterman named McLaren, now at Sandridge, is either already enlisted, or about to be so.

"The detective has been unable, up to the present, to collect any reliable information as to whether ammunition, &c., has been put on board the Shenandoah at this port, or whether arrangements have been made with any person for that purpose.

(Signed) "D. S. KENNEDY, *First Class Detective.*"*

The Superintendent, in forwarding this report, added the following statement:—

"Mr. Scott, Resident Clerk, has been informed—in fact, he overheard a person represented as an assistant-purser state—that about sixty men engaged here were to be shipped on board an old vessel, believed to be the Eli Whitney, together with a quantity of ammunition, &c., about two or three days before the Shenandoah sails. The former vessel is to be cleared out for Portland or Warrnambool, but is to wait outside the Heads for the Shenandoah, to whom her cargo and passengers are to be transferred."

Hereupon, the Commissioner of Trade and Customs undertook, by the desire of the Government and Council, that the Eli Whitney should be watched, and that vessel was watched accordingly.

Notwithstanding that the foregoing report of the detective Kennedy appeared to point to specific facts, and the police were on the look out to detect any attempts to enlist men, nothing of a definite or certain character came to light. In the report afterwards made by the Minister of Justice, the Attorney-General of the Colony, the Chief Secretary, and the Commissioner of Customs, which has been before referred to, it is stated that:—

"Whilst the Shenandoah was in port, there were many vague rumours in circulation that it was the intention of a number of men to sail in her, but although the police authorities made every exertion to ascertain the truth of these rumours, yet (with the exception of the four men already alluded to) nothing sufficiently definite to justify criminal proceedings could be ascertained; indeed, at the best, these rumours justified nothing more than suspicion, and called only for that watchfulness which the Government exercised to the fullest extent in its power. It was not until after the Shenandoah had left the waters of Victoria that the Government received information confirming in a manner the truth of these rumours."†

On the 16th (as appears from a report of the Chief Commissioner of Police on this subject made in October last),‡ representations were again made to the Government that the Foreign Enlistment Act was being violated, and the police were instructed to use their utmost efforts to prevent it. Nothing, however, appears to have occurred on that day.

But about 5 o'clock on the afternoon of the 17th, a man of the name of Forbes came to the American Consul, Mr. Blanchard, and informed him that, at 4 o'clock that afternoon, he had seen, at the pier at Sandridge, five men, most of whom, if not all, were British subjects, and that one of them had told him that they and others were

* British Appendix, vol. i, p. 523. † Ibid., vol. v, p. 62. ‡ Ibid., p. 121.

going on board a barque called the Maria Ross, then lying in the bay, and were to join the Shenandoah when she was out at sea, and that boats from the Maria Ross were to come for them at 5 o'clock.* The Shenandoah — At Melbourne.

The Consul thereupon took Forbes to the office of the Crown Solicitor; but, according to the statement of the Consul made to the Governor on the ensuing day, the Crown Solicitor refused to take the information, and the Consul further complained that the language and manner of that officer in doing so had been insulting to him. The Crown Solicitor, however, disclaimed any intention of giving offence to the Consul, as appears from the letter of the private secretary of the Governor to Mr. Blanchard, the Consul, which is as follows:—

"Sir, "*February* 21, 1865.

"I am desired by his Excellency the Governor to acquaint you that he received your letter of the 18th instant in the afternoon of that day, Saturday, and that on Monday, the 20th, he caused it to be referred, through the Honourable the Attorney-General, to the Crown Solicitor for any explanation he might wish to offer.

"2. After stating that it was only in consequence of his accidentally returning to his office at half-past 5 P.M., after it had been closed for the day, that the interview between you and himself occurred at all, Mr. Gurner states that he informed you that, not being a magistrate, he could not take an information, and adds that he was in a hurry to save a railway train, and therefore left more suddenly than he otherwise should have done; but he positively asserts that neither in manner nor language did he insult you.

"3. His Excellency feels sure that the Crown Solicitor's tone and manner have been misapprehended, and confidently assures you that there was no intention on the part of that officer to fail in the respect due to your position as the Consul of the United States of America."†

What occurred after the Consul left the Crown Solicitor's office is to be found in the statement of a Mr. Lord, an American gentleman residing at Melbourne, made for the use of the Consul; Mr. Lord having accompanied that gentleman in his endeavours to secure the arrest of the men. Mr. Lord states as follows:—

"We left and went first to the office of the Chief Commissioner of Police, and not finding either him or Mr. Lyttleton in, we drove to the Houses of Parliament, and on sending your name to the Attorney-General he at once came out and asked us into the side room; he patiently listened to all you had to say, and then suggested that, if you would place the matter in the shape of an affidavit, he would lay it before his colleagues; that a verbal statement was not sufficient for the Government to proceed upon. We then left and drove to the office of the detective police, and saw Mr. Nicholson, the Chief, who heard the man's statement in full, but as he could not act without a warrant, advised us go to the Police Magistrate, Mr. Sturt, and get a warrant: then he would at once act upon it. Leaving there, we went to the residence of Mr. Sturt, in Spencer Street, who received you very politely, listened to what you had to say, examined the man, but stated that he could not take the responsibility of granting a warrant on the evidence of this man alone, and advised your going to Williamstown to Mr. Call, who, perhaps would be in possession of corroborative testimony through the water police. We then left, it being about half-past 7, and you, finding such a disinclination in any one to act in the matter, decided to take the deposition yourself and send it to the Attorney-General, leaving it to the Government to take such action on it as it might deem proper. Going to your Consulate the deposition was taken, and a copy inclosed to the Attorney-General, with a request for me to deliver it.

"I took it to the Houses of Parliament, which I found closed, and it being then late, about 9, I decided it was too late to stop the shipment of the men, as we understood the vessel was to leave at 5, and I went home and returned the letter to you on Sunday morning. Previous to going home, however, I again went to the detective office, saw Mr. Nicholson, told him how you had been prevented from getting the evidence before the Government in the shape they required it. He expressed his regret but could not act in so important a matter without a warrant."†

From the foregoing statement it appears that it was suggested by the Attorney-General to the Consul to embody the matter of his communication in the shape of an affidavit. This the Consul, having the power to take affidavits, could readily have done, in which case the responsibility of further action would have rested with the Colonial authorities. Instead of this the Consul proceeded to the office of the detective police, but as the chief officer could not act without a warrant, he very properly advised Mr. Blanchard to proceed to the residence of Mr. Sturt, the Police Magistrate, to procure a warrant. This accordingly Mr. Blanchard did, but it appears that Mr. Sturt, having heard the statement of the man Forbes, was not satisfied with it or disposed to act on his unsupported testimony. He therefore declined to grant the warrant, but advised that the Consul should proceed to Williamstown to Mr. Call, the

* British Appendix, vol. i, p. 616. † Ibid., p. 619.

The Shenandoah.

At Melbourne.

head of the water police, who would probably be able to procure evidence of a more conclusive character.

It being by this time almost 7 o'clock, the Consul decided upon doing what the Attorney-General had desired him to do some two hours before, namely, take the deposition himself, and dispatch it by Mr. Lord to the Attorney-General, leaving it, as Mr. Lord says, to the Government to take such action as it might deem proper. The Consul himself proposed to follow Mr. Sturt's advice, and proceeded to Williamstown; but we learn from his own statement that when Forbes, his informant, "found he had to go among his acquaintances, he was afraid of bodily harm, and refused to proceed."*

In the meantime, Mr. Lord proceeded with the deposition taken at the Consulate to the House of Parliament to find the Attorney-General; but, on arriving there, found the House was up, and it being then about 9 o'clock, concluded it was too late to stop the shipment of the men, as it had been understood the vessel was to leave at 5, so Mr. Lord gave the matter up, and went quietly home.

I am at a loss to see wherein it can be said that there was here negligence on the part of any one, unless it may have been on that of Mr. Lord, who, having undertaken to deliver Forbes' deposition to the Attorney-General, left the task he had undertaken incomplete, because he did not succeed in finding that officer at the only place where he sought him. But, in truth, the whole matter becomes perfectly immaterial from the fact that what was desired to be done had reference solely to the preventing of the men from being taken off to the Maria Ross by the boats of that vessel. But, as it turned out, no intention whatever existed of conveying the men to the Shenandoah by means of the Maria Ross; or, if such intention ever did exist, it was afterwards abandoned. No boats of that vessel came to take the men off, and she left the next morning upon her own destination. But, as showing the anxiety of the local authorities to prevent men from joining the Shenandoah, it should be mentioned that it appears from the report of the detective officer subsequently employed to make inquiry on the subject, that the Maria Ross was searched, to see that no men for the Shenandoah were on board of her, both before she left, and again when off the Heads, that is, before she finally quitted the bay.†

As has, however, been said, there can be no doubt that men did contrive to get on board the Shenandoah late that night, under cover of the darkness. It appears from the statement of the Consul, that one Robbins, a master stevedore, having observed boats taking off men with their luggage from the pier at Sandridge, went up to the American Consulate about 11 o'clock at night, and gave information to Mr. Blanchard of what was going on. Mr. Blanchard, however, did not think himself called upon to repair to the spot, or deem it necessary to call upon the police to take any steps to prevent the men from being conveyed to the Shenandoah. He contented himself with telling Robbins "that Mr. Sturt, the Police Magistrate, had told him the water-police were the proper persons to lodge any information with," and that, "as a good subject, he (Robbins) was bound to inform them of any violation of law that came under his notice."‡ This Robbins promised to do, and to convey a message from Mr. Blanchard to the police.

Thus the interests of the American Government were transferred by their proper representative, who no doubt went quietly to bed, hoping for the best, to Robbins, the stevedore, who, however, seems to have been, "as a good subject," more zealous in the maintenance of neutrality than the Consul; for it appears that Robbins actually went to Williamstown and gave information to the police. He crossed over to Williamstown, however, only in time to see the last boat-load going towards the ship. In the meantime, the water-police having heard reports of what was likely to take place, were out in the Bay in their boat; but Williamstown, on the opposite side of the Bay, being the principal shipping place, and the place from which men would be the most likely to embark, their attention had to be directed to that quarter; and it would seem that when they approached the pier at Sandridge, from which the men were putting off, the latter secreted themselves in some rough wood in the immediate vicinity, called scrub, and, as soon as the police-boat had gone in another direction, slipped off in watermen's boats, and managed to reach the Shenandoah unseen by the police. They were seen by two constables who were successively on duty at this spot, who must, one would suppose, have been pretty well aware of what was going on, as the men had their

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* British Appendix, vol. i, p. 587. † Ibid., vol. v, p. 121. ‡ Ibid., vol. i, p. 587.

luggage with them, and at that hour of the night could have had no business on board the Shenandoah; besides which, two American officers, one in uniform, the other in plain clothes, were on the pier directing the embarkation of the men;* but neither of these constables did anything towards preventing the men from getting off. The Shenandoah. At Melbourne.

It is possible that, not having any warrant for the apprehension of the men, they did not think they had any power or authority to detain them; or, the numbers being formidable and the place lonely, they may have thought it wiser to abstain from interfering. By the time Robbins arrived at Williamstown and gave information of what had occurred, the last boat-load of men must have been already on board;† and the police were powerless to act without orders from the Authorities, which would have involved a forcible search of the ship, and which, therefore, the latter could not properly have given.‡

I will not go the length of saying that, in my opinion, the police were on this occasion as vigilant and active as they might have been. There was reason to suspect the officers of the Shenandoah of a design to recruit their crew from the port; and as that purpose had so far been prevented by the look-out kept in respect of the two ships, the Eli Whitney and the Maria Ross, suspected of being intended to take the men to the Shenandoah when outside the waters of the colony, it was not unlikely that, on the eve of the ship's departure, some attempt would be made by the men who wished to ship in her to get on board. The police had received instructions to use the utmost vigilance to prevent anything of the kind being done, but they appear to have failed to carry out their instructions at a critical moment. A few resolute officers, stationed on the two piers of Williamstown and Sandridge, would probably have prevented the men from embarking, or deterred the watermen from conveying them to the ship. But the Governor and Council acted throughout under an honest and thorough sense of duty, and exhibited in all their relations with the Commander of the Shenandoah the fullest determination to prevent, as far as in them lay, any infraction of neutrality.

Possibly their suspicions may have been removed too easily by the positive word of honour of the American Commander and his officers, but, as has been more than once observed, it has ever been a received rule of official conduct to trust implicitly to the honour of an officer.

To hold, under such circumstances, that because the local police were not as vigilant as they might have been, or because under cover of the darkness men may have contrived to elude their vigilance, a nation is to be held liable for damage done by a vessel to the extent of a claim of many millions of dollars, would be, as it appears to me, to carry the notion of "due diligence" to an unheard-of and unwarranted length, and would be calculated to deprive the decisions of the Tribunal of respect in the eyes of the world.

Questions have been raised as to the number of men thus added to the crew of the Shenandoah, and as to the proportion which the number thus added bore to the number of her crew on her arrival in the port. But to this I attach no value. The second Rule of the Treaty prohibits any recruitment of men. There can be no doubt that the number was sufficient to constitute a recruitment. And though it may be true that, independently of the addition thus made, the number of the crew remaining after the desertions at Melbourne would have been sufficient to enable the vessel to carry on operations against ordinary merchant-vessels, and therefore, if the operations of this ship had been directed against the same class of vessels as before, the augmentation of the crew would have made no difference as to her capacity for mischief, yet I agree with the Counsel of the United States that it is unlikely that without such augmentation she would have ventured into the dangerous polar seas to destroy the whaling vessels. My opinion is based on the ground that the authorities cannot justly be held responsible for what happened in spite of their anxious desire and endeavour to ensure the observance of neutrality.

It only remains to be stated that on hearing that men had been embarked in the Shenandoah prior to her departure, the Governor caused inquiries to be made, and finding that a violation of neutrality had taken place, he announced his intention of refusing the hospitality of the port to the captain or any other officers of the Shenandoah, should they again visit the colony. He, moreover, wrote to the Governors of the other Australian colonies, and to the Commodore of the station, to warn them of what had

* British Appendix, vol. i, pp. 551, 553. † Ibid., p. 553.
‡ Appendix to United States' Counter-Case, p. 1185.

The Shenandoah. At Melbourne.

occurred. As the Shenandoah did not visit any other British port until she arrived at Liverpool to be surrendered at the end of the war, no opportunity occurred of taking proper notice of the conduct of her commander on this occasion.

Importance has been attached to the language of this letter of the Governor. It is in the following terms:—

"Sir, "*Government House, Melbourne, February* 27, 1865.

"I consider it my duty to place your Excellency in possession of the accompanying correspondence and other documents connected with the proceedings of the commander of the Confederate States' vessel Shenandoah, while laying in Hobson's Bay, for the purpose of having necessary repairs effected and taking in supplies, under permission granted by me in accordance with the conditions prescribed by Her Majesty's Proclamation and Instructions for the observance of neutrality.

"2. I have also the honour to forward copies of letters from the Chief Commissioner of Police in Victoria, accompanied by reports and statements which leave no doubt that the neutrality has been flagrantly violated by the commander of the Shenandoah, who, after having assured me of his intention to respect it, and pleaded the privilege of a belligerent ship of war to prevent the execution of warrants under the Foreign Enlistment Act, nevertheless received on board his vessel, before he left the port on the 18th instant, a considerable number of men destined to augment the ship's company.

"3. I have thought it right to communicate to your Excellency this information, in the event of Lieutenant Waddell or any of his officers hereafter claiming the privileges of a belligerent in any port of the colony under your government.

"I have, &c.
(Signed) "C. H. DARLING."*

Our distinguished President dwelt, as one of the governing motives of his decision against the British Government as to this ship, on the admission thus made by the Governor, that the neutrality had been flagrantly violated by the Commander of the Shenandoah, as though this were an admission made by the Governor as against himself. The Governor is complaining that the neutrality of a British port has been violated by a belligerent, in spite of the endeavours of the Authorities to maintain it, and of the pledge given by the belligerent to respect it. To hold the Governor responsible for what he thus complains of is to reverse the nature of things and *to make the party wronged liable instead of the wrong-doer.* The violation of the neutrality of a British port by the commander of the Shenandoah could only affect British liability if there had been negligence on the part of the British Authorities, whereby the violation of neutrality had been allowed to occur.

I cannot, therefore, concur in the decision of the majority of the Tribunal that the British Government is responsible for anything that happened with reference to the Shenandoah at Melbourne. Looking to the Regulations, and the distance of the vessel from her nearest port, I cannot agree with the President that too much coal was allowed. I cannot agree that repairing or taking in coal at a particular port, on the way to some ulterior operation, makes the port a base of naval operations; still less that the neutral can be affected thereby when he is ignorant of the ulterior operation so contemplated. I cannot agree that where the government of a colony is honestly desirous of doing its duty and maintaining neutrality, the fact that men anxious to ship on board a belligerent vessel elude the vigilance of the police in the night time is to make the parent State liable for all the damage such vessel may afterwards do. And I protest, respectfully but emphatically, against a decision based on grounds to my mind so wholly untenable.

After leaving Melbourne.

The remainder of the history of the Shenandoah may be told in a few words. On leaving Melbourne in February 1865, she proceeded to the Arctic Seas in quest of the whalers of the United States; and does not appear to have touched at any port, with the exception of the Island of Ascension, until she arrived and surrendered at Liverpool, on the 6th of November, 1865. Meanwhile, however, the great contest between Federals and Confederates had been finally decided. General Lee had been forced to evacuate the lines of Petersburg and Richmond, and had surrendered with the remnant of his army. The President and Vice-President of the Confederacy had been arrested and the principal European Powers had withdrawn the recognition of belligerent rights accorded in 1861. Under these circumstances, Mr. Mason, the Confederate Agent in England, applied to Her Majesty's Government, on the 20th June, 1865, for permission to send, through the British authorities, letters to the Commander of the Shenandoah directing him to desist from any further hostile proceedings. This application was acceded to, and the letters of recall were sent to Nagasaki, Shanghae, and the Sandwich Islands, and copies

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* British Appendix, vol. i, p. 565.

The Shenandoah.

After leaving Melbourne.

were also sent to the Governors of the British Colonial possessions and to the officers commanding the British squadrons in the Pacific and China Seas, and on other foreign stations.* In August, reports were received by the British Government from Washington, that the Shenandoah was continuing her depredations although her commander had been informed of the termination of the war, and orders were in consequence given to the various Colonial authorities, and to the officers commanding British squadrons, to detain the vessel whenever she should come within their reach. The vessel herself was to be surrendered to the United States' authorities, but the crew was to be allowed to go free.† She arrived at Liverpool on the 6th of November, 1865, and was at once placed under detention by the Authorities. A party of men from Her Majesty's ship Donegal was placed on board of her, and a gun-boat lashed alongside to prevent her leaving the port. Her Commander addressed, the same day, a letter to the British Government surrendering the vessel. He explained that the captures made by him after the close of the war had been made in ignorance of that fact, and asserted that he had received the first intelligence of the extinction of the Government, under whose authority he was acting, on communicating at sea with a British barque on the 2nd of August, and that he had then suspended all further warlike action.‡

Acting upon the advice of the Law Officers, the British Government decided upon setting free such of the crew of the Shenandoah as could not be prosecuted under the Foreign Enlistment Act, and upon giving up the vessel herself to the United States' Government, who had claimed her through their Minister in London. This was accordingly done. The Captain of Her Majesty's ship Donegal, who had been placed in charge of the Shenandoah, interrogated the crew, and having satisfied himself, as he afterwards reported, that none of them were British subjects, the whole of them were set at liberty.§ It is certain that, at the time, no evidence to prove the British nationality of any of the crew was offered to, or in the possession of, Her Majesty's Government. About seven weeks afterwards, the deposition of a man named Temple, who asserted among other things that part of the crew were British subjects, was communicated by Mr. Adams to the Government, and investigations were made with a view to instituting prosecutions. But Temple was found to be himself unworthy of credit, and, no further evidence being forthcoming, the matter was allowed to drop.‖ The Shenandoah was finally delivered up to the American Consul at Liverpool, and sailed for New York in November 1865.¶

The act of the British Government in thus giving orders for seizing the Shenandoah, has been referred to in the United States' Argument as an instance of the exercise of the prerogative. And in a certain sense it is true that it was so. But the case was altogether exceptional. It was supposed that the Shenandoah being, owing to the extinction of the Confederate Government, from whom her character as a ship of war had been derived, without a commission, was continuing her hostile operations on the high seas. Such acts done in the absence of a commission would have assumed the character of piracy, and the party committing them have become a *hostis communis*, who might be taken by any one having the means of stopping such proceedings. Instructions might therefore well be given to any officers of Her Majesty to seize the vessel wheresoever found.

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* British Appendix, vol. i, p. 654. † Ibid., p. 657; United States' Documents, vol. vi, p. 701.
‡ British Appendix, vol. i, p. 667. § Ibid., pp. 682, 711.
‖ Ibid., p. 720. ¶ Ibid., pp. 683, 689.

Cases of the Sumter, Nashville, Chickamauga, Tallahassee, and Retribution.

The five cases we are now about to enter on belong to a class differing altogether from those which have hitherto occupied our attention. We have here no question as to the fitting-out or equipping on British territory; none of these vessels having been fitted-out or equipped, for the purpose of war, in a British port. The complaint, with respect to them, is that they were permitted unduly to enter and remain in ports of Great Britain, and to procure coal, beyond what Her Majesty's Regulations of the 31st January, 1862, prescribed; or that they were treated with a degree of indulgence refused to ships of the United States.

The Sumter.

First, as to the Sumter.

At Trinidad.

This vessel was a steam-ship; she was purchased, at the commencement of the war, by the Government of the Confederate States, fitted-out, and armed, and duly commissioned as a ship of war. As such she left the Mississippi, on the 30th of June, 1861, under the command of an officer of the name of Semmes, holding a commission from the Confederate Government. She cruized for a period of six months, and during that time made seventeen prizes. She coaled once, and once only, at a British port, namely, at Trinidad, where she arrived on the 30th of July. But prior to arriving at Trinidad, she had put in and coaled at the Spanish port of Cienfuegos, and the Dutch port of St. Ann, Curaçoa. After her visit to Trinidad, she put in and coaled at the Dutch port of Paramaribo, and after that at Martinique. Besides stopping at these ports, she put into Cadiz for repairs.

It was in respect of the Sumter, the first ship of war of the Confederate States which appeared upon the ocean, that the United States' Government asserted the untenable position that, while itself treating those States as a belligerent Power, and shrinking from treating Confederate prisoners as rebels, or Confederate ships, when taken, as pirates, they were entitled to call upon all other nations to treat these ships as such, and to refuse the ordinary shelter accorded by the universal comity of nations to vessels of war in neutral ports. Upon this assertion, which was at once repudiated by every other country, I have already taken the opportunity of making such remarks as occurred to me. I refer to the subject in this place only for the purpose of pointing out that, as regards the assistance afforded to the Sumter at Trinidad, the complaint preferred by the United States' Government was not in respect of any excess in the accommodation afforded, but to the vessel having been permitted to enter the port and receive any assistance at all.

On the 7th of August, Mr. Francis Bernard, an American gentleman, residing at Trinidad—there being at the time no United States' Consul at that place—wrote to inform Mr. Seward that, "on the 30th ultimo, a steam sloop of war (Semmes, Commander) carrying a Secession flag, five guns, some of a large calibre, and a crew of from 120 to 150 men, sailed boldly into our harbour, and reported herself to the authorities of this island as being on a cruize. She was last from Puerto Cabello; and since she succeeded in getting out of the Mississippi River she has already captured no less than eleven American vessels."

Having given the names of some of these he adds:—"The Sumter remained here till the 5th instant, and was allowed to supply herself with coals and other necessary outfits. The British flag was hoisted on the Government flag-staff for her arrival, and the officers of the British war-vessel Cadmus appeared to be on amicable terms with

The Sumter.

At Trinidad.

those of the Snmter. The merchant who supplied the Sumter with coals did it with the consent and approval of our Attorney-General."*

On the 30th September Mr. Adams, transmitting to Earl Russell an extract from Mr. Bernard's letter, writes as follows :—

"*Legation of the United States, September* 30, 1861.

"The Undersigned, Envoy Extraordinary and Minister Plenipotentiary of the United States, regrets to be obliged to inform the Right Honourable Earl Russell, Her Majesty's Principal Secretary of State for Foreign Affairs that he has been instructed by the President of the United States to prefer a complaint against the authorities of the Island of Trinidad for a violation of Her Majesty's Proclamation of Neutrality, by giving aid and encouragement to the insurgents of the United States. It appears, by an extract from a letter received at the Department of State from a gentleman believed to be worthy of credit, a resident of Trinidad, Mr. Francis Bernard, a copy of which is submitted herewith, that a steam-vessel known as an armed insurgent privateer, called the Sumter, was received on the 30th of July last at that port, and was permitted to remain for six days, during which time she was not only furnished with all necessary supplies for the continuance of her cruize, under the sanction of the Attorney-General, but that Her Majesty's flag was actually hoisted on the Government flag-staff in acknowledgment of her arrival.

"The Undersigned has been directed by his Government to bring this extraordinary proceeding to the attention of Lord Russell, and in case it shall not be satisfactorily explained, to ask for the adoption of such measures as shall insure, on the part of the authorities of the island, the prevention of all occurrences of the kind during the continuance of the difficulties in America.

"The Undersigned deems it proper to add, in explanation of the absence of any official representation from Trinidad, to substantiate the present complaint, that there was no Consul of the United States there at the time of the arrival of the vessel. The Undersigned had the honour, a few days since, to apprize Lord Russell of the fact that this deficiency has been since supplied by preferring an application for Her Majesty's exequatur for a new Consul, who is already on his way to occupy his post."*

It will be observed that, in these communications, nothing is said as to the quantity of coal; all that Mr. Bernard reports is, that the vessel "was allowed to supply herself with coal and necessary outfits," In the Case of the United States, this is converted, without any reference to the actual quantity, into "a *full supply* of coal."‡

In point of fact, the vessel took in 80 tons, which, as we shall see presently was not a third of what she could actually carry.

The facts which occurred on the arrival of the Sumter at Trinidad were these :—

The Governor, evidently a little embarrassed at this, the first visit of a Confederate ship of war to the island, sent off a despatch to Captain Hillyer, commanding Her Majesty's ship Cadmus, then supposed to be at St. Vincent, requesting his presence. Before receiving the letter Captain Hillyer, as appears from his report to Admiral Sir A. Milne of the 6th August, being about to enter the harbour of Granada, was informed by the Harbour Master there that a large privateer, belonging to the Southern Confederation, was at Trinidad, and that the Governor of the latter island had dispatched a letter to him at St. Vincent the day before; whereupon he proceeded with his ship to Trinidad, arriving there on the 4th.

He reports further as follows :—

"I found a heavy barque-rigged steamer, with South Federal flag, with ten stars and pendant flying. An officer from her boarded us as soon as we anchored, with the Captain's respects. Soon after, I sent the Senior Lieutenant, Mr. Sittingstone, with my compliments, requesting he would be good enough to show his commission and papers, which, after some hesitation, and not before Mr. Sittingstone produced his commission, he did.

"From his report, it is a regular commission as Commander to Captain Semmes, late of the United States' Navy, to the Sumter, as a man-of-war, signed by President Davis. She mounts five guns between decks, viz., four heavy 32-pounders and one pivot 68-pounder; but, having been a passenger-boat, her scantling is so light (not more than 5 or 6 inches) that I do not think she could stand any firing, and the guns being only from 4 to 5 feet from the water, would not be worked in bad weather.

"She broke the blockade at New Orleans, and was nearly captured; since then, she has been most successful, having eleven prizes; two she sank, and the rest are at St. Jago de Cuba, under the protection of the Government, with the sanction of the Governors-in-Chief, until they receive orders from Spain as to the matter.

"She has been supplied with a new main yard, eighty tons of coal, and provisions from this place, the Attorney-General having given the Governor his opinion that it was quite legal to supply her.

"I called on Captain Semmes next morning as he was getting his steam up, and he gave me full

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* British Appendix, vol. ii, p. 3. † Ibid.

‡ Case of the United States, p. 321.

The Sumter.

At Trinidad.

assurance that he would in no way interfere with British or neutral trade, but complained greatly of the Southerners having no port to send their prizes to, and that he would be obliged to destroy all he took, in consequence of the strict blockade on the Southern ports and the stringent proclamations of all the great Powers. He thinks himself safe at Cuba, as the Government of Spain's Proclamation is only against privateers and their prizes, and says nothing about men-of-war.

"She sailed yesterday under steam, at 1 P.M., and from the signal station was reported going to windward, and, from his questions, I should fancy he is going to cruize for some of the California and China homeward-bound ships, and there is no doubt he will do an enormous amount of damage before he is taken, for he seems a bold determined man, and well up to his work."*

The Governor, Mr. Keate, appears to have been much on his guard against any compromise of the neutrality he had been enjoined by Her Majesty's Government to observe. In his despatch to the Duke of Newcastle of the 7th of August, announcing the arrival of the Sumter, he writes:—

"I have the honour to report that a steamer, purporting to be a man-of-war, and to belong to the so-called Confederate States of North America, put into the harbour of Port of Spain on the 30th ultimo. The vessel is called the Sumter, and appears to be a converted passenger-steamer. She now carries, as I am given to understand, five powerful guns.

"2. On the day of her arrival, one of her officers (all of whom seem to have been in the naval service of the United States) called upon me, sending in his card, with the words written under his name, 'Lieutenant, Confederate States' Navy.' Before receiving him, I directed my Private Secretary to inquire of him whether my doing so, after reading these words, would be construed into any sort of recognition of him or his ship in their assumed character. I did this in consequence of the injunction in your Grace's despatch 'on no account to recognize' any ship 'in any other capacity than that of a United States' vessel.' Mr. Evans, for such was this officer's name, replied that he was sent by his Commanding Officer, Captain Semmes, who was himself unwell, simply to pay his respects, and that to prevent any such construction he would withdraw his card and only send in his name verbally. I then received him, and had some conversation with him, taking occasion to refer expressly to the neutral position occupied by Great Britain in regard to the two belligerent parties in North America."†

It seems pretty plain that the presence of the Sumter was by no means agreeable, for Governor Keate adds:—

"The avowed and principal object, no doubt, with which the Sumter ran to this port was to obtain coals and provisions. A great deal of trade goes on between Trinidad and the northern ports of North America, and Captain Semmes, I imagine, has not failed to take this opportunity of obtaining information with regard to the vessels employed under the flag of the United States in this traffic. Fears are entertained with regard to one or two now expected. It is to be hoped that the presence of the Sumter in these waters will soon be made generally known, and that, while the civil war continues; the lumber and provision trade, any interruption of which would cause serious embarrassment to this community, will be carried on in British bottoms. I have communicated with Admiral Sir Alexander Milne, now, I believe, at Halifax, on the subject, and since the arrival of the Sumter, Her Majesty's ship Cadmus has come into the harbour, and her Commander, Captain Hillyar, has verified the character of the Sumter, and the commissions of her officers, and recognized her as a man-of-war."‡

It appears from these letters that the Governor, beyond recognizing the Sumter as a belligerent, as he was bound to do, acted with the utmost caution as to recognizing her nationality; that the production of Captain Semmes' commission was insisted on before any accommodation was afforded; that the supplies which the ship obtained, beyond provisions, were confined to a new main yard and 80 tons of coal; that even this was not conceded before the advice of the Attorney-General of the colony had been taken; that the ship came into port on the 30th of July, and left on the 5th of August; a period of about six days.

We are now able to estimate the correctness of Mr. Bernard's opinion as to the amicable terms on which the officers of the British war-vessel were with those of the Sumter. Their intercouse appears to have been purely of an official character.

It is important to observe that what thus took place at Trinidad occurred in August 1861, several months before the issuing of the regulations restricting the stay of belligerent vessels and the supplies to be obtained in British ports, and when the matter stood simply on the principles of international law.

The Sumter, in her short career of six months, put in and obtained supplies of coal, as has been stated, at ports of four different nations, Spain, Holland, the Brazils, and France.

It may be interesting to see how the Governors of these ports understood and acted upon the principles of neutrality which they were bound to observe.

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* British Appendix, vol. ii, p. 4. † Ibid., p. 1. ‡ Ibid.

Before arriving at Trinidad the Sumter, as has been stated, put into the port of Cienfuegos.

It appears from the remonstrance of the United States' Consul to the Captain-General of the Havana that, she arrived there on the 7th of July and took in coal; from the journal of Captain Semmes, we learn that the quantity was 100 tons.*

It appears from a despatch of Mr. Secretary Seward, to the United States' Minister at the Hague, of the 15th August, that the Sumter arrived at St. Ann's, Curaçoa, on the 17th July, and that she there received 120 tons of coal. It appears from Captain Semmes' Journal and from a letter of the United States' Minister at the Hague of October 8, 1861, that she remained there six or seven days.†

After her stay at Trinidad, we next find her at the Dutch port of Paramaribo. She arrived, as appears from a letter of the United States' Consul at that port to the United States' Minister at the Hague, on the 19th August, and left on the 31st, making a period of twelve days, having been allowed to coal and refit.‡ The quantity of coal is stated, in a latter of the 15th October, from the Netherlands Minister for Foreign Affairs to the United States Minister, to have been, as he terms it, "the very restricted quantity of 125 tons, at the most sufficient for four days progress."§

The vessel next arrived at the Brazilian port of Maranham. It appears, from a letter from the United States' Consul at that port to Mr. Seward of the 15th September, 1861, that she arrived at Maranham on the 6th and remained there nine days, and obtained 100 tons of coal, having already 150 tons on board, "which," he adds, "would make an ample supply for ten or fifteen days of constant running." Other supplies she was allowed to procure *ad libitum*, and, when she left, her Commander stated that she had enough to last for three months.‖

She appears to have arrived at Martinique on the 9th of November. She remained there fourteen days. Permission was given by the Government to take on board as much coal as her commander required. He took sufficient to enable him to cross the Atlantic.¶

The ship arrived at Cadiz on the 4th January, 1862, as appears from a despatch of the United States' Minister to Mr. Seward of the 8th of that month.** As she needed repairs her Commander requested the use of the Government dock for that purpose. The request was granted, though with the limitation to such repairs as were strictly necessary. She remained at Cadiz thirteen days.††

It thus appears that, in every instance on which the Sumter had occasion to coal, she was allowed to take in a considerably larger quantity than she took in at Trinidad, and that on every one of such visits, with the exception of the one to Cienfuegos, she remained a greater number of days than in the British ports.

On the receipt of Governor Keate's despatch, this being the first time such a thing as the arrival of a Confederate ship of war at a British port had occurred, the Secretary of State for the Colonies required the opinion of the Law Officers of the Crown "as to the propriety of the course pursued by the Governor and the Commander of Her Majesty's ship Cadmus;" and also "as to whether vessels of war, or privateers, belonging either to the United States or to the so-styled Confederate States can properly be required to leave British ports in the West Indies and British North America, if the state of the weather permitted their doing so."

The Law Officers on the 16th September, a fortnight prior to the letter of Mr. Adams to Lord Russell, reported as follows:—

"We do not precisely understand what was the course pursued towards the Sumter by the Commander of Her Majesty's ship Cadmus; there is nothing from this officer; and Governor Keate's despatch, of August 7, only states that 'Captain Hillyer has verified the character of the Sumter, and the commissions of her officers, and recognized her as a man-of-war.'

"Governor Keate appears to have carefully avoided any such recognition whatever. We know not upon what instructions either of these officers may have acted; but, as at present advised, we see no reason to disapprove of the conduct of either. The Sumter certainly appears not to be a privateer, and is (we presume) a vessel of war commissioned by a *de facto* belligerent Government.

"Your Lordship's second question must, in our opinion, be at present answered in the negative.

"Although it is competent, by the law and usages of nations, to Her Majesty, in common with all

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* British Appendix, vol. vi, pp. 101, 105; Semmes' "Adventures Afloat," p. 145.
† British Appendix, vol. vi, pp. 69, 81; Semmes' "Adventures Afloat," pp. 154–160.
‡ British Appendix, vol. vi, p. 81. § Ibid., p. 84. ‖ Ibid., p. 2.
¶ British Case, p. 17. ** British Appendix, vol. vi, p. 108. †† Ibid., pp. 113, 116.

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neutrals, to place certain restrictions upon the access of the ships of war, or privateers, of belligerent governments to British ports, yet Her Majesty has not (as far as we are aware) done so during the present contest, excepting only in the case of their being accompanied by prizes in the (printed) instructions, of June 1, herewith; at the present time, therefore, *expressio unius est exclusio alterius*; and Her Majesty's Government should determine upon and make public some other general instructions on the point if this should be considered expedient on grounds of Imperial and international policy; unless, or until, this be done, the ships of war, or privateers, of either party, unaccompanied by prizes, should not, in our opinion, be required to leave British ports by the local authorities."*

This opinion having been given by the Law Officers, Earl Russell on receiving the letter of Mr. Adams of the 4th October, replied as follows:—

"*Foreign Office, October* 4, 1861.

"The Undersigned, Her Majesty's Principal Secretary of State for Foreign Affairs, has had the honour to receive a complaint from Mr. Adams, Envoy Extraordinary and Minister Plenipotentiary of the United States at this Court, against the authorities of the Island of Trinidad for a violation of Her Majesty's Proclamation of Neutrality, by giving aid and encouragement to the insurgents of the United States.

"It appears, from the accounts received at the Colonial Office and at the Admiralty, that a vessel bearing a Secession flag entered the port of Trinidad on the 30th of July last.

"Captain Hillyar, of Her Majesty's ship Cadmus, having sent a boat to ascertain her nationality, the Commanding Officer showed a Commission signed by Mr. Jefferson Davis, calling himself the President of the so-styled Confederate States.

"The Sumter, which was the vessel in question, was allowed to stay six days at Trinidad, and to supply herself with coals and provisions; and the Attorney-General of the island perceived no illegality in these proceedings.

"The Law Officers of the Crown have reported that the conduct of the Governor was in conformity to Her Majesty's Proclamation.

"No mention is made by the Governor of his hoisting the British flag on the Government flag-staff; and, if he did so, it was probably in order to show the national character of the island, and not in acknowledgment of the arrival of the Sumter.

"There does not appear, therefore, any reason to believe that Her Majesty's Proclamation of Neutrality has been violated by the Governor of Trinidad, or by the Commanding Officer of Her Majesty's ship Cadmus."†

The Government of the United States instructed Mr. Adams to inform Her Majesty's Government that "the President deeply regrets that Lord Russell is unable to give to our complaint a satisfactory solution."‡ "The armament, the insurgent flag, and the spurious commission," says Mr. Seward, "told the Governor, as they sufficiently prove to Her Majesty's Government, that the Sumter is and can be nothing but a piratical vessel." Consequently her officers and crew ought not to be received in foreign ports. At another time she was said to be a privateer, and that Great Britain ought to adopt towards her, as such, the rule established by some European Governments of not allowing privateers to stay in their ports longer than twenty-four hours at a time. Such was the language of Mr. Seward to Lord Lyons, as appears from a despatch of the latter to Earl Russell of November 4, 1861.§ But the assumption that the Sumter was a privateer was a mistake. She was a commissioned ship of war of the Confederate States.

Now, we have seen, when considering how far, according to international law, a neutral Sovereign is bound to place any restraint on the stay in his ports of belligerent vessels, or on the supplies they are allowed to procure, that by that law, no such obligation exists. Indeed it is admitted in the Case of the United States‖ that there were "not any precedents which settled absolutely the quantity of coal that might be furnished to a belligerent man-of-war by a neutral," and I observe that it is nowhere asserted by the United States that the Law of Nations imposes any such restraint. There is, therefore, an end to the claim of the United States in respect of this vessel having been permitted to coal at Trinidad. For, I need hardly say that the Queen's Regulations of January 1862 cannot be applied *ex post facto* to create an obligation which did not previously exist. It would indeed be strange if regulations, more stringent than the rules of International Law, framed by a neutral Sovereign for the very purpose of insuring the observance of neutrality, can be made to create an antecedent liability which never would have existed without them. Even if the hospitality afforded to the Sumter at Trinidad should be deemed too great with reference to the rules laid down in the Regulations, the fact that it occurred some months before those regulations were issued deprives it of all importance.

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* British Appendix, vol. ii, p. 2. † Ibid., p. 5.
‡ United States' Documents, vol. ii, p. 487. § Ibid., p. 488. ‖ Page 324.

It is true that in this case, as in others, the Government of the United States insists that partiality, inconsistent with neutrality, was exhibited towards Confederate vessels by reason that these, as in the present instance, were permitted to coal, while liberty to form a depôt of coal at Bermuda for the supply of their ships of war was denied to the United States. No one can be misled by such a contention. I have already pointed out that to allow one belligerent to have a supply always stored up and ready, and to leave the other to take his chance of the public market, are things essentially different, and that, far from the refusal of such an advantage to the United States being a violation of neutrality, the concession of it would have been so in the opposite direction. Moreover, such a contention involves a forgetfulness of one of the elementary principles of international law. A neutral is only justified in allowing to a belligerent vessel the use of his ports and access to his shores to obtain the things which the belligerent may lawfully procure. He has no right to allow the belligerent the use of his territory on shore for belligerent purposes, which the permission to form a depôt would necessarily involve.

There is one other material fact connected with this vessel to which I desire to draw attention, the more particularly as it is stated in the American Case* that "the excessive supply of coal" (80 tons) "furnished to the Sumter at Trinidad enabled her to inflict the subsequent injuries on the commerce of the United States." The fact to which I refer is, that *while using the coals furnished at Trinidad, the Sumter did not capture a single prize.*

From the lists of captures contained in the fourth volume of the American Documents, and from the two lists of claims successively put in by the United States' Government, it appears that this ship captured in the whole eighteen vessels, of which, however, one was recaptured, and seven were afterwards released by the Spanish Government. Those captured should be thus distributed:—

On her cruize back from New Orleans to Cienfuegos the Sumter captured eight vessels; on her cruize between Cienfuegos and Curaçoa, none; on her cruize between Curaçoa and Trinidad, two; between Trinidad and Paramaribo and Maranham, none; between Maranham and Martinique, one; between Martinique and Cadiz, five; between Cadiz and Gibraltar, two. It thus appears that, of the eighteen vessels taken by the Sumter, eight were taken before the vessel ever entered a neutral port at all; nine before she arrived at Trinidad; that after leaving Trinidad she made two cruizes without taking a single vessel; and that it was not till she had obtained at Maranham the supply of 100 tons of coal, in addition to the 150 she already had on board, that she again became successful in making a prize. Of the prizes for which Great Britain is now asked to make compensation, two were taken before the Sumter arrived at Trinidad, and the rest at intervals of two, three, and four months from the time she left a British port, and when she was cruizing by means of coal furnished from a French port. The Tribunal is now in a position to judge how far the supply, said to have been "excessive," furnished at Trinidad, "enabled this vessel to inflict the subsequent injuries sustained by the commerce of the United States."

It is impossible, with any regard to equity and justice, to hold Great Britain liable for injuries inflicted by the Sumter on United States' commerce at a time when this vessel was deriving no benefit from coal supplied to her from a British port, but was availing herself of supplies obtained from other countries.

The facts connected with the Sumter during her stay at Gibraltar may be briefly stated.

She arrived at Gibraltar on the 18th January, 1862, in need of some repair, and wholly out of coal. According to the United States' Consul, she had but two days' supply in her bunkers. The merchants at Gibraltar, from what motive is immaterial, refused to supply her with any. The pecuniary resources of her commander ran short. Many of the crew having got on shore refused to return, and when force was attempted to be used to compel them, the local police interfered and protected the men against violence. Another crew could not be got, and, under these circumstances, the vessel was compelled to remain in the port. Mr. Sprague, the United States' Consul, had from the first protested against her being allowed to enter or remain in the port, but received the very proper answer that strict neutrality should be observed. On the 21st of January he telegraphed to Mr. Adams, "the Sumter is still here,

* Page 324.

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evidently awaiting funds. The British Government observes strict neutrality in conformity with the Queen's Proclamation."* On the 7th of February Mr. Sprague informs Mr. Seward that "the Sumter still remained in port, not having yet received a pound of coal."†

The helpless condition of the vessel further appears from a letter from Mr. Sprague to Mr. Adams of the 6th February :—

"The Sumter remains in port. She took in yesterday 3,000 gallons of water, paid for by a Mr. R. O. Joyce, of this city, who had previously provided her with an anchor and chain. To-day her commander made a second attempt to obtain coal from the coal merchants in this market, and I am informed they have declined supplying him, out of deference to myself.

"Since yesterday there are some ten or twelve seamen of the Sumter on shore, and to-day they have nearly all refused to return to their ship. One of them, in a drunken state, called upon me this day for protection. As the officers of the Sumter have attempted to forcibly ship them off from the quay, I to-day called upon the Governor of this fortress to inform him of the circumstance; that I was ready to take under my charge any of these seamen who might wish to avail of my protection, and who would swear allegiance to the Government of the United States; and that I did not believe that it would be in conformity with strict neutrality to force these men on board of the Sumter.

"Since my interview with the Governor, I hear that orders have been given to the police authorities not to permit these men to be forcibly taken on board of the Sumter by her officers, and up to this hour (7 P.M.) they remain on shore, mostly in a state of intoxication.

"All these circumstances may probably retard the departure of the Sumter from this port; still, I sincerely hope that a Federal cruizer may soon appear to do away with any further trouble about this craft. I have every reason to believe that her boilers are defective, and that she is very badly provided with powder and other munitions of war."‡

On the 10th of February Captain Semmes having, it seems, in the meantime procured funds, finding the market shut against him, addressed a pressing letter to Captain Warden, the officer of the dockyard, to be allowed to purchase coal from the Government stores. He writes :—

"*Confederate States' steamer Sumter,*
"*Bay of Gibraltar, February* 10, 1862.

"Sir,

"I have the honour to inform you that I have made every effort to procure a supply of coal without success. The British and other merchants of Gibraltar, instigated I learn, by the United States' Consul, have entered into the unneutral combination of declining to furnish the Sumter with coal on any terms. Under these circumstances I trust that the Government of Her Majesty will find no difficulty in supplying me.

"By the recent letter of Earl Russell (January 31, 1861), it is not inconsistent with neutrality for a belligerent to supply himself with coal in a British port. In other words, the article has been pronounced, like provisions, unnoxious; and this being the case, it can make no difference whether it be supplied by the Government or an individual (the Government being reimbursed the expense), and this even though the market was open to me—much more, then, may the Government supply me with an innocent article, the market not being open to me. Suppose I had come into port destitute of provisions, and the same illegal combination had shut me out from the market, would the British Government permit my crew to starve? Or suppose I had been a sail ship and had come in dismantled, and the dockyard was the only place where I could be refitted, would you have denied me a mast; and if you would not deny me a mast, on what principle would you deny me coal, both articles being declared by your Government to be innocent? The true criterion is not whether the Government or an individual may supply the article, but whether the article itself is noxious or unnoxious. The Government may not supply me with powder, why? Not because I may have recourse to the market, but because the article is noxious. A case in point occurred when I was in Cadiz recently. My ship was admitted into a Government dock and there repaired, and why? First, because the repairs were innocent; and, secondly, because there were no private docks in Cadiz.

"So here the article is innocent, and there is none in the market (accessible to me); why may not the Government supply me?

"In conclusion, I respectfully request that you will supply me with 150 tons of coal, for which I will pay the cash, or if you prefer it I will deposit the money with an agent, who can have have no difficulty, I suppose, in purchasing the same amount of the material from some one of the hulks and returning it to Her Majesty's dockyard."§

Here was an occasion where an "habitually insincere neutrality" might have found grounds for making an exception to rules however strict. The only answer, however, which Captain Semmes received was, that "Captain Warden's instructions prohibit him from supplying the foreign men-of-war of any nation with coal, either by purchase or otherwise, from the Government depôt, so long as there is any in the market."‖

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* United States' Documents, vol. ii, p. 500. † Ibid., p. 501. ‡ Ibid.
§ British Appendix, vol. ii, p. 18. ‖ Ibid., p. 18.

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On the 12th of February the United States' war ship the Tuscarora arrived off Algeciras, and was soon followed by the Kearsarge, and later by the Ino, and these vessels thenceforth lay in wait to intercept the Sumter if she attempted to leave the bay. In the meantime her condition remained as helpless as before. On the 18th Mr. Sprague writes to Mr. Adams—"The Sumter still remains in port. The Coal Companies in this market still persist in refusing to sell her coal, notwithstanding that 12 dollars per ton is offered for it, which is 50 per cent over the market price."*

Whether by reason of not being able to procure coal, or from fear of being captured by the United States' ships which were waiting to intercept her, or both, the Sumter remained at Gibraltar till December, when it was proposed to sell her. Having heard of the intended sale, the United States' Minister at Madrid desired Mr. Sprague to protest against it.

Captain Pickering, the Commander of the Kearsarge, though considering the vessel "as of little value," yet thinking that she was offered for sale probably only in order to establish a precedent, and because, in his opinion, "the sale of the so-called Confederate war-vessels in British ports was an act as unfriendly and hostile to the United States' Government as the purchase of war-vessels in their ports by the same party," advised a similar course.†

Mr. Adams took a wiser and more liberal view. On the 24th of December he writes thus to Mr. Seward:—

"I have the honour to transmit copies of a series of communications received from Mr. H. J. Sprague, the Consul at Gibraltar respecting the movements made at that port to sell the steamer Sumter. As he desired my advice, I gave it to him in the letter a copy of which goes with the papers. The question of the right to sell the property of a belligerent to a neutral in a neutral port is not without its difficulties, and I find the authorities differ materially about it. My own leaning is rather to a liberal construction, especially as in this case it relieves us from a burdensome process of vigilance. Besides which, I find that the Government bought a war-vessel of the Greeks whilst engaged, in 1826, in their war with the Turks."‡

The protest of Mr. Sprague was founded on two grounds: first, that the Sumter was a United States' vessel which had been made prize by the Confederates; 2ndly, that the sale was made in order to avoid capture by the vessels of the United States' navy.§ The local Government refused to interfere to prevent the sale, but gave official publicity to the protest of the American Consul.‖ The sale took place, and the vessel was sold for 19,500 dollars.¶ The purchaser was a Mr. Klingender, said to have been connected with the house of Fraser, Trenholm, and Co., of Liverpool. It is probable that the purchase was in reality made on behalf of the latter. It was no doubt believed at the time that the sale was fictitious, and that the vessel was intended still to remain the property of the Confederates, and to be employed in her former service (whence the objection to the sale), more especially when the vessel, taking advantage of a very high wind, slipped away at night and escaped the vigilance of the hostile cruizers, who had instructions from Mr. Adams to seize her, notwithstanding the sale, if she quitted the port and was caught on the high seas. Had the sale been to an unobjectionable purchaser, Mr. Adams was prepared to acquiesce in it. On the 17th of December, three days before the sale, he writes to Mr. Sprague:—

"You will, first of all, confine yourself to the simple duty of watching all the proceedings. In case of any attempt at a merely fraudulent transfer for the sake of escaping harmless from our cruizers and resuming her former career, you will call their attention to the fact, deny the validity of any such proceeding, and invoke their interference. Should it appear to you, on the other hand, that the purchasing parties are foreigners acting in good faith for the conversion of the vessel to some legitimate and peaceful trade, I see no better way of getting rid of a burdensome labour of vigilance upon a property of little value than to acquiesce in it. On the other hand, should you have reason to suspect a spurious transaction for the sole purpose of extricating the vessel from its present position in order to replace it in a more effective attitude of hostility to the United States, you will do well to remonstrate with the local authorities, and to send a copy of your remonstrance, together with the evidence on which you rest it, to this Legation."**

The vessel arrived at Liverpool on the 13th of February, 1863. There she underwent repairs; all fittings for warlike purposes were removed, and she was reduced to the condition of a freight-carrying merchant-vessel.†† But Mr. Dudley maintained to the

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* United States' Documents, vol. ii, p. 505. † Ibid., pp. 508, 510. ‡ Ibid., vol. ii, p. 507.
§ British Appendix, vol. ii, p. 45. ‖ Ibid., p. 44. ¶ United States' Documents, vol. ii, p. 515.
** Ibid., p. 514. †† British Appendix, vol. ii, p. 64.

last the belief that she was again intended to be employed on her former service. The consequence was, that vigorous remonstrances were addressed by Mr. Adams to Her Majesty's Government for having permitted the sale of the vessel, on the double ground that the transfer was fictitious, and that the sale of a belligerent ship in a neutral port, effected to avoid capture, is, by the Law of Nations, unlawful.*

Three complaints are put forward with reference to the foregoing facts:—(1.) That the vessel ought to have been compelled to leave the port in conformity with the Regulations of January 1862, as soon as those regulations came into operation, namely, on the 17th of February. (2.) That the Authorities ought not to have permitted the sale to take place, more especially as it was fictitious. (3.) That when, after the sale, the vessel entered the port of Liverpool she ought to have been treated as a Confederate ship of war, and as such compelled to leave the port under the Regulations of January 1862.†

The first of these heads of complaint is brought forward for the first time in the Case of the United States. It never occurred to the zeal either of Mr. Sprague or Mr. Adams to insist on the Sumter being driven out of the harbour into the very jaws of her enemies. It is now insisted on as a flagrant violation of neutrality.

As regards this head of complaint it is plain that the only way in which the United States could be prejudiced by the Sumter remaining in the port is that, if compelled to leave, she would inevitably have been captured by the Federal ships which were waiting to seize her. But for this, the longer she remained idle at Gibraltar, incapacitated by want of coal and want of funds, the better; while there, she could do no damage to the commerce of the United States. From the hour she entered the harbour of Gibraltar all complaint of prizes taken or destroyed necessarily ceases. All that the United States could have gained by the Sumter being forced to leave Gibraltar, and being taken by their war-vessels, would have been the few thousand pounds which this old steamer would have sold for; to which, however, should perhaps be added, that the employment of ships to watch her would have ceased to be necessary.

But was the Government under any obligation to compel the ship to leave on the expiration of the twenty-four hours? The answer is that the Regulations of January 31, 1862, did not apply to, but on the contrary excluded, the Sumter, which entered the harbour on the 18th of January, 1862, the Regulations applying in terms only to such vessels as should enter ports of Her Majesty, "*after* the time when the order should be first notified and put in force," in the particular place; which, in this instance, was not till the 1st of February. Even had this been otherwise it would have been impossible with any pretence of justice to apply, *ex post facto*, to a vessel which had entered the port, when no such Regulations existed, a rule which must inevitably have had the effect of delivering her into the hands of her enemies.

Again, even if the 3rd Article of the Regulations had been applicable to the Sumter, the fact that the necessary effect of forcing her to leave the harbour would have been to give her up to hostile vessels, waiting just outside to seize her, would have afforded, I think, a sufficient ground for suspending the Regulation, and extending the time beyond the twenty-four hours, under the discretionary power which admits of such extension in cases of necessity. No Governor, as it seems to me, is bound to force a vessel to quit a port in which she is in safety, when the necessary effect of doing so must be to throw her into the hands of a more powerful enemy who is waiting for her outside. It is admitted that by the Law of Nations a vessel taking refuge, when pursued by an enemy, in a neutral port, cannot be pursued. She is protected by reason of the inviolability of the neutral territory and its waters, and by the right of asylum which the neutral concedes to her.

But of what avail would this be, if the neutral were bound, at the expiration of twenty-four hours, to say, "You must quit my port. I am aware that your enemy is waiting outside to seize you, but your time is up and you must go. If, indeed, your enemy were inside the port, I could give you twenty-four hours start of him, which would probably enable you to escape; but he is just outside the port instead of within it, and I must therefore leave you to your fate." I cannot think that any Governor would be bound to drive a vessel out of a port where she is in safety, when the necessary consequence must be her capture or destruction, any more than he would be bound to do so if the consequence would be her exposure to a hurricane. The Regulation never was intended to apply to such a case.

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* British Appendix, vol. ii, p. 58. † Case of the United States, p. 325.

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Furthermore I cannot help thinking that, giving an equitable construction to the 3rd Article of the Queen's regulations, the inability to procure a supply of coal also brought the vessel within the exceptions contained in it, although coals are not specifically mentioned.

The Sumter, indeed, had her sails and could have put to sea; but it is obvious that a steamer without coal, in the face of powerful steam-ships, would have but a poor chance. Thus crippled, her power of navigation on the ocean or of escape from enemies being seriously impaired, she would be the crippled duck in the comparison of M. Drouyn de l'Huys. Supposing a sailing vessel dismasted, in a port at which no mast suitable to her size could be procured, the local authority would certainly not be bound to compel her to leave; the case would be within the exception: but what masts and sails are to the sailing vessel, coal, in addition to her machinery, is to the steamer.

If, as I have shown, the Queen's regulations did not apply to the Sumter, *à fortiori* in the exercise of his discretion the Governor ought not to have compelled her to leave under the circumstances stated.

In answer to the remonstrances of Mr. Adams as to the sale of the vessel having been allowed to take place, Her Majesty's Government, under the advice of its Law Officers, took this position. The sale of a belligerent ship in a neutral port to avoid capture has in it nothing unlawful. It may possibly be invalid against the other belligerent, into whose hands, but for such sale, the vessel would have fallen; but it is good against the rest of the world. The vessel may be subject to capture, when again at sea, by a ship of the belligerent, and the new owner must abide by the decision of a Prize Court of the belligerent as to the validity of his purchase; he cannot claim protection from his own Government in respect of the seizure. But the Government of the neutral port cannot interfere to prevent the sale, nor can it prevent the purchaser from dealing with the vessel as he pleases. It is under no obligation to do so; and—what is still more to the purpose—it has no power to do so.

It was therefore impossible that the British Authorities could, consistently with the law, interfere with the sale or movements of this vessel.

They had no power to try the question whether the sale was real or fictitious; even if the transfer had been plainly fictitious, they had no power to prevent the vessel leaving the port as freely as she had entered it.

This position appears to me impregnable. I will only add that I do not find anywhere pointed out by what power, whether derived from statute or common law, the British authorities could have seized or interfered with this vessel after her sale.

Even if the British Government could be held to have incurred any liability in respect of the Sumter having been suffered to leave Gibraltar, as she never again appeared on the seas as a vessel of war, or did injury to an American ship, no claim to damages can arise in respect of her being permitted to leave, beyond, possibly, the inconsiderable sum which may been her value.

The position at first taken by M. Staempfli that, by analogy to the case of a military force taking refuge in a neutral country, in which case an established rule of international law requires that such force should submit to being disarmed and disbanded, a ship of war taking refuge in a neutral port must in like manner be disarmed and dismantled is, as I have shown elsewhere, wholly untenable, the distinction between military and naval forces in this respect being universally admitted. I am glad to find the honourable gentleman no longer insists on it.

At Liverpool.

After the arrival of the ship at Liverpool Mr. Adams, addressing Earl Russell, insisted on her being still considered as a Confederate vessel of war, and therefore within the Queen's regulations relating to the stay of ships of war in British ports.*

Earl Russell gave the proper answer:—

"I have the honour to inform you that Her Majesty's Government have had under their consideration, in communication with the proper Law Advisers of the Crown, your letter of the 18th ultimo, stating that you had received information of the arrival of the steamer Sumter at Liverpool, and calling my attention to the bearing on this case of Her Majesty's Proclamation, limiting the stay within British ports of vessels of war belonging to either of the belligerent parties.

"I have now to inform you that Her Majesty's Government, in the present state of their information on the subject, are unable to assume, as you appear to do, that the ship lately called the Sumter has not been legally and *bonâ fide* sold to a British owner for commercial and peaceful purposes; and unless it were established that the sale was merely fictitious, Her Majesty's Proclamation, to which you refer, cannot be deemed applicable to that vessel in the port of Liverpool."†

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* British Appendix, vol. ii, p. 56.

† Ibid., pp. 57, 58.

To this might have been added that she was no longer a vessel of war.

Even if this view were erroneous, the Sumter, never having done further mischief to United States' vessels, no claim to damages can possibly arise in respect of her having been allowed to remain at Liverpool.

This being so, it may be scarcely worth while to say more about her. But as this pitiful claim is made the occasion of studied insult to Great Britain, on the score of her "habitually insincere neutrality," it is right to observe that, as soon as this vessel was known to be at Liverpool, she became the object of watchful attention on the part of Her Majesty's Government.

On the 4th of April Earl Russell writes to Mr. Adams, as follows :—

"My attention having been drawn to a paragraph which appeared in the 'Daily News' of the 17th ultimo, in which, under the heading of 'Confederate War-Vessels,' is included the Sumter, now called the Gibraltar, as having been thoroughly repaired at Birkenhead, and being ready for sea, I deemed it advisable at once to request the proper authorities to cause particular attention to be paid to this vessel.

"I have now the honour to acquaint you that it appears, from a Report which has been received from the Collector of Customs at Liverpool, and which has been communicated to me by the Lords Commissioners of Her Majesty's Treasury, that, since the arrival of the Sumter at Liverpool on the 13th of February last, she has been carefully watched by the Custom-house officers, and that, although the vessel has received some repairs, nothing has taken place regarding her of a suspicious character.

"The Sumter appears to be laid up in the upper part of the Great Float, at Birkenhead, and there seems to be no sign of her being at present intended for sea.

"I have the honour to add that the authorities at Liverpool are instructed to continue to observe this vessel and to report without delay any circumstances of an unusual character which may happen to take place with regard to her."*

To which Mr. Adams replies :—

"I have had the honour to receive your note of the 4th instant, in reference to a paragraph which appeared in the 'Daily News' of the 17th ultimo, respecting the immediate preparation of the Sumter for departure from the port of Liverpool. I must confess that the information received by me from Liverpool, from wholly independent sources, had led me to believe the newspaper statement to be true. It is, however, with very great satisfaction I receive the contradiction of it from your Lordship, as well as the assurance that the movements of that vessel are under the observation of Her Majesty's Government. I am the more led to indulge this that the notice appears to have been spontaneously furnished to me with a degree of courtesy which I should be wanting in my duty if I were to fail properly to appreciate."†

A month or six weeks later, all her war fittings were removed; and the vessel, having been adapted for running cargo, it was proposed to load some heavy ordnance on board of her, the intention being no doubt to run the blockade and convey the guns, which appear to have been intended for purposes of fortification, to one of the Southern ports. The Authorities immediately interfered, nor would they allow the ship to sail with the guns, till thoroughly satisfied that they were incapable of being used on board, and were to be carried only as cargo.

On the 1st of July, Mr. Dudley, for once giving credit to the Authorities for a desire to do their duty, writes :—

"The steamer Sumter is still in port. She has taken on the two large guns referred to in previous despatches. The Collector refuses to clear the vessel until they are removed, and threatens to seize her if she sails without her clearance. Either the Government or owners will have to give way. This looks as if the authorities were in earnest; at least, so far as this vessel is concerned."‡

On further inquiry all doubt as to the guns being cargo was removed, and the vessel was allowed to clear with them on board.

The confident expectations at first entertained by Mr Dudley of her being destined for further use as a vessel of war proved unfounded.

She assumed the humbler character of a blockade-runner, and is supposed to have been lost in attempting to get into Charleston.

It is impossible to say that any responsibility attaches to Great Britain in respect of this vessel.

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* British Appendix, vol. ii, p. 59. † Ibid., p. 61.
‡ United States' Documents, vol. iv, p. 203.

The Nashville.

The Nashville.

The facts relating to the Nashville are very similar to the earlier part of the history of the Sumter.

She is stated, in the Case of the United States,* to have been a large paddle-wheel steamer, formerly engaged on the New York and Charleston line; to have been lightened to diminish her draught; to have been armed with two guns, and to have been commanded by an officer who had been in the navy of the United States. She ran out from Charleston on the night of the 26th of October, 1861, and arrived at the port of St. George, Bermuda, on the 30th. She was then short of coal, having, no doubt, taken only a sufficient supply to bring her to Bermuda, the object being to lighten her draught as much as possible, in order to facilitate her getting over the bar at Charleston. In a despatch to the Duke of Newcastle, of the 2nd of November, Governor Ord writes:— At Bermuda.

"I have the honour to acquaint your Excellency that these islands were visited, on the 30th ultimo, by the Confederate States' paddle-wheel steamer Nashville, commanded by Lieutenant Peagram, and having on board Lieutenant-Colonel Peyton, of the Confederate States' army, said to be a Minister from those States to the Court of Spain, with numerous other officers and persons apparently connected with the ship. The vessel anchored off the dockyard; and Lieutenant Peagram and Colonel Peyton at once called upon Captain Hutton, R.N., the Superintendent, and requested him to supply their vessel with 600 tons of coal, it being their wish to proceed to sea as early as possible."

This request Captain Hutton declared himself unable to comply with, and the Governor, on being applied to, having repeated the refusal, Lieutenant Peagram supplied himself from private sources.

The Governor further states:—

"The object of the Nashville's visit has not been distinctly stated; but there can be no doubt that she is bound to England, and that she has on board persons who will endeavour to excite an interest in the favour of the Confederate States at some of the European Courts, and probably to obtain supplies of material and stores for the support of their cause.

"It had been reported that the Nashville left Charleston, on the 12th ultimo, with ex-Senators Slidell and Mason, as Representatives from the Confederate States to the Governments of France and England; that she had 2,000,000 dol. on board for the purchase of material, and was intended to coal at Bermuda. This report no doubt led to the calling in here, on the 20th ultimo, of the United States' steam-vessel Connecticut, which left here immediately after, and proceeded apparently to cruize south.

"It appears from the report of the Nashville officers that these ex-Senators really did break the blockade about the time named, but in a smaller vessel, and that they reached Havana on their way to England. The United States' steam-vessels being thus put upon a wrong scent, the Nashville ran the blockade the night of the 26th, probably with the remainder of the Confederate States' Representatives and the specie, and got to Bermuda in safety, from which she has every chance of reaching England unmolested by the United States' vessels of war.

"I trust my proceedings on this occasion will meet your Grace's approval."†

It is stated in the Case of the United States, that "the Nashville took on board at Bermuda, by the permission of the Governor, 600 tons of coal, and that this act was approved by Her Majesty's Principal Secretary of State for the Colonies. This approval seems to have been elicited by the complaints which had been made to the Governor by the Consul of the United States at that port. It may also be that Her Majesty's Government preferred to have the question settled, before it could be made the subject of diplomatic representation on the part of the United States."

This statement requires correction. In the first place, no permission was given by the Governor. At that time none was required. No regulations having then been issued as to the stay of vessels in British ports, or the supply of coal to be allowed to them, it was free to a vessel of war to purchase as much coal as she required.

In the second place the quantity was, in fact, not 600 tons, but, as appears from a despatch from Governor Lefroy to the Earl of Kimberley, either 442½ or 472½ tons, according as the report of an officer of the port, who took down the amount, or the memory of the party who supplied the coal, may happen to be correct.‡

This fact appearing in the evidence furnished by Her Majesty's Government, it is

* Page 328. † British Appendix, vol. ii, p. 87. ‡ Ibid., vol. v, p. 13.

now said by the United States' Government to "matter little which is the true account;"* yet we have seen 150 tons treated as a considerable amount; and while on this subject I cannot help observing that although it is true that Governor Ord, in writing to the Duke of Newcastle, says, with reference to the amount of coal taken by the Nashville, he "has been informed they have taken in about 600 tons," the United States' Consul, Mr. Wells, who no doubt kept a sharp eye on what was doing, and was more likely to be well informed about it, states, in a letter to Mr. Seward of the 8th of November, "the Nashville took in about 500 tons of coal."† Why should the larger figure at once be assumed to be the right one, without any reference to the statement of Mr. Wells?

When it is stated that the approval of the Colonial Secretary of what has been done "seems to have been elicited by the complaints which had been made to the Governor by the United States' Consul," I am struck by the fact that there is a total absence of all such complaint. Beyond an application made by the Consul to the Governor, on hearing of the ship's arrival, soliciting that an order may be given that no supplies shall be granted to the vessel, no remonstrance or complaint of any kind is made by Mr. Wells.‡

When it is insinuated that "Her Majesty's Government preferred to have the matter settled before it could be made the subject of diplomatic correspondence," two things should be added; the first, that the supplies furnished to the Nashville at Bermuda never did become the subject of diplomatic correspondence, no complaint having ever been addressed to Her Majesty's Government, either as to the fact of coal having been supplied to the Nashville, or as to the quantity furnished to her. The subject is brought forward as a matter of complaint, for the first time, in the proceedings before this Tribunal. Further, it should be stated that the approval of the Secretary of State was elicited by the request of Governor Ord himself, who asked to be informed if he had acted rightly in allowing the vessel to coal. It is distressing to have so frequently to advert to inaccuracies of this kind.

The approval of the Secretary of State for the Colonies was in these words:—

"The course pursued by you in the present instance was in strict accordance with the principles which you will find laid down in my Circular despatch.

"I have further to state that both you and Captain Hutton showed a very proper discretion in declining to furnish supplies to a war-vessel of one of the belligernnt parties from public stores belonging to the British Government.

"Her Majesty's Government entirely approve of the whole of your proceedings on this occasion."§

The Secretary of State, by the same mail which carried out the approval of the Secretary of State as to what had been done, sent a Circular to the Governors of Her Majesty's Colonies, containing instructions for their future guidance in such cases:—

"Having had occasion to consult the Law Officers of the Crown on the subject of remonstrances addressed to the Governors of some of the Colonies by Consuls of the United States, in regard to certain particulars in the treatment of vessels bearing the flag of the States which have seceded from the Union, I think it right to communicate to you, for your information and guidance, the principles which ought to be observed in cases of the kind which raised the present question.

"You will understand, therefore, that no foreign Consul has any power or jurisdiction to seize any vessel (under whatever flag) within British territorial waters, and that the British authorities ought not to take any steps adverse to merchant-vessels of the Confederate States, or to interfere with their free resort to British ports.

"With respect to supplies, even of articles clearly "contraband of war" (such as arms or ammunition), to the vessels of either party, the Colonial authorities are not at liberty to interfere, unless anything should be done in violation of the Foreign Enlistment Act, 59 Geo. III, cap. 69, which prohibits the equipping, furnishing, fitting out, and arming of ships or vessels of foreign belligerent Powers, and also the supply of guns or equipments for war, so as to increase the warlike force of vessels of war, but which does not render illegal the mere supply of arms or ammunition, &c., to private ships or vessels.

"If it should be necessary for the Colonial authorities to act in any such case, it should only be done when the law is regularly put in force, and under the advice of the Law Officers of the Crown.

"With respect to the supplying in British jurisdiction of articles *ancipitis usus* (such, for instance, as coal), there is no ground for any interference whatever on the part of the Colonial authorities."‖

It is plain from these instructions that Her Majesty's Government, acting under the advice of the Council of the Crown, took the same view of the law applicable to such a case that all writers on international law had taken, namely, that in the absence

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* Argument of the United States, p. 301. † United States' Documents, vol. vi, p. 207.
‡ British Appendix, vol. ii, p. 88. § Ibid., p. 89. ‖ Ibid.

The Nashville.

At Bermuda.

of regulations made by the neutral State, a belligerent vessel in a neutral port enjoys perfect liberty to obtain, from private sources, whatever supplies she may require.

Nor, even if the Governor had had any discretion in the matter, could it be said that he had exercised such discretion unwisely. The Nashville did not appear to be going on a mission of war at all. She was imperfectly armed with only two rifled 6-pounder guns. She was conveying to Europe agents authorized to communicate with European Governments on behalf of the Confederate States. The quantity of coal allowed her was no more than was sufficient for the purpose of such a voyage, and there was then no rule limiting the supply to the quantity to take her to her nearest port. As a ship of war she was at liberty to buy what she wanted.

I am therefore quite at a loss to see how the supply of coal at Bermuda can be made a ground for asking damages at the hands of this Tribunal. The argument that what was done, at a time when there was unrestricted freedom in respect of such transactions, is to be tried by the test of stringent regulations, afterwards made for the purpose of placing restraints on that freedom, is obviously unsound. When it is said that there was a violation of neutrality in allowing a Confederate vessel to take as much coal as she wanted, while the United States were not permitted to establish a depôt of coal for the supply of their vessels, the argument which confounds the obvious distinction between a public national store and the resources of private dealers, if indeed worthy of attention, has already been disposed of.

At Southampton.

The Nashville arrived at Southampton on the 21st November, 1861. On her way she seized and set fire to a United States' merchant-vessel, making her crew prisoners of war. On this ground, as well as her being a vessel of the insurgent Government, Mr. Adams objected to her being received into a British port.

It was ascertained that the Nashville was duly commissioned as a ship of war of the Confederate States, and was under the command of a duly commissioned officer.

The Law Officers, on being consulted by the Government, gave an opinion in strict conformity to established principles of international law:—

"The Nashville appears to be a Confederate vessel of war; her commander and officers have commissions in the Confederate navy; some of them have written orders from the Navy Department, Richmond, to report to Lieutenant Peagram 'for duty' on board the Nashville, and her crew have signed articles to ship in 'the Confederate navy.' Her having captured and burnt a United States' merchant-vessel on the high seas cannot, under these circumstances, be considered (to adopt Mr. Adams' words) as 'voluntarily undertaken by individuals not vested with powers generally acknowledged to be necessary to justify aggressive warfare;' nor does it at all approximate within the definition of piracy; nor is it an unauthorized act of violence; and if (as Mr. Adams suggests) Her Majesty's Government is called on in this case 'either to recognize a belligerent, or to denounce a wrong-doer,' Her Majesty's Goveenment must, upon the facts and documents now appearing, adopt the former course.

"With reference to the allegation that some of her officers are to be put in command of vessels now fitting out in British ports for hostile purposes against the United States, we can only say that if reasonable evidence can be procured that such vessels are being so fitted out, in contravention of the Foreign Enlistment Act, all parties concerned therein should be legally proceeded against, with the view to their being personally punished, and to the forfeiture of the vessels.

"We may add (generally) that it will be competent to Her Majesty, as a neutral Power, either to designate the particular ports to which alone the national ships of the belligerents are permitted to resort; to limit the time for which, or to define the circumstances under which, they may so resort thereto, or to make and publish such general regulations with reference thereto as she may think proper; but, subject to such limitations, Her Majesty cannot interfere with the national ships of one party resorting to her ports in respect of hostile acts done on the high seas to the ships of the opposite party."*

Sir Hugh Cairns and Dr. Deane, being consulted by the United States' Consul as to the possibility of recovering chronometers seized as prizes on the taking of the Harvey Birch, advised:—

"It appears from the affidavit of Captain Nelson that the Harvey Birch was taken possession of and burnt on the high seas, outside the limit of British waters, and that the armed ship Nashville carried the flag of the Confederate States.

"From the statement in the newspaper above referred to, the Commander of the Nashville seems to have held a commission under the Confederate States and in the navy of those States.

"The British Government has considered the Federal and Confederate States entitled to be treated as belligerents, each possessed of the rights of war, one of which rights is the capture and destruction of vessels belonging to the enemy by the commissioned vessels of the belligerents.

"If, therefore, the Nashville was a commissioned vessel belonging to the Confederate States, we

* British Appendix, vol. ii, p. 99.

The Nashville.

At Southampton.

are of opinion that Captain Nelson has no legal rights in this country against the Nashville or her Commander."*

There is nothing in what was done in relation to the Nashville after her arrival at Southampton which could give occasion for any complaint. As soon as it was found that she was about to undergo repairs at that port, instructions were given by the Government to exercise the utmost vigilance to see that nothing was added to her equipment or her power as a vessel of war.† Mr. Adams, naturally anxious to prevent any attempt of this nature, found, on applying to Earl Russell, that he had been anticipated by the spontaneous action of the Government.‡ Nothing was done to the Nashville beyond necessary repairs, and she eventually left England on the 3rd of February, 1862, the same in point of equipment and strength as she had been on leaving Charleston.

On the 15th of December the United States' steamer Tuscarora arrived also at Southampton, and having taken in 150 tons of coal proceeded to keep watch on the Nashville, evidently, as the sequel showed, for the purpose of seizing her on her departure from British waters. From a telegram of Captain Patey, Senior Officer of Her Majesty's ships at Southampton, to the Admiralty, it appears that on the night of the 9th of January "the dockmaster reported having discovered in the dock two officers and three men from Tuscarora, who stated they were on shore under orders watching Nashville, and to signal should she get under weigh. Dockmaster removed them from the dock."§

Earl Russell, having become acquainted with this state of things, wrote on the 10th to Mr. Adams:—

"I have just been informed that armed men were found last night watching the Nashville in Southampton docks, and that they were discovered by Mr. Hodge, the Dock Superintendent, close at the Nashville's bows.

"I think it necessary to state to you that, except in case of stress of weather forcing them to land, Her Majesty's Government cannot permit armed men in the service of a foreign Government to land upon British ground.

"I therefore request that you will inform the Captain of the Federal steamer in Southampton waters that he must refrain from acts of this kind, which may lead to a collision between his men and the British authorities.

"I have also to inform you that no act of hostility can be permitted between the Federal steamer and its enemy within British waters, and that orders to that effect will be issued to the Board of Admiralty.

"In the case of the Nashville leaving British waters, the Federal steamer of war will not be permitted to start from British waters in pursuit of her till after the expiration of twenty-four hours.

"The same rule will be applied to the vessels of the so-called Confederate States."‖

On the 10th Captain Wilcox, of Her Majesty's ship Dauntless, writes to Captain Craven, the Commander of the Tuscarora, as follows:—

"Having observed preparations for departure in the United States' steamer Tuscarora, under your command, and also in the Confederate States' steamer Nashville, I beg to acquaint you that I have received instructions to prevent any hostility taking place in British waters; and I beg to bring to your notice the usual law of nations which requires that twenty-four hours should elapse before the departure of one belligerent ship in pursuit of the other.

"Relying upon your good judgment in this matter, and the friendly feeling existing between the two Governments, I have, &c."¶

Captain Craven answered, giving, it will be observed, no pledge:—

"I have the honour to acknowledge the receipt of your communication this evening.

"I am not aware that I have given cause for your assuming that I meditate an act of hostility in the waters of Great Britain.

"Claiming the right of free access to, and egress from, the waters of a nation believed to be in amity with the United States, and sincerely desirous of avoiding all semblance of offence, I am, &c."**

It was not without some difficulty that Captain Patey obtained the required pledge. On the 25th of January he reports to the Admiralty:—

"The Nashville's necessary defects have been made good, and she has been coaled; and, judging from the frequent movements of the Tuscarora up and down the Southampton water, including one trip through the Needles and round the Isle of Wight, that the ship is in all respects ready for sea, I am induced to bring this matter under the notice of their Lordships, because it appears to me, from the course pursued, and avowedly so made known to me by the Captain of the Tuscarora, in a conversation which I have had with that officer, he will do his utmost to render the rule of twenty-four hours which

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* United States' Documents, vol. ii, p. 560. † British Appendix, vol. ii, p. 91.
‡ Ibid., p. 102. § Ibid., p. 107. ‖ Ibid., p. 108. ¶ Ibid., p. 109. ** Ibid., p. 110.

The Nashville.

At Southampton.

the Nashville may be inclined to take advantage of null and void, by constantly keeping up his steam, and having slips on his cable, so that the moment Nashville moves Tuscarora will precede her, and at once claim priority of sailing, returning to this port again within the lapse of twenty-four hours; it hence follows that the Nashville is closely blockaded in a neutral port, and this is, no doubt, the special object of the Tuscarora's visit to Southampton.

"I would also beg to point out to their Lordships the possibility of the Tuscarora and Nashville coming into collision in a narrow channel and at night, and the probability of Tuscarora, supposing that the other ship had purposely run into her, opening fire on her, and hence bringing on a grave difficulty in the matter. Under all the circumstances of this peculiar case, I think it my duty to make this communication to their Lordships, that they may take such steps as may by them be deemed necessary, respectfully submitting that the Commanders of the Tuscarora and Nashville respectively should be called upon to give me a written notice of the date and hour they intend to proceed to sea, and that, having received such notice from either one, the other should be immediately notified of the fact, and that he would not be allowed to follow until twenty-four hours had elapsed."*

The following summary of facts, forwarded by the Admiralty to the Foreign Office on the 31st, is printed in the British Appendix:—

"*November* 21, 1861.—Nashville arrived at Southampton, and taken into dock for caulking and other repairs.

"*December* 15.—Tuscarora arrived, and anchored off entrance to River Itchen.

"*December* 23.—Captain Patey reported no repairs had been made in Nashville beyond what were absolutely necessary, and that she had not been in any way equipped more completely as a man-of-war.

"*January* 10, 1862.—Captain Patey reported that Dockmaster at Southampton had on previous night found two officers (one with side-arms) and three men belonging to Tuscarora under Graving Dock fence on pier between Docks; they stated that they were stationed there by their Captain's orders to watch Nashville and to make a signal to their own ship should Nashville attempt to get under way. Dockmaster removed these persons.

"*January* 10. Captain Patey also reported that Tuscarora had received 150 tons of coal, and had kept her steam up since her arrival, with a spring on her cable, apparently ready for sea.

"*January* 11.—Captain Wilcox, of Her Majesty's ship Dauntless, stationed in Southampton Water, informed Captains of Tuscarora and Nashville that he had observed preparations for their departure, and had instructions to prevent any hostilities in British waters, and brought to their notice that the Law of Nations requires that twenty-four hours should elapse before the departure of one belligerent ship from a neutral port in pursuit of another. Captain Patey, as Senior Officer at Southampton, also informed Captains of Tuscarora and Nashville that he had received orders to detain one vessel until the other had twenty-four hours' start. Captains of two vessels answered they would conform to law; and Captain Craven (of Tuscarora) claimed right of free access to and egress from 'waters of a nation believed to be in amity with United States,' trusting that strict impartiality would be observed between the two vessels. In reply, Captain Patey referred to fact of Captain Craven having sent officers and men into Docks to watch Nashville, and also pointed out that a boat, apparently armed, from the Tuscarora had been observed pulling in and out of the Docks without landing during the night. Captain Craven gave assurance that this would not be repeated.

"*January* 13.—Tuscarora left anchorage at 4 A.M., and proceeded to anchor one mile west of Calshot light-ship. Returned at 4 P.M. to former anchorage at entrance of Itchen River.

"*January* 15.—Tuscarora at 2 P.M. weighed, and passed Calshot.

"*January* 16.—At 2 P.M. returned to original anchorage.

"*January* 20.—At 8 P.M. proceeded down Southampton Water, and anchored outside Calshot Castle.

"*January* 22.—At 10 A.M. returned to anchorage at mouth of Itchen River.

"*January* 25.—Captain Patey reported Nashville coaled, and necessary repairs completed, and Tuscarora ready for sea; also that, in conversation with him, Captain Craven, of Tuscarora, had avowed that he would do his utmost to render rule as to twenty-four hours' start null and void by constantly keeping up steam, and having slips on her cable, so that the moment Nashville might move Tuscarora would precede her, and claim priority of sailing, returning again within twenty-four hours, and so actually blockading Nashville in a neutral port.

"*January* 26.—Under instructions, Captain Patey obtained written promises from captains of Tuscarora and Nashville not to leave their then positions without giving twenty-four hours' notice.

"*January* 27.—In order to prevent any hostile proceedings between the two vessels in British waters, a messenger was dispatched in the morning to Southampton, with instructions to Captain Patey to require Nashville to depart by 12 o'clock at noon on Tuesday, the 28th January, and Tuscarora on following day at same hour; but at 1 P.M., and before receiving these last-mentioned instructions, Captain Patey telegraphed that Captain of Tuscarora had notified to him that that ship would put to sea on the following day, namely, on 28th January, at 11 A.M. To this telegram an answer was at once sent that Tuscarora was accordingly to be allowed to proceed first; and, under the circumstances, Captain Patey did not think it necessary to acquaint the captain of Tuscarora of the orders he (Captain Patey) received subsequently (on the afternoon of the 27th), requiring the ship to quit Southampton.

"*January* 28.—Captain of Tuscarora reported by letter to Captain Patey that he should defer departure, in consequence of inclemency of weather, until 29th, or first fine day. Captain Patey, in answer, told Captain Craven that he saw nothing in the state of the weather to prevent Tuscarora

* British Appendix, vol. ii, p. 114.

The Nashville.

At Southampton.

proceeding, and requested she would lose no time in doing so, observing that, having received from Captain Craven a written notification of his intention to proceed on the 27th, at 11 A.M., he (Captain Patey) had not deemed it necessary to convey to Captain Craven the instructions he had received for Tuscarora to leave Southampton at noon on the 28th.

"*January* 28.—Captain Patey directed by telegraph not to take any steps, at present, to compel Tuscarora's departure.

"*January* 29.—At 8·10 A.M., Tuscarora proceeded down Southampton Water.

"*January* 30.—Captain Patey, by telegraph, reports Tuscarora, at 2 P.M., remains in Yarmouth Roads, and he asks for instructions as to Nashville's departure. Informed, in reply, that the time of Nashville's departure will date from hour Tuscarora shall really go to sea, in accordance with notice.

"*Admiralty, January* 30, 1862."*

This summary was forwarded by Earl Russell to Mr. Adams, with this observation:—

"I think you will see from this summary that Her Majesty's Government have reason to complain of the conduct of the commander of the Tuscarora, as an attempt to carry on hostilities in the waters of a neutral.

"I have the honour also to inclose a copy of the 'London Gazette,'† containing the rules which I mentioned to you in a previous letter."

On the 1st of February, the Tuscarora, having left Lymington, to which place she had previously shifted her berth, six miles to the west of the Needles, is seen steaming to the westward. The Nashville is accordingly informed that she can leave on the ensuing day. The next day the Tuscarora is at Portland. On the 3rd, she is at her former station in Cowes Roads. The Nashville having in the mean time given notice to leave on the 3rd, notice was given to the captain of the Tuscarora not to leave for twenty-four hours. But so suspicious did the movements of this vessel appear to the commanders of Her Majesty's ships, that it was thought necessary for a ship of war to accompany the Nashville past the Tuscarora, and for a watch to be kept on the latter by the Dauntless.

It thus appears that the Captain of the Tuscarora systematically endeavoured to elude the twenty-four hours' rule by keeping up his steam and having slips on his cable, and by making a series of false starts. Indeed, he preceded the Nashville only to return at the moment of the latter's departure, and he was therefore not permitted to leave for another space of twenty-four hours. Nevertheless this officer, who had himself been treated with scrupulous impartiality and attention, but had given to Her Majesty's Government just cause of complaint, having been baffled in his endeavours to elude the necessary regulations of neutrality, did not leave Southampton without complaining that "a just and rigid impartiality did not appear to have been extended to him,"‡ in connection with "the escape of the pirate Nashville." It is true that Mr. Adams admits, in a despatch of the 7th of February, 1862, that "he (Captain Craven of the Tuscarora) will doubtless lay the blame on the action of the people and Government of this country; my own opinion is, that if he had been a little more cool and quiet, he would have fared better."§

These proceedings of the Commander of the Tuscarora have been referred to by M. Calvo in his recent work as a clear violation of neutrality.

Again at Bermuda.

The Nashville, on leaving Southampton, recrossed the Atlantic and arrived at Bermuda on the 20th of February, 1862.‖ The regulations issued by the British Government on the 31st of January previous, limiting the stay of the armed vessels of the belligerents and the supplies to be obtained by them in British ports, did not arrive in that colony until nearly a fortnight later, and were unknown to the Governor at the time of the Nashville's visit.¶ There was no ground therefore for placing any restriction on the coaling of the Nashville, and she is stated by the United States 'Consul to have taken in 150 tons.** She left the following day, and apparently went straight to Charleston. Measures were taken by the Governor to insure the observance of neutrality during her visit, and as at the time of her departure several merchant-vessels were in sight, some of which might have been United States' ships, the Admiral in command desired the Commander of Her Majesty's ship Spiteful to proceed to sea and watch that the Nashville did not interfere with any vessels of whatever nationality until beyond the limit of British territorial jurisdiction.††

Here the career of the Nashville, as a vessel of war, seems to have closed, and on

* British Appendix, vol. ii, pp. 120, 121. † Ibid., p. 121. ‡ Ibid., p. 125.
§ Executive Documents, 1861–62, No. 104, p. 38. ‖ British Appendix, vol. ii, p. 178.
¶ British Counter-Case, p. 108. ** United States' Documents, vol. vi, p. 213.
†† British Appendix, vol. ii, p. 178; vol. v, p. 2.

her return to Charleston she was converted into a merchant-vessel, under the name of the Thomas L. Wragg.* The Nashville.

It is idle to say that any responsibility can attach to Her Majesty's Government in respect of this vessel.

The Chickamauga. The Chickamauga.

The claim put forward in respect of this vessel is founded on a single act of coaling at Bermuda. I must express my surprise that the time of this tribunal should have been occupied with a claim so groundless and frivolous as this.

This vessel was originally called the Edith. She was a double screw steamer, and was employed in running the blockade. She was purchased by the Confederate Government, and being found to be fast, was converted into a vessel of war, and named the Chickamauga.

The Case of the United States "invites the attention of the Tribunal of Arbitration" to the facile manner in which this and other vessels were permitted to adapt themselves to circumstances.† Why our attention should be thus invited I am at a loss to imagine. Is it meant to be suggested that Great Britain could, or ought to have, prevented vessels, originally built as trading vessels from being converted into ships of war, or should have refused to recognize them as ships of war, when so converted and commissioned, because their original destination had been of an humbler character? Either supposition is obviously absurd.

Having run out from Wilmington on the night of the 28th of October, 1864, and succeeded in evading the blockading ships, she destroyed several trading vessels belonging to the United States. On the 7th of November she put into Bermuda.‡ Her Commander, Lieutenant Wilkinson, applied to the Lieutenant-Governor for leave to coal and repair his machinery. The Lieutenant-Governor thereupon requested the Admiral commanding on the station to cause a survey to be made to ascertain the repairs required by the vessel, and the time necessary for their completion, as well as the quantity of coal now in her, and the additional quantity, if any, that would be required to enable her to proceed to the nearest Confederate port.§ The officer appointed by Captain Glasse reported that certain repairs (specified in detail) were necessary to render the vessel fit for sea, and that these repairs would occupy from four to five days; that they were informed that she had about 75 tons of coal on board, while her daily consumption was 25 tons; they therefore considered that 25 tons more would be sufficient to enable her to reach the nearest Confederate port.‖ Orders were issued by the Lieutenant-Governor in conformity with this report.

Permission was given to Lieutenant Wilkinson to remain five days from the 9th of November for the completion of the necessary repairs, and to take 25 tons of coal. But the permission to take in the 25 tons of coal was coupled with the condition that "a revenue officer should be allowed to go on board and see the coal shipped," and the chief officer of the Customs was directed to "take measures for ascertaining that the vessel received no more than the quantity prescribed."¶

Lieutenant Wilkinson, while making "no objection to the terms on which the coal was to be permitted to come on board," "with respect to the quantity, begs to inform his Excellency that, in his opinion, there will not be a sufficiency to take the Chickamauga to the nearest Confederate port." "I trust therefore," he says, "that on further consideration, an additional day's supply (or say 25 tons) will be allowed." But he is told in answer that the quantity had been fixed in conformity with Admiral Glasse's report, and that if he was dissatisfied any further communication must be addressed to the Admiral.** There the matter ended.

Upon these facts it might have been thought difficult to found any possible complaint. But it is alleged that having obtained permission to stay five days, she actually stayed seven; that the permission was given to take the 25 tons of coal when she already had 100 tons in her bunkers; and that having had permission to take 25 tons, she in fact took 82.††

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* United States' Documents, vol. vi, p. 73.

† Page 414. ‡ British Appendix, vol. ii, p. 135. § Ibid. ‖ Ibid., p. 136.

¶ Ibid., p. 137. ** Ibid., pp. 137, 138. †† Case of the United States, p. 415.

The Chickamauga.

The only authority for this statement is the diary of a midshipman who was serving on board the ship. The diary is not unamusing, and it is not without its value. It proves conclusively that any claim in respect of this vessel is wholly out of the question. The part which relates to Bermuda is in these terms :—

"*November* 7, 1864.—At 7·25 took Bermuda pilot. At 8 A.M. let go the port anchor with 25 fathoms chain in Five Fathom Hole off St. George. I went in ashore in charge of captain's boat. Captain went to Hamilton to see the Governor to get permission to bring the ship in.

"*November* 8, 1864.—Ship still anchored in the same place. We will go in this evening. They have decided to let us come in for five days. Hove up anchor at 4 P.M. and came into St. George, and let go anchor at about 4·30.

"*November* 9.—Ship in the stream. Receiving fresh water and provisions. Ship is swarming with bumboat women, washerwomen, &c. Met Midshipman Warren ,Confederate States' Navy, who is waiting for the Florida. Went out into the country and staid all night with him.

"*November* 10.—Ship still in stream. At 4 P.M. the bark Pleiades hauled alongside to give us coal. Coaling ship all night. Got in about 72 tons.

"*November* 11.—Stopped coaling at 4 A.M.

"*November* 15.—Returned on board at 2·30 P.M. Got under way and stood out of the harbour. Pilot left us at 3 P.M.

"*November* 19 *to December* 20.—Reached Wilmington at about 11 A.M. Found the Tallahassee safe in port. She had destroyed six vessels, one of which was a brig that we chased the second day out. . . . . Until about the middle of December, nothing occurred. The officers were granted leave. The Tallahassee was put out of commission about the 15th of December, and loaded with cotton. The command was given to Captain Wilkinson, Captain Ward taking the Chickamauga. I expected to go out in the Chameleon, as she is now called, but I slipped up on my expectations."*

We thus find that leave having been given on the 9th of November to stay till the 15th, the vessel left on the 15th, the day on which the permission expired; and we further see that by another unlucky inaccuracy, the 72 tons in the midshipman's diary are magnified into 82 in the Case of the United States.

From the following affidavit of William Gilbert Outerbridge, the revenue officer who superintended the lading of the coal, it would appear that the writer of the diary must have been in error as to the quantity shipped.

The affidavit is as follows :—

"I, William Gilbert Outerbridge, of Hamilton Parish, Bermuda, make oath and say :—

"I was employed as a Revenue Officer at St. George's in 1864. I was ordered to see that the Confederate cruizer Chickamauga did not receive more than twenty-five tons of coal. I saw her receive twenty-five tons of coal, in the stream, and left her between 3 and 4 in the morning, or, perhaps, between 4 and 5, I cannot be positive to the hour, nor am I sure whether the date was the 10th November; I have a note-book of 1865, but have not been able to find the one I kept in 1864. I swear that she did not receive more than twenty-five tons in the night in which I was on board her. She was coaled from a barque alongside, but I cannot recollect if she was called the Pleiades. I made a report to Mr. Edwin Jones, but kept no copy of it. The barque was still alongside when they ceased coaling, and I left the Chickamauga, and I am positive that she was not alongside at daylight in the morning.

"I went on board about 6 P.M. the previous evening, and did not leave my post all the time she was coaling. I took an exact account of all the coal put on board, and swear that she did not get seventy-two tons while I was on board. I do not believe she got that quantity at all.

(Signed) "WM. GILBERT OUTERBRIDGE."†

It is, however, possible that the opportunity may have been abused and the vigilance of the officers eluded. It appears from the affidavit of another revenue officer that there were at that time frequently as many as fifty vessels in the harbour of St. George's. Mr. Brown, a merchant of the port, says :—

"I, John Tory Bourne, of the town of St. George, in the Islands of Bermuda, merchant, make oath and say that I well remember the arrival of the Confederate States' cruizer, the Chickamauga, in the port of St. George, in the said Islands, in November 1864, and that she obtained permission from the Colonial authorities to take on board twenty-five tons of coal, and no more. I cannot positively state that she received on board no greater quantity, but I know that the officers and others connected with the ship expressed great dissatisfaction at the restrictions placed on her and the very small quantity of coal allowed. The port of St. George was so crowded with shipping at that time that it would have been easy for the Chickamauga to evade such restrictions, and no vigilance or activity on the part of the Colonial Government could, in my judgment and opinion, have prevented such evasions if the officers of the vessel chose to practise them.

"Sworn at the town of Hamilton, in the Islands of Bermuda, this 15th day of February, A.D. 1872.

(Signed) "JNO. T. BOURNE."‡

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* United States' Documents, vol. vi, p. 726 † British Appendix, vol. vi, p. 139.

‡ Ibid.

Assuming, however, that the Commander of the Chickamauga, forgetful of what a due sense of honourable conduct should have dictated, did get any coal in excess of the prescribed quantity, it would be most unjust to impute this to the default of the Bermuda authorities.

But in the result the whole question becomes immaterial. We see from Mr. Carey's diary, that the Chickamauga arrived at Wilmington, where this young officer unfortunately "slipped up on his expectations" on the 19th of November, without having fallen in with, taken, or destroyed a single United States' vessel. The coaling at Bermuda therefore did not lead to any injury to the United States, and cannot in any point of view found a claim for damages.

Case of the Tallahassee.

This vessel, said to have been also known as the Olustee, was built and originally employed as a blockade-runner under the name of the Atlanta. In the correspondence of the United States' Consulates during the first six months of the year 1864 she is several times spoken of as a blockade-runner of superior power of speed.* No reference whatever is made to her having been built for, or being adapted to, the purpose of war.

In the August of that year, some guns were put on board of her at Wilmington, with a crew of 120 men, and having contrived to escape from the blockading vessels, she commenced her work of devastation, and destroyed several vessels.† Having done so, she arrived at Halifax on the 18th of August. What occurred there will be best told in the narrative of her commander, John Taylor Wood :—

"My reception by the Admiral was very cold and uncivil: that of the Governor less so. I stated I was in want of coal, and that as soon as I could fill up I would go to sea—that it would take from two to three days. No objection was made at the time. If there had been, I was prepared to demand forty-eight hours for repairs. The Governor asked me to call next day and let him know how I was progressing and when I would leave. I did so, and then was told that he was surprised that I was still in port; that we must leave at once; that we could leave the harbour with only 100 tons of coal on board. I protested against this, as being utterly insufficient. He replied that the Admiral had reported that quantity sufficient (and, in such matters, he must be governed by his statement) to run the ship to Wilmington. The Admiral had obtained this information by sending on board three of his officers, ostensibly to look at our machinery and the twin screw, a new system, but really *to ascertain the quantity of coal on board, that burned daily, &c.* . . . . I am under many obligations to our agent, Mr. Weir, for transacting our business, and through his management about 120 tons of coal were put aboard instead of half that quantity. . . . Had I procured the coal needed, I intended to have struck the coast at the Capes of the Delaware, and followed it down to Cape Fear, but I had only coal enough to reach Wilmington on the night of the 25th.‡

It is admitted, in the Case of the United States, that, in respect of what took place on this occasion, the United States have no cause of complaint. Indeed, it is said :—

"Had the British authorities at Nassau, Bermuda, Barbadoes, Cape Town, Melbourne, and other colonial ports, pursued the same course that the Lieutenant-Governor at Halifax did, under the wise advice of the Admiral, the grievances of the United States would have been much less, and this case would have been shorter by many pages. The first time that the rule of January 31, 1862, as to the supply of coal, was fairly carried out, the operations of the insurgent cruizer, to which it was applied, were arrested on the spot, and the vessel was obliged to run for a home port."§

The Tallahassee remained at Wilmington some months; and she was then sold by the Confederate Government and purchased by a private merchant, and became, and afterwards remained, a merchant-vessel. In that character, and under the name of the Chameleon, she visited Bermuda in January 1865, with a cargo of cotton and tobacco. The vessel being identified as the former Tallahassee, inquiries were set on foot by the Authorities, when it was fully shown by Mr. Wilkinson, the consignee of the cargo, that she had passed into private hands, and had been duly registered as private property.‖

Upon what possible grounds, then, can we be asked to award damages in respect of this vessel? Simply because, as it is said, "the Tallahassee was a British steamer fitted out from London to play the part of a privateer out of Wilmington."¶ But upon what authority is this statement made? Simply on that of a passage to that effect in a

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* United States' Documents, vol. vi, pp. 727, 728.
† United States' Documents, vol. vi, p, 729; British Appendix, vol. v, p. 143.
‡ United States' Documents, vol. vi, p. 729. § Page 411. ‖ British Appendix, vol. v, p. 150.
¶ Case of the United States, p. 412.

letter of Mr. Adams to Earl Russell, written much later, namely in March 1865, in which, complaining of the system of blockade running carried on by British ships, he thus speaks of the former Tallahassee:— The Tallahassee.

"The Chameleon, not inaptly named, but before known as the Tallahassee, and still earlier as a British steamer fitted out from London to play the part of a privateer out of Wilmington, was lying at that very time in Nassau, relieved, indeed, of her guns, but still retaining all the attributes of her hostile occupation."*

Every one knows that Mr. Adams would not say anything that he did not fully believe to be true; but he must forgive me for saying that in this instance he must have been mistaken, possibly confounding the vessel in question with some other. In the earlier correspondence of the United States' Consulate respecting this vessel there is not, as I have already mentioned, any reference whatever to it as having been intended for a privateer. She was, in fact, sold after a three weeks' cruise, because, as the consignee of her cargo at Bermuda tells us, she had been "found ill adapted to the purposes of war."† Besides, had she been built as a privateer, it is very unlikely that she would afterwards have been bought by a merchant as a carrying vessel. Every one acquainted with these things knows that a vessel intended for war-purposes differs essentially, in point of construction, from one intended for trade.

When a Government is unable to build or to procure ships properly constructed for war, it may be driven to the expedient of converting merchant-vessels into vessels of war; but a merchant does not buy ships of war to turn them to a purpose for which their construction makes them wholly unfit.

But what if this vessel had been originally built as a privateer? Is it meant to be asserted that this alone, without any suggestion, much less proof, of default on the part of the British Government, is enough to fix the latter with liability for the acts of such a vessel?

But it would be a waste of time to pursue this further. Here again, I must say I think this claim ought never to have been submitted to us.

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* United States' Documents, vol. i, p. 709.

† British Appendix, vol. i, p 151.

Case of the Retribution.

This vessel was a small steamer built in the State of New York and originally employed as a tug-steamer on Lake Erie. Just before the attack on Fort Sumter she was chartered by the Government of the United States and sent to the Southern coast.

Having been compelled by stress of weather to enter Cape Fear River, she was there seized by the Confederates. Her machinery was removed, and she was converted into a sailing schooner and armed; she then started on a cruize under the name of the Retribution.*

On the 28th of January, 1863, she captured near San Domingo the United States' merchant-vessel Hanover, laden with a cargo of provisions. The master and crew of the vessel were put into the boat, in which they rowed to San Domingo, and the chief officer of the Retribution, a man named Vernon Locke or Parker (for he was at different times known under both these names) took possession of the Hanover with a prize crew.†

The Hanover arrived on the 5th of February at Long Cay, a small island of the Bahamas, about 240 miles from the seat of Government, in company with a wrecking schooner named the Brothers, and owned by Messrs. Farrington, merchants, of that island. Here Vernon Locke represented himself to be the master of the Hanover, and stated that he was bound from Boston to a port of Cuba, where he was to have sold his cargo, and to run the blockade with a cargo of salt. On the plea that his vessel had run ashore on a neighbouring island, and was in a leaky condition, he obtained the permission of the Customs Collector at Long Cay to transfer part of the cargo to the Brothers, and to land the rest, and eventually to sell the whole through the agency of Messrs. Farrington. For this purpose he produced the manifests of the cargo, and forged to them the signature of the true master of the vessel, one Washington Case. The magistrate of the district, who resided in another island, but who happened to arrive at Long Cay at the time, questioned the pretended master, and appears to have had his doubts as to the truth of some of the particulars of the story.

In a report which he afterwards furnished to the Governor, of the 20th of April, 1863, he says:—

"I had my doubts as to the vessel having been on shore at Inagua, and I mentioned my doubts to Mr. Farrington. I told him that I was under the impression that in the cargo there might be articles contraband of war, and that the reported disaster was but a ruse to prevent the Boston merchant being tracked in Nassau in his illicit trade with the South. But I found out afterwards, on inquiry from the Acting Tide Waiter, that the cargo was really one of provisions.

"Mr. Farrington admitted that he also doubted whether the Hanover had been on shore, but inasmuch as the captain came to him properly documented, he did not see any impropriety in his acting as the captain's agent, and that he was not aware of any illegality in the matter,—and I must here add that I am under the impression that, up to that moment, Mr. Farrington was as ignorant of the real facts of the case as I was. It must be remembered that the captain was a perfect stranger; that the register and articles of the Hanover were produced, I believe, at the Collector's office, but I know that he had the ship's clearance, the bills of lading, and even the certificate from the Custom-house in Boston that the captain had taken the oath of fidelity to the Union. He represented himself as Captain Case, and signed all documents as Washington Case, the name of the captain as appearing on the documents."‡

The schooner Brothers, having taken on board part of the cargo of the Hanover, left with it for Nassau, taking also the pretended master; but it seems that he only went in her as far as Rum Cay, another island of the Bahamas, from which he was taken off by the Retribution. The Hanover remained at Long Cay for a day or

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* United States Documents, vol. vi, p. 736. † Ibid., p. 740.
‡ British Appendix, vol. v, p. 168.

two after the Brothers had left, and then seems to have sailed for some port in the Southern States.* The manner in which the fraud which had been committed on the Authorities was discovered, is thus related by Mr. Burnside, the magistrate of the district, in the report which has been already referred to:—

"The Hanover remained a day or two after the Brothers had left, at Long Cay, under the charge of the former mate taking in a cargo of salt, and it was only about half-an-hour previous to her departure that I, and, I am under the impression, Mr. Farrington also had the slightest misgiving that the person who had represented himself as the Captain of the Hanover was not Washington Case. One of the sailors of the Hanover, under the influence of liquor, referred to the supposed captain in the Collector's presence by some other name. I was with Mr. Farrington when the Collector mentioned the circumstance; reference was immediately made to the documents and the difference in the signatures confirmed what the Collector had heard. The supposed Captain Case had then left in the Brothers, and no action could have been taken even if I had been armed with power; but even then we were under the impression that the name had been assumed in the Custom-house, in Boston, by some other person to facilitate Captain Case's leaving Boston, supposing him to have been a suspicious person; and it was only after I had left Long Cay, on my way to Inagua, that we met a vessel from Inagua, and I received a letter from Mr. Sargent informing me that he was under the impression that the Hanover was a prize to the Retribution."

On the 19th of February following, the Retribution captured another American merchant vessel, the Emily Fisher, in the neighbourhood of Castle Island, one of the Bahamas. The case of this vessel does not seem to have formed the subject of any complaint either on the part of the United States' Government or of the parties interested until the present time; and the Collector of Customs at Long Cay being now dead, there is little evidence to be depended upon as regards the proceedings at that place.

The statement, produced by the United States, of a man named Sampson who was at the time, according to his own account, employed at Long Cay under the orders of the United States' Government as a "deputy marshal" or detective officer to look after wreckers and blockade-runners, cannot be regarded as reliable. He states that all the facts connected with the capture of the vessel and the subsequent transactions were true, "from his personal knowledge," and that he had previously testified to them before a Court in New Jersey.† But it is obvious that he can have had no personal knowledge of the facts connected with the capture of the vessel, which took place at a distance from Long Cay; and, on reference to the proceedings of the trial mentioned, the material portion of his evidence is found to be no more than that he saw the Retribution in the spring of 1863 at Long Cay, where she was lying outside the Emily Fisher; that he was introduced by an acting magistrate of Long Cay to the first and second lieutenant of the former vessel, and "had a general talk about the North and South."‡

According to the statement on oath of Mr. Staples, the former master of the Emily Fisher, which, however, was only made in September last, eight years after the event, he was induced by the assurances of a captain of a British wrecking vessel, to come within range of the Retribution, by whom he was captured. The Emily Fisher was then run on shore by the orders of the Captain of the Retribution, and was taken possession of by some wrecking boats. The vessels afterwards proceeded to Long Cay, where the Master was eventually placed in possession of the vessel by the Collector, but not until he had bargained with the wreckers to pay them 50 per cent. on the cargo and 33½ per cent. on the vessel for salvage. Staples adds, that "he was told by the Authorities that, though the law would not allow the privateer to touch the brig," yet, "if he wished to do so, they had no means of preventing him; that the captain of the privateer told him, the deponent, that he had given the cargo to the wreckers, as he wanted the brig; that he was going to put his guns on board of her, and destroy his schooner;" "that he further told the deponent that the wreckers were to pay him something handsome, and that the deponent believes that they did so; that deponent was obliged to accept the wreckers' terms at the port of entry, because the brig lay under the guns of the privateer, and the Authorities declared their inability to protect him."§

Having recovered possession of his vessel and a portion of the cargo, the master of the Emily Fisher proceeded on his voyage.

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* British Appendix, vol. v, pp. 165, 168, and 190.
† United States' Documents, vol. vi, p. 736. ‡ British Appendix, vol. v, p. 196.
§ United States' Documents, vol. vi, pp. 738, 739.

The Retribution.

It is admitted, in a memorandum inclosed in a despatch from the Acting Governor of the Bahamas of the 17th of February last, that "from inquiries which have been recently instituted, there is very little doubt that the statements contained in the deposition of Captain Staples are substantially correct, so far as they relate to what took place in Fortune Island."* It seems not improbable indeed that the Authorities may have really been unable to afford any protection to the master of the Emily Fisher, the place being a small port in a remote island. The Magistrate, Mr. Burnside, who was at this time absent, speaks in his report, quoted above, of his inability to take action against the supposed Captain Case, "even if he had been armed with power."† The Authorities, in Mr. Burnside's absence, probably consisted only of the Customs Collector, and perhaps the "Assistant Magistrate," mentioned in Sampson's affidavit. It does not, moreover, appear how far Mr. Staples made them acquainted with what had happened previously to the arrival of this vessel at Long Cay.

The question of the capture of the Emily Fisher, as I have already said, seems not to have formed the subject of any complaint up to the time of the present arbitration, and all the information that appears to have reached the Government at the time is contained in the following passage of Mr. Burnside's report, which shows no trace of any improper proceedings having been committed or tolerated at Long Cay:—

"I have heard from Long Cay that the Retribution, subsequent to the affair of the Hanover, captured an American brig in the neighbourhood of Castle Island—the Emily Fisher, with a cargo of sugar—that the Commander of the Retribution ordered her to be run on shore near Long Cay, and that subsequently she was extricated from danger by the wreckers, who carried her to Long Cay, where salvage was awarded to the wreckers, and a portion of the cargo sold to pay the salvage and expense, and the Emily Fisher then proceeded with the balance of her cargo to New York.

"On this latter occasion the Retribution did call at Long Cay, and some of her officers had communication with Mr. Richard Farrington, and at that time the supposed Washington Case was seen on board of the Retribution; but I do not know in what capacity."‡

There seems no ground whatever for saying that either in respect to the Hanover, or to the Emily Fisher, any charge of want of due diligence can be sustained against the British authorities.

The Retribution remained at Long Cay, according to the evidence afterwards given by Mr. Farrington at the trial of Vernon Locke, not more than a day.§ Shortly before the end of February she arrived at Nassau, where it must be remembered that none of her previous proceedings were at the time known to the Authorities. It is stated in the Argument of the United States that—

"The 'special leave' called for by the British Government, under date of January 31, 1862, seems never to have asked for or granted. Her commander was not even called upon for his commission. All that occurred upon her arrival is thus stated by the pilot: 'She had a small gun on deck. The captain told me he was from Long Cay. I asked the captain where he was from. He answered "Long Cay." I saw from the look of the vessel and the appearance of the crew, their clothing, that she was likely to be an armed vessel. I then asked him if she was a vessel of war. I begged him to excuse my being so particular, as I was instructed to do so, to put such questions. He told me she was an armed vessel.'"‖

Here the quotation ends, but the deposition of the pilot, when referred to, is found to continue as follows:—"I then told him he could not go into port. We rounded to immediately, and came to anchor;" and the pilot goes on to say that the captain came on shore in his boat.¶

And in the evidence of Mr. Taylor, at that time the Acting Receiver-General at Nassau, given afterwards at the trial of the Etta, it is stated that "the Retribution did not enter as a trader in the port of Nassau, she was treated as a Confederate vessel of war."** It seems obvious, therefore, that her character was verified and the necessary permission obtained before she was allowed to enter the port. This view receives additional corroboration by the notice inserted in the "Bahama Herald" of the 28th of February, to the following effect:—

"The Southern gun-boat Retribution put in here on Thursday last for the purpose of undergoing repairs, if permitted to do so by his Excellency the Governor. She has since been condemned, and is to be sold at public auction on Monday."††

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* British Appendix, vol. vi, pp. 23, 24. † Ibid., p. 168. ‡ Ibid., vol. v, pp. 168, 169.
§ Ibid., p. 190. ‖ Page 308. ¶ British Appendix, vol. v, p. 191. ** Ibid., p. 196.
†† Ibid., p. 22.

The vessel was, as is stated in this announcement, condemned as unseaworthy by a board of survey. Her hull was sold on the 3rd of March, 1863, for 250*l.*, to Messrs. Perpall and Co., merchants, of Nassau,* there being at the time no regulation to prevent the dismantling and sale of belligerent armed vessels in British ports. By Messrs. Perpall she was again sold for the same sum to a Mr. Thomas Stead, who was at the time a clerk to some parties engaged in the blockade-running trade.† By him she was registered on the 10th of April, 1863, as a British vessel, under the name of the Etta,‡ and it is said that an attempt was made to run the blockade with her, but failed. In June 1863, she was again sold by public auction to the firm of Renouard and Co., of Nassau, who, having bought her for 158*l.* and repaired her at a cost of 200*l.*, sent her with a cargo of fruit to New York, where she was seized, libelled in the District Court of New Jersey, and ultimately adjudged as forfeited to the United States.§

This terminates the history of the Retribution. Into the steps taken by the authorities at Nassau for the punishment of the principal offender, it is scarcely necessary to enter in detail, as they do not affect the acts previously committed by the vessel. They are briefly as follows:—The first information received by the Governor as to the sale of the cargo of the Hanover at Long Cay, was given in a letter dated the 11th March, 1863, from a Mr. Jackson, Agent at Nassau for the American underwriters.‖ The Retribution had at this time been sold to private owners, and although it was said by Mr. Jackson that the officers of that vessel were residing in Nassau, the Attorney-General was of opinion that the facts as related were not sufficient to render the parties criminally liable.¶ A further representation was made on the same subject in April 1863 by the United States' Government through the British Minister at Washington. Inquiries had in the meanwhile been made by the Governor on the advice of the Attorney-General, which led to the report of the resident Magistrate, Mr. Burnside, dated April 20, 1863, of which I have quoted some passages. This report rendered it clear that the pretended master of the Hanover had been guilty of forgery and personation, and the Attorney-General received in the following month information pointing to Vernon Locke, then in the Colony, as the guilty person. As the witnesses were all at a considerable distance, the ordinary process of obtaining sworn information on which to found a warrant would have caused considerable delay, the Attorney-General therefore availed himself of the power given him by a local Act, and issued a precept to the police magistrate at Nassau requiring him to issue a warrant against Locke.** The latter was accordingly arrested, and, after a long examination, was committed for trial, but escaped, forfeiting his bail. He was, however, re-arrested and brought to trial; but the evidence being insufficient on some of the essential points, he was finally acquitted.††

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* British Appendix, vol. v, p. 193. † Ibid., p. 21. ‡ Ibid., p. 195. § Ibid., p. 22.
‖ Ibid., p. 165. ¶ Ibid., p. 166. ** Ibid., p. 23. †† Ibid., p. 187.

Cases in which Great Britain has been held responsible.

I have now gone through the cases of all the different vessels in respect of which claims have been preferred for losses sustained through the alleged want of due diligence on the part of the British Government. After all that has been said and written, it is only in respect of two vessels, both equipped at the very outset of the civil war, and before the contrivances resorted to had become known by experience, that this Tribunal, which has not shown a disposition to take too indulgent a view of the fulfilment of neutral obligations, has been able to find any default in British Authorities at home; while, in respect of a third, the Tribunal, by a majority of one voice only, has fixed the Government with liability for an alleged error in judgment of the Governor of a distant Colony in respect of allowance of coal, and for the want of vigilance of the police in not preventing men from joining a Confederate vessel at night. We have here the best practical answer to the sweeping charges so perseveringly brought against the British Government and people.

The Tribunal having thus settled the instances in which it is prepared to hold Great Britain responsible, we have next to consider the important question of damages.

As to the award of a sum in gross.

The first question which presents itself on approaching the subject of pecuniary compensation is, whether the Tribunal ought to award a sum in gross, or whether it would be advisable to refer the amount of compensation to be settled by assessors under the provisions of the Treaty of Washington. On the one hand, as it is admitted that these claims have never been audited, or even been *bonâ fide* examined, by the Government of the United States, it must necessarily be extremely difficult to estimate the amount which should be awarded in respect of them; more especially as it becomes apparent that a large proportion of them are most extravagant in amount, while none of the ordinary documents evidencing the value of shipping property or merchandize have been brought before the Tribunal. On the other hand, it is for many reasons desirable that the matters in dispute should be disposed of and settled as soon as possible, so as to put an end to all further disputes, as well as to avoid giving the opportunity, which would be afforded by sending the settlement to assessors, to invent fresh claims and present them from day to day before the latter. On the whole, I have come to the conclusion that, if the clearly inadmissible claims be rejected, and the extravagant claims properly reduced, justice may substantially be done by awarding a lump sum, and that the advantage of such a course would counterbalance the disadvantages which it no doubt involves.

claims.

The claims for individual losses, which were in April last advanced in the Revised Statement, amounted to 25,547,161 dollars; besides which a claim for "costs of pursuit and capture," exceeding 7,000,000 dollars, was preferred on the part of the United States' Government. To all which was superadded a claim for interest of 7 per cent. per annum from the times of capture until payment. These claims have, however, to be diminished by reason of Great Britain having been pronounced by the Tribunal to be liable in respect only for the captures made by the Alabama, Florida, and Shenandoah, and for those made by the latter only after her departure from Melbourne. On the other hand, the claims in respect of the other vessels having been rejected, the representatives of the United States, on the 19th of August last, presented new and increased claims to the extent of 2,150,000 dollars, so that the claims then advanced by the United States in respect of those captures, for which Great Britain has been held liable, amounted, after correcting certain admitted errors of calculation, to 19,146,444 dollars, over and above a claim of 6,735,062 dollars for the cost of pursuit and capture in respect of the three vessels and the claim of interest at the rate of 7 per cent.

Claims for cost of pursuit and capture.

I concur entirely with the rest of the Tribunal, in holding that the claim for cost of pursuit and capture must be rejected. This item of expense formed part of the general expense of the war. The cruizers employed on this service would, probably, have been kept in commission had the three vessels in question never left the British shores.

We have, therefore, only to deal with the claim for losses sustained by individual citizens.

Question of damages.

Now there can be no doubt that the only damages which the Tribunal is authorized to award under the Treaty for the indemnification of American citizens must be confined to loss actually sustained by destruction of ships, cargoes, or personal effects. Where damage to property arises, not directly from wilful injury, but indirectly only, from want of due care, an indemnity against actual loss is all that, by the law of England or America, or by any principles of general jurisprudence, can possibly be awarded.

If, therefore, this Tribunal, instead of sending the amount to be paid by Great Britain to be ascertained by assessors, should think fit to award a sum in gross, as it is empowered to do by the Treaty, it must still, in fixing the latter, proceed on the best estimate it may be enabled to arrive at, on the data before it, of the losses actually sustained by American citizens through the three ships for which Great Britain is to be held liable.

The claims for individual losses by reason of property destroyed by the three ships in question amounts to the sum of 19,146,444 dollars; but this amount includes items which involve important questions of principle, and deserve special consideration.

These are:—

	Dollars
(A.) The claims in respect of the whaling-vessels destroyed, for loss of prospective catch, amounting to	4,009,301
(B.) The claims for gross freights amounting to	1,007,153
(C.) The double claims, amounting to	1,682,243
(D.) The new claims, presented for the first time on 19th August, amounting to...	2,150,000
	8,848,697

Claims for prospective catch.

(A.) There can be little doubt that the amount claimed for the prospective catch of the whalers, which is, in fact, about double the value assigned to the vessels and their outfits, is so extravagant as almost to justify at once the rejection of the whole claim.

The true character of these claims will be seen by comparing the amount of the demands now made for the prospective earnings of the whalers, with the original list of claims forwarded by Mr. Seward to Mr. Adams in 1866, and communicated by the latter to the British Government. It thus appears that these claims have, without any assignable reason, increased to such an extent that they are now sometimes double, sometimes treble, and sometimes even more than five times what they were in the original list. The following Table exhibits some of the more striking cases:—

	Claims for Prospective Earnings in the Original List.	Similar Claims in the Revised Statement presented in April last.
	Dollars.	Dollars.
Alert	30,000	144,863
Kate Cory	1,820	19,293
Lafayette	33,446	50,000
J. Howland	53,075	196,158

Many other similar instances of extraordinary and arbitrary increase might be cited, but the above will suffice to show (what, indeed, a mere comparison of the claims themselves with the value and tonnage of the vessels but too clearly proves), that these demands are of a most extortionate character. But, independently of the undeniably exaggerated amount of the claims, a demand for *gross* prospective earnings as distinguished from *nett* earnings is quite incapable of being maintained. This is admitted in the Argument of the United States, and is clearly demonstrated in the British Report. According to the decisions of the Supreme Court of the United States, the only allowance which ought to be made in respect of prospective catch is in the nature of interest from the time of the destruction of the vessel.*

I should myself be disposed to adopt a more liberal mode of compensation, and to award for prospective profits a reasonable per-centage on the values of the vessels and

* See Mr. Justice Story's Judgment in the case of the Lively (1 Gallison, 315). British Appendix, vol. vii, pp. 13, 14.

outfits; but I cannot but think that if a year's wages is to be awarded as proposed for the officers' and crews, the amount of 25 per cent. on those values as claimed in the American Tables presented on the 26th of August, in case of the claim for prospective catch being disallowed, far exceeds what is properly assignable. The total amount claimed for the whaling-vessels and outfits, an amount, which, as I shall presently show, bears every sign of great exaggeration, is 1,780,691 dollars. A claim of 659,021 dollars is advanced for secured earnings. To award a further sum of 400,000 dollars, as claimed, in lieu of prospective profits, would make a total allowance of over 1,000,000 dollars (or 60 per cent. of the original values of the vessels and outfits) for secured and prospective outfits alone; in addition to a sum of 588,000 dollars, or more than 30 per cent. more, for the wages of the officers and crew (which are supposed to come out of the gross earnings), and this irrespective of the fact of interest being claimed on the whole from the date of the capture.

Claims for gross freights.

(B.) As to the claims for gross freights amounting to 1,007,153 dollars.

That these claims are also greatly exaggerated appears from the several instances to be found commented on in the British Reports; but the same fact follows beyond a doubt from the following consideration:—

In a Report presented by a Committee of the House of Representatives of the United States in 1870 a Table is to be found (Table XVI) giving the value of the *gross yearly* earnings of all American vessels engaged in the foreign carrying trade from 1861 to 1870. The value of these gross yearly earnings is there stated to amount to 33⅓ per cent. of the value of the vessels. On looking at the British Tables it will be found that the amounts claimed for freight, although for individual voyages not exceeding on the average six months in duration, are more than 47 per cent. on the alleged values of the vessels, from which it would follow that these claims are exaggerated to the extent of nearly 60 per cent.

Independently, however, of the exaggeration in amount, it is clear that a claim for *gross* freight as distinguished from *nett* freight cannot be supported by any sound reasoning. It is, moreover, inconsistent with all the English and American authorities on the subject.* The United States' Counsel seemed to have themselves thought such a claim hopeless; for, on the 19th August last, they, for the first time, asserted that these were claims, not for gross, but for nett freights. It is sufficient on this point to say that, in the face of the well-known official estimate above referred to, according to which the *gross* average *yearly* earnings of American merchant-vessels amounted only to 33⅓ per cent. of the values of the vessels, an assertion that claims amounting to more than 47 per cent. of such values were advanced for *nett* and not for *gross* freights on voyages not exceeding, on the average, half a year in duration, is one which carries its own refutation on the face of it, especially when it is remembered that these claims are generally presented in the Revised Statement as claims for charter-party or bill-of-lading freight.

Under these circumstances I cannot but think that the allowance of 50 per cent. on these claims, which the Tribunal received with favour and is prepared to adopt, is far in excess of what would in justice satisfy them.

Double claims.

(C.) As to the double claims.

They consist in the main of claims made by the owners for the value of their property, simultaneously with claims advanced by insurance companies with whom the property was insured, and who paid the owners the amount of their loss. To pay the owners and the insurance companies these double claims would be clearly equivalent to paying the losses twice over. One of these claims, therefore, must necessarily be rejected.

One cannot but regret that these claims should have been advanced, and that the United States' Government should not at once have expunged them as inadmissible, instead of allowing them to be included, without exception, in the total claims of the United States.

These double claims are of two descriptions: first, those which are avowedly and intentionally made, or where, to use their own words, "the claimants protest against any diminution of their claims by reason of their having been paid by insurance companies;" secondly, those which are tacitly made.

As regards the second class of double claims, viz., those tacitly made, it is enough

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* See Report of Committee appointed by Board of Trade; British Appendix, vol. vii, pp. 9, 10.

to observe that they were pointed out many months ago in the British Reports as double claims, and the United States' Government, although it has had in its possession all the evidentiary documents bearing on the same, has never denied their character as double claims. It is, therefore, clear that all these double claims amounting to the large sum of 1,682,243 dollars must be struck out.

(D.) As to the new claims presented, for the first time, in August last. New claims.

As a majority of my colleagues have already intimated an opinion that these claims ought to be excluded from consideration in awarding a lump sum, it is only necessary for me to state that I am decidedly of the same opinion, because the claims are entirely unsupported by any evidence, and are merely based upon assumptions as to the amount of wages the officers and crews might or should have been receiving, and the amount of personal effects which they might or should have had on board at the time of capture, and which they have lost in consequence of it. I find, moreover, in the Revised Statement presented with the United States' Counter-Case, claims to considerable amounts actually preferred by the officers of some of the vessels for loss of wages and personal effects, and, as I shall show, those gentlemen have been by no means disposed to undervalue their property. Finally, it seems to me entirely inconsistent both with the letter and the spirit of the Treaty of Washington that, at the last moment, the request of the Tribunal for explanatory Tables to assist it in the discussion of the various items of claims should be taken advantage of to swell the amount already presented, without giving the British Government an opportunity to advance argument and evidence in opposition to such increase.

For all these reasons I am clearly of opinion that the claims for prospective catch and for gross freights, the double claims and the new claims presented in August last, altogether amounting to the sum of 8,848,697 dollars, must be rejected.

I now proceed to consider the questions relating to the value of the property actually destroyed. Property destroyed. It is admitted in the Argument of the United States' Government that these claims had never been audited by that Government. I cannot help thinking it would have been better if, before the United States called upon this Tribunal to estimate the value of claims to be assessed by it without an inspection of the documents which are said to be filed at Washington, these claims had been audited under the authority of the United States' Government. Had this been done I think it is only fair to assume that the very numerous demands which are manifestly extravagant would have been diminished in amount in the same manner as the claims in respect of the vessels sunk in the River Seine (more than once referred to in the British Reports) were reduced after they had been thoroughly sifted by Her Majesty's Government. The Tribunal is, in fact, called upon to estimate the values of vessels, the age and class of which are not given, and the values of cargoes, of which neither the description nor quantity is stated. Under these circumstances it is manifest from the experience every day gained in courts of justice, that a very considerable deduction ought to be made from the estimates presented by the claimants in respect of the losses for which they are claiming compensation. To hold Great Britain simply liable for the amounts demanded by the claimants would not be to award the latter fair compensation, but to grant them enormous profits.

I now proceed to consider the values of the vessels—and, first, the whalers. Values of whaling vessels. The fact of the extraordinary express double claims advanced in respect of these vessels is of itself sufficient to make one look with some suspicion on the other items of claim. I believe that the estimate of 100 dollars per ton for ship and outfit, proposed in the British Reports, is such as would be accepted as adequate by persons acquainted with the character and value of whaling-vessels. It is, moreover, borne out by the fact that the claims for insurance in the Revised Statement show that these vessels were not insured at so high a value.

But I am ready to refer to a standard given by the claimants themselves. I find that, in the case of the fourteen whalers destroyed by the Alabama, with a total tonnage of 3,560 tons, a claim is advanced for vessels and outfits of 409,233 dollars, which is equivalent to a valuation of less than 115 dollars per ton. In the case of the whalers destroyed by the Shenandoah, on the contrary, with a total tonnage of 8,560, the claim under the same head amounts to 1,325,768 dollars, or very nearly 155 dollars per ton. I cannot see why the average value of the whalers destroyed by the Shenandoah should so vastly exceed that of those destroyed by the Alabama, and I certainly think the average in the latter case may be taken as likely to be more near the mark.

alues of merchant ssels.

As regards the merchant-vessels I see no reason to doubt that the British average estimate of 40 dollars per ton is adequate; but there is one mode of arriving at an average estimate which is open to no objection. It appears from the same Table, in the Report presented to the Congress of the United States already referred to, that the average value of American vessels engaged in the foreign trade was, in the year 1861, 41 dollars per ton, and that it has, since the year 1862, been 45 dollars per ton. It will be found, on looking at the United States' Argument, that it is there strongly urged that the depredations committed by the Confederate cruizers occasioned a very serious diminution in the value of American shipping property. This assertion seems directly opposed to the statistical information given in the Table I have just referred to; but whether it be or be not correct, it cannot be doubted that an estimate of the merchant-vessels at the rate of 45 dollars per ton must be a very liberal estimate. The adoption of this valuation would cause the British allowance to be increased by 200,000 dollars, but it would cause the claim of the United States to be diminished by more than 500,000 dollars.

laims for cargoes.

I now come to the claims for cargo. Those claims, it must be remembered, include claims for the value of goods, insurances, commissions, and profits on the same cargoes; profits which will be found to be claimed at the rate of sometimes 25, sometimes 50, and sometimes as much as 100 per cent. Moreover, it is important to observe that, as merchants generally considerably overvalue their property in policies of insurance, and always include in the amount insured the premium of insurance itself, a considerable reduction ought to be made from the amounts claimed by insurance companies. Again, for reasons fully stated in the first British Report,* it is generally impossible to trace the double claims which are advanced for cargoes; and yet the probability certainly is that they exist to at least as great an extent as they have been proved to exist in the cases of vessels and freights. Taking all these circumstances into consideration, I believe that most persons who study these claims, and who are acquainted with the subjects to which they relate, will consider the reduction of 12 per cent. which has been made in the British estimate from the total claim for cargo, commission, profits, and insurances on the same, a very moderate reduction.

laims for ersonal effects.

The last item of claims to be considered is that relating to personal effects. That some of these claims are exorbitant is proved by the various instances cited in the British Reports. I will direct attention to a few of them.

Ebenezer Nye, the master of the Abigail, a whaling-vessel of 310 tons, has claimed upwards of 16,000 dollars, or 3,200*l.* for the loss of personal effects on board that vessel. Again, the master of the Rockingham, a vessel of 976 tons, has claimed for personal effects 8,054 dollars, or 1,600*l.* In the Winged Racer a passenger claims for loss of office as Consul 10,000 dollars, over and above 1,015 dollars for loss of personal effects. Finally, in the Crown Point, a vessel of 1,100 tons, the master and the mate each advance claims for 10,000 dollars. Excepting in these and some other similar cases, in which the demands are evidently grossly exaggerated, all the claims for personal effects have been allowed in the British estimate, and I see no reason whatever for adding to the amount which is proposed to be allowed in that estimate under this head.

On the whole, therefore, I am of opinion that if half a million dollars were to be added to the British estimate, more than adequate compensation will in all probability be granted for any direct losses which may have been occasioned by the Confederate cruizers, and that, therefore, the Tribunal ought to assess these claims at an amount not greater than 8,000,000 dollars.

In the observations on M. Staempfli's calculations which I submitted to the other members of the Tribunal on the 2nd of September, and which will be found in the Protocol of that date, I have shown that, even including the allowances of 988,000 dollars for profits and wages of the whalers, and the allowance of 50 per cent. on the claims for freights, and striking a mean between the British estimate and the gross claims for the other items not absolutely disallowed by the Tribunal, the amount should not exceed 10,000,000 dollars in round numbers.

Claim for interest.

The Tribunal having formed its estimate of the actual loss sustained in respect of ships and property at the time of their destruction, a most important question presents itself, whether, to such actual value, interest from the time of loss should be superadded. Upon this question, which is entirely in the discretion of the Tribunal,

* British Appendix, vol. vii, p. 13.

according to what it may deem equitable and right under all the circumstances, we have had the advantage of very able arguments. Looking to technical considerations alone, Sir Roundell Palmer's argument appears to me to be unanswerable. But I confess I should be disposed, when able to deal with a case of indemnity, unfettered by technical considerations, as I think we may do in the present instance, to hold that where a pecuniary indemnity against loss is to be given, such indemnity is not complete unless the party is compensated, not only for the property actually destroyed, but for the profit—here to be represented by interest—which that property would have brought him. If a man loses property worth 1,000*l.*, which, but for the loss, he would have continued to turn to some profitable account, and after a given period the actual value, namely, the 1,000*l.* is given to him, and no more, it is plain that he remains a loser of of all the profit he would have realized in the meantime; in other words, he remains to that extent unindemnified. Under ordinary circumstances, therefore, I should have been willing to award interest, when awarding compensation for property destroyed. But there are in this case most peculiar circumstances which make me incline to a different conclusion.

The first is, that neither the British Government, nor British subjects, were the authors of the damage done. All that can be ascribed to the British Government is want of diligence in not preventing these vessels from leaving British waters on their work of mischief. Professor Bluntschli has done justice to the British Government in this respect:—

"Il ne faut d'ailleurs pas perdre de vue que tous ces effets désastreux sont en premier lieu imputables, non pas au Gouvernement Anglais mais aux *croiseurs* eux-mêmes. Personne n'accusera le Gouvernement Anglais d'avoir donné mission de détruire les navires de commerce Américains, ou d'avoir, par ses agissements, entravé ou endommagé la marine Américaine. Ce que l'on peut lui reprocher à bon droit (en supposant que les faits cités plus haut doivent être considérés comme avoués ou prouvés), ce n'est pas un *fait*, mais une *omission contre le droit*. Sa faute ne consiste pas à avoir équipé et appareillé les corsaires, mais à *n'avoir pas empêché* leur armement et leur sortie de son territoire neutre. Mais cette *faute* n'a qu'un rapport *indirect*, et nullement un rapport *direct*, avec les déprédations réellement commises pas les croiseurs."*

American citizens have suffered by the acts of American citizens. Great Britain is to make good the injury. Why? Because, in order to commit these acts, the wrong-doers began by violating her laws, and her Government was not quick enough in preventing them. But who were the American citizens who did these things, and brought these injuries and losses on American citizens? Private individuals? No! Eleven States, heretofore an integral portion, and now again an integral portion, of the North American Union—in other words, an integral portion of the body who are the Plaintiffs against Great Britain in this memorable suit. And, to make the anomaly of the position more complete, but for concessions voluntarily made, Great Britain would have been enabled to say, first, that she was not, and could not be, liable to another nation for losses sustained through breaches not of international but of her own municipal law; next, that if she, on the one hand, was liable for injury done to American citizens, because her Government by greater diligence might have prevented them, she, on the other hand, might have claimed to be recouped by States, now forming an integral part of the Union, as having been the actual wrongdoers through violation of her law, whatever sum she was obliged to pay as compensation.

For, had the Confederate States possessed, or had they succeeded in acquiring an independent nationality, Great Britain would have had a perfect right to insist on being indemnified for a pecuniary loss incurred through a violation by them of her neutrality and of her law. The nationality of those States is now again united with and merged in that of the United States, now plaintiffs against Great Britain. And though, the compensation being asked for losses suffered by individual American citizens, and not by the Government of the United States, Her Majesty's Government were, in my humble opinion, right in not taking their stand on such an objection, I cannot but think that, looking to all these circumstances, this Tribunal, in the exercise of the equitable and unfettered jurisdiction with which it is invested, might well decline to add interest to the amount of the loss actually sustained.

Even if interest should be given, it seems to me that, as the United States might have had, as far back as the year 1869, an arbitration for the purpose of having these identical claims adjudicated upon, an arbitration having been offered by Great Britain and accepted by the Executive of the United States, and having only failed because

* "Revue de Droit International, 1870," p. 473.

rejected by the American Senate, all claim to interest, as from that date, should, as matter of equity, be disallowed by the Tribunal.

At all events, I can see no reason why, under all these circumstances, anything more than the lowest rate of interest anywhere prevailing in the United States should be allowed, and I cannot concur in the rate of 6 per cent. adopted by the Tribunal.

Conclusion.

I have now travelled through the wide range of this inquiry, partly in order to place the facts, over which a cloud of prejudice has been raised, in their true light; partly to explain the reasons which prevent my concurring in the award which the majority of the Tribunal have thought it right to pronounce.

The result is that, while I differ from the grounds on which the decision of the Tribunal in the case of the Alabama is founded, nevertheless, owing to the special circumstances to which I have hereinbefore called attention, I concur in holding Great Britain liable in respect of that ship.

With respect to the Florida, on the best judgment I can form upon a review of all the facts, the charge of want of due diligence is not made out. I cannot concur in thinking that anything was left undone by the Government of Her Majesty which could be reasonably expected of them, or the omission of which can justly subject them to the charge of want of due diligence and care. I cannot agree that the law of Great Britain should have been changed because of the breaking out of the civil war. First, because the existing law was adequate to all that could reasonably be expected; secondly, because, at all events, there was at the time no reason for believing it other than sufficient; lastly, because, even if the law might have been improved and the hands of the Executive strengthened with advantage, the United States could have no possible right to expect any amendment of the British law so long as their own remained unaltered.

As to the Shenandoah, I cannot express too strongly my dissent from the decision of the majority.

Not concurring in the decision as to the Florida and Shenandoah, I cannot, of course, concur in awarding the sum which is to be paid on account of the damage done by them.

Even if this were otherwise, I should still hold the amount awarded greater than it should have been.

Lastly, under the very special circumstances out of which these claims have arisen, it appears to me that the allowance of interest was uncalled for and unjust.

But, while the award of the Tribunal appears to me to be open to these exceptions, I trust that, by the British people, it will be accepted with the submission and respect which is due to the decision of a Tribunal by whose award it has freely consented to abide.

The United States, on the other hand, having had the claims of their citizens for losses sustained considerately weighed, and compensation awarded in respect of them, will see, I trust, in the consent of Great Britain to submit these claims to peaceful arbitration, an honest desire on her part to atone for any past errors or omissions, which an impartial judgment might find to have existed—and will feel that all just cause of grievance is now removed—so that, in the time to come, no sense of past wrong remaining unredressed will stand in the way of the friendly and harmonious relations which should subsist between two great and kindred nations.

A. E. COCKBURN.

Geneva,
September 14, 1872.

No. 2.

Lord Tenterden to Earl Granville.

My Lord, *Geneva, September* 14, 1872.

I TRANSMIT to your Lordship herewith the copies of the statements of the opinions of Mr. Adams, Viscount Itajubá, M. Staempfli, and Count Sclopis, as delivered at the different meetings of the Tribunal, with which I have been officially furnished by the Secretary.*

The statements of the Chief Justice's opinions are embodied in his Statement of reasons for dissenting from the decision and award of the other Arbitrators.

I have, &c.

(Signed) TENTERDEN.

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* Translations of these Statements will be published in a subsequent Gazette.

Inclosure 1 in No. 2.

Statement of Mr. Adams.

The Florida.

ON the 18th February, 1862, Mr. Adams addressed a note to Lord Russell, calling his attention to a letter he had received from Mr. Dudley, the Consul of the United States at Liverpool, touching a certain gun-boat fitting out at that port, which he had reason to believe was intended for the use of the American insurgents in their war against their Government.

On the 19th, Mr. Hammond, on behalf of Lord Russell, replied to this note, apprising Mr. Adams that he "would move the Lords Commissioners to cause immediate inquiries to be made respecting the vessel, and to take such steps in the matter as might be right and proper."

On the 22nd, the Commissioners of the Customs made a Report to the effect that there was a vessel of the sort described called the Oreto; that it had been built by Messrs. Miller and Sons for Messrs. Fawcett, Preston, and Co., engineers, and intended for the use of Messrs. Thomas, Brothers, of Palermo. Messrs. Miller and Sons expressed their belief that her destination was Palermo.

The fact is now clear that in this statement there was either equivocation or positive falsehood somewhere between the parties named. The testimony of Mr. Prioleau, of the firm of Fraser, Trenholm, and Co., of Liverpool, agents of the insurgent organization in America (than whom no man on earth was more sure to know), testimony, too, extorted from him with great reluctance on his oath in a British Court, establishes beyond dispute the fact that she was built for the order of J. D. Bullock, agent of the insurgents.

So with regard to the statement made by Mr. S. Price Edwards, Collector of Liverpool, in his letter of the 21st, transmitted by the Commissioners to Lord Russell, that *he had every reason to believe* that she was for the Italian Government, it is now made clear that he either told a falsehood or had been wilfully deceived by Mr. Thomas or others connected with the transaction.

Earl Russell directed Her Majesty's Minister at Turin to inquire as to the fact of this proceeding on the part of the Italian Government, and on the 1st of March he received an answer that Baron Ricasoli had no knowledge whatever of any such ship.

It is admitted that at the time now in question Her Majesty's Government had no reason to suspect any of these statements to be false, excepting the last. Subsequently on the 25th of March the final information came, completely establishing the fact in that case. But even the earlier information would have been likely, as it would seem, at least to shake confidence in the veracity of the party making the statement. And here I trust I may be permitted a general remark, possibly rather trite, as to the moral effect of falsehood upon the general credit of men. In the private relations established between persons, if any individual in a matter of importance be once detected in a deliberate falsehood, the consequence is an habitual distrust of him by his associates for the future in any transaction whatever. So I doubt not if my respected colleague who has done so much honour to the bench over which he has long presided should discover, in the examination of any important witness in a case, the fact that he had deliberately perjured himself, he would at once feel it his duty in charging the jury to set his evidence aside as generally undeserving of confidence.

Now upon a calm review of the voluminous transactions recorded in the numerous volumes which have been submitted to the judgment of this Tribunal, I do not hesitate to say that it contains a record of the most continuous, persistent, wilful, and flagrant falsehood and perjury carried on in the British Possessions by individuals associated in the American insurgent cause and their British affiliations, from the date of the building

of the Oreto at the beginning to that of the return of the Shenandoah to Liverpool at the close, that has yet been brought to light in history.

The earliest evidences of the truth of this affirmation are found thickly strewn among the transactions relating to this vessel. They appear most strikingly in the reports made by Mr. Dudley, the Consul of the United States at Liverpool, both to his own Government and to Mr. Adams. His duty was, with such imperfect means as he had in his possession, to exercise due diligence in exposing every trace of an attempt to carry on from that place hostile operations against his own country; and, I must add, most faithfully and energetically does he seem to me to have performed it. But just in the proportion to the efficacy of his exertions was the attention of those engaged in such enterprises directed to the means of baffling his aim. To this end it appears clear that, among the parties to which he was driven to resort for the purpose of gathering information, were not a few of indifferent character, and probably some employed by his opponents expressly to put him on a false scent. Having no power in his hands to extort unwilling testimony, he was compelled to rely entirely on his own judgment to pick out of the mixed mass before him that which might seem to him most in harmony with the probabilities of the case. That he should have been occasionally misled, and thus have made representations through Mr. Adams to Her Majesty's Government which were proved on investigation not to be accurate, ought to be neither surprising nor matter of blame to him. In point of fact he seems in the present case to have supplied pretty much all the correct information which Her Majesty's Government actually received, and which, if they had followed it up with corresponding diligence, would certainly have ended in the detention of the vessel. And her detention at that critical moment in these enterprises would probably have had the effect of putting a stop to them all, as well as to the necessity of any such Tribunal as the one now constituted here.

But this was not to be. The Government, which had in its hands all the means of extorting unwilling testimony, through efficient and trustworthy agents, does not seem to have been, at this moment at least, conscious of the existence of any obligation to originate investigations at all. It may reasonably be doubted, from the evidence before us, whether it believed in it, if it was. On the 1st of March, that is, twenty days before the escape of the Oreto, an inquiry made of the Government of Italy respecting one of the official statements received from Liverpool had been replied to in terms which, if not absolutely decisive as to its falsehood, certainly tended to throw the greatest possible doubt upon its truth. In such an important transaction as the building of a gun-boat, it would seem to be clear that a grave misstatement of its destination by responsible parties was not likely to be made carelessly, or without giving rise to some possible suspicion of an adequate motive to account for it. It does not appear from anything contained in the papers before us that the attention of the parties concerned was called to this circumstance at all. But it does appear very clear that both in the letters of Mr. Adams and Mr. Dudley under the eyes of Her Majesty's Government, there was presented an adequate motive to explain it, to wit, the wish to elude the vigilance of Her Majesty's Government and her officers in preventing the outfit from one of her ports of a vessel sadly wanted by the insurgent Americans to carry on war on the ocean against their Government. All the external circumstances indicating a state of peace everywhere else in the civilized world pointed to that quarter alone as the probable one, not simply to explain the destination of the vessel itself, but likewise the false representation which had been made for the purpose of concealing it. Her Majesty's Government does not seem to have entered into any such process of reasoning.

On the 23rd of February it has already been observed that Her Majesty's Commissioners of Customs had addressed a letter to the Treasury Board, making a report in regard to the condition and destination of the vessel called the Oreto. At the close of that letter are the following words:—

"We beg further to add that special directions have been given to the officers at Liverpool to *watch the movements of the vessel*, and that we will not fail to report forthwith any circumstances which may occur worthy of your Lordship's cognizance.

(Signed) "THO. F. FREMANTLE.
"GRENVILLE C. L. BERKELEY."

After a diligent search, I do not succeed in finding a trace of any report of these gentlemen earlier than the 4th April. Probably they did not regard the circumstances of her outfit and departure from the port as worthy of their Lordships' cognizance, unless the news were absolutely demanded.

Yet when Mr. Adams, on the 25th of March, addressed another remonstrance to Earl Russell, it seems to have had the effect of prompting his Lordship, on the 26th of March, to direct a note to be sent to the Secretary of the Treasury requesting the Commissioners of Customs "to give directions that the Oreto may be diligently watched."

This seems to have brought forth a letter from Mr. S. Price Edwards to the following effect. It is dated the 28th of March :—

"To the Commissioners of Customs,

"The screw-vessel Oreto was registered at this port on the 3rd instant, as per copy of registry annexed. She cleared on the following day, the 4th, for Palermo and Jamaica in ballast, as per inclosed victualling bill. She sailed on the 22nd instant, the day upon which the American Consul's letter is dated, having a crew of fifty-two men, all British, save some three or four, one of whom only was an American. She had nothing whatever on board save the stores enumerated. She had neither gunpowder nor even a signal gun, and no colours save Maryatt's Code of Signals and a British ensign. With reference to the passengers brought by the Annie Child, it is clear that they were not intended to form any portion of the crew of the Oreto, for they are still in Liverpool; and as respects the dipping of the ensign, this, as far as I can ascertain, was a compliment paid to one of the Cunard steamers and some other vessel which saluted the Annie Child on her arrival, the masters being parties known to one another."

What became of this letter it is difficult to explain. It seems clear that Lord Russell could have known nothing of it on the 7th of April, for he appears then to have directed Mr. Hammond to write to the Secretary of the Treasury "to cause his Lordship to be informed whether any report has been received from the Commissioners of Customs respecting the vessel the Oreto." This was the sixteenth day after that vessel had sailed—a fact which he appears at that time not to have officially known, though doubtless he had gathered it from the newspapers.

The report before alluded to was then produced dated the 4th, but not received until the 8th. It then first gave the information that the vessel had sailed on the 22nd, having been registered in the name of John Henry Thomas of Liverpool as sole owner, and cleared for Palermo and Jamaica in ballast.

The reports indicative of any observation whatever made in watching the movements of the Oreto appear not to have been collected until the latter part of August, and then only at the instance of Lord Russell for another purpose.

One more report was made by the Commissioners of Customs on the 1st of May. The official declaration of the Minister of State of the Italian Government to Earl Russell, denying all knowledge whatever of the Oreto, had been put into their hands. This declaration had been sent to Mr. Edwards, the Collector of the port, who had been the first person to declare his faith in the falsehood, and was now called to make further observations. He did not think fit to make any explanation of the reasons of his belief nor of its source, but contented himself with a reference to the registry of the vessel in the name of a native of Palermo, which he probably knew to have been a fraud, because he went on to admit the fact of its real destination, and to place his absence from action on the ground that "*even* in that case no act had been committed to justify his interference." It does not seem to have occurred to him to ask himself, if the dispatch of the steamer was a legitimate act, where was the need of the falsehood about the Italian Govermment or the further falsehood of the ownership of Mr. Thomas. Neither does it seem to have occurred to Her Majesty's Government to consider whether they had been cheated by their own officers.

A steamer completely fitted in all respects as a man-of-war had succeeded in escaping from Liverpool, and nothing was left to make her a power on the ocean but the receipt of arms and ammunition. How that proceeding was accomplished we shall see in the sequel. At present I desire to point out the extent to which the falsehood and fraud that had been resorted to in the course of the transaction, to cover it from observation, betray the consciousness of the parties concerned in it of the danger they were incurring of the indignation of Her Majesty's Government, in case they were detected in preparing such a hostile enterprise in a British port. At least they appear to have had no idea that such an attempt, if really understood, was not an act which would justify the interference of the Government. Hence the studied efforts to misrepresent the transaction from the beginning to the end. Hence the labour to substitute a false British owner, and a false destiny for the real one. Hence the studied representation of Palermo in Sicily as the term of the voyage even to the simple seamen decoyed by this means into an unwilling service. In a word, the affair reeks with malignant fraud from its inception to its close. The parties concerned appear to have

had no conception how easy it was to paralyse the action of Her Majesty's Government, or they would at once have relieved themselves of all the opprobrium that attended their proceedings. Doubtless they would not have indulged in mendacity for the mere love of it. They did not then conceive that the principle of action was not to initiate any active measures of thorough investigation into the truth of their words and the good faith of their acts, but to wait for the disclosure of the necessary evidence by the agents of the United States, who could not in the nature of things possess anything like their power of extorting the truth from unwilling lips.

I have now reached the moment when it seems necessary to apply myself to the question so much discussed in the arguments laid before us by the respective parties to the litigation. What is the diligence due from one nation to another in preventing the fitting-out of any vessel which it has reasonable ground to believe intended to cruize against the other? Although my own judgment is distinctly formed upon it, I feel that this is not the place in which I can, with the most propriety, explain my reasons in full. It is enough for my purpose here to say that, in my mind, the diligence manifested by all the requisite authorities of Great Britain in the case now before us does not appear to me to be that contemplated by the language of the Treaty, because it was not in any sense a spontaneous movement. So far as the papers before us are concerned, I cannot perceive that Her Majesty's Government acted in any case excepting after representations made by the Agent of the United States; and even when they did act, they confined themselves exclusively to the allegations therein made, presuming that if they could report upon them satisfactorily to themselves, their obligations were fully performed. It must be obvious that such a method of action furnishes every possible opportunity to the parties implicated, if they be at all adroit, to escape conviction, by resort to equivocation if not absolute falsehood. I can form no definition of the word "diligence" which does not embrace direct original action, persevered in not merely to verify acts of offence one by one, but to establish the general fact of intent as obtained from continuous observation of the operations going on; not merely to detect the motives for falsehood but to penetrate to the bottom of the truth. If there was a conspiracy of persons at home engaged in a treasonable effort to overthrow the Government, would not due diligence comprehend in its meaning a close and constant observation of each and every one of the persons reasonably suspected of being engaged in it, and an immediate action to prevent any movement in advance of its maturity? Especially, would not such energy be called for in time of war, when the danger to the State from external co-operation might become extreme? Most of all, would it not be natural to expect from every Power in amity to furnish all the means it could command to render abortive every combination suspected to be forming within its borders to render assistance to the manœuvres of the malcontents at home? All these are parts of a complete whole the maintenance of order at home and of peace abroad.

That there did exist in Great Britain a combination of persons, composed partly of Americans and partly of British subjects, having for its object and intent the fitting out of vessels to carry on war with the United States to the end of overturning the Government, is made perfectly plain by the evidence placed before us by the two parties. That Her Majesty's Government considered it no part of her duty to originate any proceedings tending to prevention, at the time of the outfit of the Oreto, or to pass at all beyond the range of investigation especially pointed out by the agents of the American Government to its attention, appears to me certain. At a later stage of the difficulties this policy appears to have been partially changed. The favourable effects of it are claimed as a merit in a portion of the papers before us, and I am ready at any and at all proper times to testify to my sense of its efficiency and value wherever it is shown. But after close examination I fail to see any traces of this policy in the present instance.

It is, then, my opinion at this stage of the transactions that Her Majesty's Government did fail to use due diligence to prevent the fitting out, within its jurisdiction, of the Oreto, which it had reasonable ground to believe intended to cruise against the United States.

I now proceed to the next step in the career of this vessel.

Nassau.

On the 22nd of March, 1862, the Oreto escaped from Liverpool with an intent to carry on war against the United States. Her Majesty's Government had not been tempted to penetrate the deception which had been deliberately practised upon it.

On the 28th of April she arrived at Nassau, and was reported by the Governor as a registered British vessel and carrying the British flag.

On the 30th Commander McKillop, of Her Majesty's ship Bulldog, addressed a letter to the Secretary of the Admiralty to this effect:—

"A very suspicious steamer, the Oreto, evidently intended for a gun-boat, is now in the upper anchorage under the British flag; but as there are no less than three cargoes of arms and ammunition united to run the blockade, some of these guns, &c., would turn her into a privateer in a few hours. Agents of the Confederate Government and officers of their navy are here on the spot, and *I have no doubt that the Oreto is intended for their service.*"

Such was the natural and just conclusion of a gallant British officer writing under no bias on one side or the other, but moved only by his sense of justice and fair dealing. Let us now proceed to consider the manner in which events contributed to verify his prediction to the letter.

On the 9th of May, Mr. Whiting, the Consul of the United States at Nassau, addressed a note to the Governor, calling his attention to the fact of the almost concurrent arrival from the port of Liverpool of the gun-boat Oreto, and of the tug Fanny Lewis, laden with gunpowder for the insurgent Americans.

This letter was referred by the Governor to the consideration of the Attorney-General, with an endorsement on it to the effect that he wished the agents of the Oreto to be informed that if they put arms on board that vessel he should then enforce the rules laid down in the Queen's Proclamation.

The Receiver-General enters his minute on Mr. Whiting's letter, to the effect that the Fanny Lewis has an assorted cargo not to be landed. He is confident that no part of the cargo had then been transferred.

But on the 26th of the month his tone changes, and he is convinced that the consignees of the Oreto intend shipping large quantities of arms and munitions as cargo.

Two days later Commander McKillop writes to the Governor as follows:—

"Several steamers having anchored at Cochrane's anchorage, I sent an officer, yesterday, to visit them and muster their crews, and ascertain what they were and how employed.

"The officer reports that one steamer, the Oreto, is apparently fitting and preparing for a vessel of war; under these circumstances, I would suggest that she should come into the harbour of Nassau, to prevent any misunderstanding as to her equipping in this port, contrary to the Foreign Enlistment Act, as a privateer or war vessel."

The Governor referred the question to the Attorney-General, who gave it as his deliberate opinion that an order for the removal of the Oreto to a place where she was within reach of observation should not be made, as such order could not be legally enforced unless it was distinctly shown that such a violation of law had taken place in respect to her as would justify her seizure.

Here also it is to be noted that the Attorney-General, following the example given in the mother-country, considers it not incumbent upon the Government to initiate any measures whatever of a preventive nature. In other words, not until a vessel should succeed in an undertaking of an illegal nature, which would necessarily imply her escape from the jurisdiction, would the proper time come for proceeding with proof that she ought to have been detained.

It was not until I became familiar with all these transactions that I fully comprehended the singular facility of adaptation of the law, as understood and practised in Great Britain, to the delay and defeat of the ends of justice.

It is due to the Governor to say that he was not altogether satisfied with the passive policy recommended by his Attorney-General; and he proceeded to recommend to Commander McKillop to take active measures of prevention in the event of his being convinced that the vessel was about to be armed within that jurisdiction.

On the 8th of June, Commander McKillop, in a letter to the Governor, announces that he will seize the vessel should she attempt to take ammunition on board.

On the very next day the consignees of the Oreto began to load the Oreto with arms and ammunition. But Commander McKillop did not execute his purpose. On that day he quitted his command.

But on the very next day his successor, Commander Hickley, of Her Majesty's ship Greyhound, visited the Oreto, and found the consignees just as busy discharging the arms and ammunition taken in the day before. In point of fact, they had received a private notice from the Governor and the Commander that it would not do; but it

was not a menacing intimation as to absolute action. They were cunning enough to take the hint, and change the line of their operations.

They now declared their intention to clear the Oreto in ballast for Havana. This assurance quieted the apprehensions of the British Commander. But finding that the vessel still remained, on the 15th of June he again visited her, in company with eight of his officers. The crew had refused to get the anchor up until they could be made certain as to where the ship was going. The Oreto was a suspicious vessel. After close observation, Captain Hickley and his eight officers all signed a report addressed to the Governor, to the effect that she is in every respect fitted as a man-of-war. She had left Liverpool fitted in all respects as they saw her. No addition or alteration had been made at Nassau.

This paper was submitted to the Attorney-General for his opinion, and he gave it to the effect that nothing contained in it would justify the detention of the vessel.

But Commander Hickley saw the thing in a different light from the Attorney, and on the 15th addressed a new letter to the Governor, reporting the result of his conversations with the portion of the crew that had come to see him. He was now so convinced of the intent of the parties controlling the Oreto, that he was strongly inclined to take the responsibility of her seizure and removal to another station at which was placed the Commodore or Commander-in-chief. And he actually put one of his officers temporarily in charge.

On the 16th of June the Governor wrote, in reply, deprecating all action of the kind contemplated, and throwing the responsibility wholly upon him, if he should take it.

On the same day the Attorney-General gives an opinion that no case has yet been made out for seizure. He does not appear to have thought it his duty to initiate any measures to ascertain what was the evidence upon which Commander Hickley was impelled to his convictions. It was the passive policy, the example of which had been set at home. The evidence must come to the Government. It was not for the Government to go to the evidence. Of course it naturally happened that this worked entirely for the benefit of the malefactors, and to the injury of the party that ought to have been protected. On the same day Commander Hickley wrote a reply maintaining his conviction, but declining to assume the responsibility of acting in the face of the Attorney-General's opinion. He therefore withdrew the officer whom he had placed in charge of the ship.

But the Governor is not satisfied with the action of either party, and is afraid to commit himself entirely against the clear conviction of the Commander, so he decides in favour of a seizure of the vessel with a view to a submission of the question to the local Court of Vice-Admiralty at Nassau.

This was on the 17th of June. The information of the act of Captain Hickley was transmitted to the Government at London, and received the approbation of Earl Russell. Indeed, there is a degree of heartiness in the terms he uses to express it, and in his anxiety to see the officer properly secured from any hazard to himself by reason of his course, that clearly shows the earnestness of his satisfaction. I hope I may not be exceeding my just limits if I seize this occasion to do a simple act of justice to that eminent Statesman. Much as I may see cause to differ with him in his limited construction of his own duty, or in the views which appear in these papers to have been taken by him of the policy proper to be pursued by Her Majesty's Government, I am far from drawing any inferences from them to the effect that he was actuated in any way by motives of ill-will to the United States, or, indeed, by unworthy motives of any kind. If I were permitted to judge from a calm comparison of the relative weight of his various opinions with his action in different contingencies, I should be led rather to infer a balance of goodwill than of hostility to the United States.

The Law Officers of the Crown were likewise consulted, and they gave an opinion favourable to the action of Governor Bayley, but strongly urging that evidence of what occurred at Liverpool of building and fitting out should be at once sent forward in order to complete the proof of her hostile destination to the United States.

And here I trust I may be permitted to express my sense of gratification on reading the Reports and observing the action of the two gallant naval officers. Their clear good sense and rapid judgment had led them straight forward to the penetration of the motives of the authors of the wretched equivocations and falsehoods by which they were surrounded, as well as to the adoption of the most effective measures to bring their machinations to nought. Neither does this course appear to have been in any way prompted by a mere spirit of good will to the United States, which were to be protected by their action. It seems to have sprung from that natural impulse of a conscience

void of offence, which perceived an act of injustice and fraud to be in contemplation, and determined at once to resort to the best measures to prevent it.

Had such an energetic spirit animated the whole action of Her Majesty's Government at all times and in all conjunctures, there would have been no question about the exercise of due diligence in this narrative.

The opinion of the Law Officers in London was received by Earl Russell on the 12th of August. Ten days before that date he had addressed a letter to Mr. Stuart, the British Secretary at Washington, requesting him, in view of this proceeding, to dissuade the American Government from proceeding in the measure then contemplated of issuing letters of marque. He little thought of what had been laid up in store for him by the learned Judge of the Court of Nassau.

On that very same day he had pronounced his judgment that there was no sufficient evidence to prove any act committed at Nassau to justify the seizure. But considering the very suspicious nature of the circumstances, he should release his own Government from the payment of costs.

It is the general rule of courtesy between nations to recognize the action of their respective Courts without seeking to analyse the principles upon which the decisions are made. And it is a wise rule, as conducive to the general maintenance of law and order in the performance of their reciprocal duties of protection to individual interests. But I am not altogether sure whether this rule should be held to extend so far as to bind the members of this Tribunal to absolute silence in this and similar instances that come before us. Whilst most anxious upon all occasions to preserve the decorum appropriate to a station of such eminence, I am at the same time oppressed by the conviction that in no portion of the history of this proceediug is the responsibility of Her Majesty's Government for the subsequent career of this vessel more deeply implicated than by the action of this Vice-Admiralty Judge, in letting this vessel go upon the reasoning which he presents in his justification. It would be easy for me, if it were necessary, to go into an analysis of the various points in which he appears to have ruled erroneously both in regard to the law and to the evidence. It is made certain by the papers that, in the former, he was not sustained by the Law Officers of the Crown at home. And as to the latter, I cannot but assume the presence of some strong external bias which should have induced him to give credit to certain persons on the mere score of personal character where testimony proves them so clearly, in my eyes, to have been arrant cheats, and to discredit the seamen, chiefly on account of their low condition, who are as clearly manifested to have told the substantial truth. My mode of explanation of this flagrant perversion of the law is, that the Judge partook so largely of the general sympathy admitted by the Governor to have held sway over the entire population of the island, as to render him absolutely incapable, in this case, of a perception of justice. It is not probably without a strong conviction of this truth that the plain sense and clear appreciation of facts prompted Commander Hickley to advise the removal of the vessel entirely out of this jurisdiction. For the honour of Great Britain, which must be held responsible through its agents for this flagrant wrong done to the injured party, it had been perhaps well if the desire of the gallant officer had been complied with.

Many strictures have likewise been made upon the action of the Attorney-General, Mr. Anderson, throughout these proceedings, of so harsh a nature as to have called from him a formal paper in his justification which has been placed among the documents before us.

After a careful examination of the question, I am led to the belief that it is possible to arrive at a clear comprehension of the motives which actuated him without the necessity of imputing any purpose deeply affecting his integrity.

It appears that if, on the one hand, he was slow in his disposition to reach any effective action to defeat the enterprize of the Oreto in 1862, on the other he appears in proportion quite as swift in the process of seizing the vessel known as the Alexandra, and subsequently the Mary, and pressing for her condemnation, when she made her appearance at Nassau in the winter of 1864, under much less dubious circumstances.

The reason is plain. Mr. Anderson virtually admits in his statement that in the earlier stages of the struggle in America he considered the fate of the United States as settled and he did not regret it. But in the last months of the war not a shadow of doubt could have remained in his mind as to its permanenee. He then cheerfully accepted a retainer on their side. The transition from one state of feeling to the other can be no cause of surprise to any one observant of the relations of the small population of Nassau to the United States. Neither is it difficult to perceive among the documents the traces of a similar revolution of sentiment and action going on simultaneously in other portions of Her Majesty's dominions far removed from that relatively insignificant island.

Be this as it may, the effect of the decision of the Admiralty Court in 1862 was not only to liberate the ship, but to put an end to all serious attempts to prevent the full accomplishment of the nefarious purpose of her owners. On or about the 7th of August the Oreto sailed from Nassau. On the 9th of the same month the schooner Prince Alfred also left the place. They met at a spot agreed upon about sixty miles distant, called Green Cay; and there the Oreto received her armament and ammunition, as well as her true officers and crew. The Commander was relieved from the terror of a new arrest which he had felt in the event of his continuance at Nassau for another day. There was no cause for this apprehension. His victory was complete. On the morning of the 11th August in a place called Blossom Channel, believed to be within the British jurisdiction, the logbook found in his vessel shows the transaction to have been completed. The authority of Her Majesty's Government had been successfully defied, and the decision of her Admiralty Court proved a mockery and a show.

Hence it appears to me that Great Britain had clearly failed in enforcing the second rule prescribed in the Treaty of Washington, as well as the first; and if these two rules were not enforced as they should have been, a failure in regard to the third appears to result as a matter of course.

The next step in the career of the Florida, material to the present discussion, is the fact of her entry into Mobile, a port held by the insurgents, although at the time blockaded by the vessels of the United States. Here she remained for more than four months. On the 15th of January, 1863, she again succeeded in running the blockade outward, and on the 25th her captain had the cool insolence to go at once to the very place of the Island of Nassau from which he had just escaped under terrors which belong only to a malefactor. It is proper to add that in the interval he had shipped an additional motley force of fifty-four men at Mobile.

The question here naturally arises whether by this process the vessel had so far changed her previous character as to be divested of any trace of her British origin and fraudulent equipment, and entitled to claim a new departure as a legitimate offspring of a recognized belligerent power. This question, appertaining exclusively to the case of this vessel among all those submitted to our consideration, and touching the release of Her Britannic Majesty's Government from any further responsibility for the taint of her origin, appears to me one of the most interesting and difficult of all that we are called to decide. But in order to complete the review of the career of the vessel, so far as it relates to the action of Great Britain upon the occasion of her visits at any ports within that jurisdiction, I deem it expedient to postpone the observations I propose to make upon it until the end.

Whatever may be the doubts elsewhere expressed about this point, none whatever were admitted at Nassau, the very spot where the flagrant fraud had been most successfully perpetrated and Her Majesty's dignity insulted and defied. She was immediately recognized as a legitimate belligerent, the only objection made to her presence being a violation of a minor regulation of the port, which required a previous application for permission before coming to anchor. For this minor offence the captain could afford to apologize, when the vastly greater one had been so readily condoned. The object he now had in view was the procuring a good supply of coals for the prosecution of his cruize. Permission seems to have been given without stint. Some question has been raised about the precise quantity; but if there was no limit prescribed by the authorities, it may reasonably be inferred, from the general sympathy strongly manifested by the population, that all would be supplied the captain would be ready to take. So, likewise, with provisions. A person on board of the Florida at the time seems to have recorded his impression that enough had been supplied to last several months. This is doubtless exaggerated. So with the testimony of two persons, taken several years afterwards, of their recollection of the facts, which would naturally be subject to serious reduction. Yet, after making every possible allowance for these circumstances, it appears reasonable to me to conclude that Captain Maffit succeeded in getting all that he desired to put him in a condition to commence, and continue for some time, a predatory cruize. It is also alleged that the captain shipped here eleven men, which is not unlikely to be true also, if he needed them.

Captain Maffit, thus completely fitted out from Nassau as a basis, proceeded on his cruize, which lasted for about a month, and in which he alleges that he experienced very rough weather. This is the reason assigned for his visit to Barbadoes, where he applied for more coal and some lumber. He suppressed the fact of his late supply, and reported himself as last from Mobile. He succeeded in obtaining 90 tons, and thus prosecuted his predatory voyage on his renewed stock.

Much damage as these permissions unquestionably entailed upon the United

States' commerce, it is proper to add that they had not been given so much from any wilful disposition on the part of the officers of Her Majesty's Government, but rather from their indifference to all measures of early prevention. So soon as information of these events had been received at the Colonial Office in London this liberality was checked, and orders were issued to be more cautious in the future.

After a visit of four days to Pernambuco, the next British port entered by Captain Maffit was Bermuda on the 15th of July. His application for Government coal was here, for the first time, refused. He succeeded, however, in obtaining plenty from other sources, and in transgressing the limit prescribed for his stay for repairs without censure, which enabled him to cross the ocean and reach Brest, in France, on the 23rd of August.

It should be noted that this long cruise, from the 25th of January to the 23rd of August, of nearly seven months, was made with supplies of coal received exclusively from British sources.

It seems to be unnecessary to enter into further particulars of her career after she left Brest. She seems to have touched at some British ports in the West Indies and obtained assistance, and she finally put into Bahia, which proved to be the termination of her record, in October. The length of her term on the ocean had been about eighteen months—long enough to perpetrate much too large an amount of mischief.

It now remains to me only to recur to the question, already proposed in the course of this opinion, regarding any change of original character that may be considered to have taken place in this vessel by the fact of her having succeeded in reaching a port of the belligerent Power to which she claimed to belong.

I have endeavoured to give to this point the most careful and diligent study of which I am capable. The result is, that I cannot arrive at any conclusion satisfactory to myself which even implies a necessity to assent to the proposition that *success sanctifies fraud.* All law recognized by the conscience of civilized nations has for its only solid basis a conviction that it is based upon clear principles of right. In some languages the word used to express these ideas is identical. At the same time I am not unaware that in the progress of international relations there may happen from time to time occasions when a necessity will arise to recognize a simple fact without reference to its nature. But this must happen under circumstances which imply neither participation nor approval. It ought not to be permitted to happen when these circumstances are clearly within control, and the motive to act should be imperative as upholding the majesty of law.

In the case before us it seems to me conclusively established by evidence that, from the moment of inception to that of complete execution, the building, equipping, and despatching of the vessel were equally carried on by a resort to every species of falsehood and fraud in order to baffle and defeat the legitimate purpose of Her Majesty's Government to uphold the sanctity of her laws and make good her obligations to a foreign nation with which she was at peace. Down to the moment of arrival at Mobile I fail to perceive any good reason for supposing that the character the vessel took at the outset had not substantially adhered to it to the end.

It has always been to me a cause of profound regret that Her Majesty's Government had not seen fit to mark her sense of the indignities heaped upon her by the flagrant violation of her laws in these cases, at least by excluding the vessels from her ports. Thus she would have rescued her own honour and escaped the evil consequences which have ever since attended her opposite decision. Such a course had not been without its advocates among jurists of eminence in the Kingdom, at least one of whom had recorded his opinion. A significant example may be found in the papers before us. Such a course could not have failed to maintain itself in the end by the simple force of its innate harmony with justice and with right.

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 dishonour 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 sate 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 fulfil 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.

The Alabama.

On the 24th of June, 1862, Mr. Adams addressed a note to Earl Russell, reminding him of the representation he had made some time before touching the equipment of the Oreto, and alluding to the verification of his apprehension of its true destination.

In point of fact, Lord Russell had had in his hands for a fortnight a copy of a letter of Commander McKillop to the Secretary to the Admiralty, which has already been quoted in the Memoir on the Florida, as clearly indicating the character of that vessel and its destination.

Her Majesty's Government had then had no reason to doubt as to the nature of the vigilance which had been promised on the part of her officers at Liverpool, or of the manner in which it had been deceived.

Mr. Adams then proceeded to call his Lordship's attention to another and more remarkable case of a vessel in process of construction at Liverpool, in the yard of one of the most noted building firms of that place, intended for the same purpose as designated in the case of the Oreto, and controlled virtually by the same parties.

Mr. Adams at the same time transmitted to his Lordship a letter from Mr. Dudley, the Consul of the United States at Liverpool, addressed to himself, giving all the information touching the matter he had been able to collect.

On the next day Mr. Hammond, on behalf of his Lordship, addressed one letter to the Secretary of the Treasury, requesting immediate inquiries to be made respecting this vessel, &c., in the customary form.

At the same time he addressed another to the Law Officers of the Crown, transmitting the note of Mr. Adams and the letter of Mr. Dudley for their consideration, and asking for such observations as they might have to make on the subject.

It is presumed that this last measure was a precaution additional to anything that had been done in the case of the Oreto.

Five days later a report was made by the Law Officers, in reply to this application, in substance to this effect:—

"If the representation made by Mr. Adams is in accordance with the facts, the building and equipment of the steamer is a manifest violation of the Foreign Enlistment Act, and steps ought to be taken to put that Act in force, and to *prevent the vessel from going to sea.*"

This was a great step in advance of anything that had taken place in the former case. It fully recognized the duty of prevention, and strongly recommended that proper steps be taken by the authorities at Liverpool to ascertain the truth, and if sufficient evidence could be obtained to justify proceedings under the Act, to take such proceedings as soon as possible.

Nothing could be more satisfactory than this direction. If it had been carried out in its spirit by the parties who had it in charge, there is little reason to doubt that the policy pointed out would have been effected.

But it appears more than doubtful whether this injunction produced the smallest effect upon the parties concerned. For it could hardly have reached its destination before the time at which the report of the Commissioners of the Customs was made up. That report was clearly made in answer to the earlier letter of Mr. Hammond of the 25th; for the reports of Mr. S. Price Edwards, the Collector, and of E. Morgan,

Surveyor at Liverpool, dated the 28th instant, inclosed therein, precede by two days the opinion of the Law Officers. No allusion appears to be made to it in this reply. The substance of it is the admission of the fact that the vessel is intended for a ship of war. But no evidence has been produced of its destination sufficient to justify proceedings, and unless the Consul, Mr. Dudley, should be able to submit such evidence to the Collector of the port, any attempt to seize the vessel would end only in entailing upon the parties concerned very serious consequences.

The report of the Commissioners terminates in the customary form, to wit:—

"We beg to add that the officers at Liverpool will keep a strict watch on the vessel, and that any further information that may be obtained concerning her will be forthwith reported."

On a first examination this paragraph would seem by its terms to imply a promise in the nature of a pledge of constant vigilance; but upon comparing the phrases with the almost identical ones used in the preceding case of the Oreto, and observing the results which happened in both cases, it must be inferred that it was regarded by the parties only as one of the established forms of ending a despatch.

A copy of this report was, on the 4th of July, transmitted to Mr. Adams, with a request that the United States' Consul at Liverpool, Mr. Dudley, should be instructed to submit to the Collector of the Customs such evidence as he might possess tending to show that his suspicions as to the destination of the vessel were well founded.

The name of this Collector was S. Price Edwards, and I have already had occasion to point out in my examination of the destination of the Oreto the very peculiar situation in which he was placed by the representations on that subject made by him at that time to Her Majesty's Government.

Mr. Dudley, in accordance with Mr. Adams's instructions, accordingly addressed to Mr. Edwards on the 9th July, a letter furnishing a long array of details as to the nature and source of the information he had obtained, and providing, as it would appear, abundant means of prosecuting further inquiries if there were any inclination so to do.

To this letter Mr. S. Price Edwards replied by promising that he would submit it to the consideration of the Board of Customs. He did not fail, however, to add an expression of opinion that the statements made by him must, first of all, be substantiated by evidence furnished by himself.

But this Mr. S. Price Edwards happened to have received from the same Consul, Mr. Dudley, nearly three weeks before, a letter giving many details strongly pointing to the destination of this vessel, which, so far as appears from these papers, must have been entirely suppressed. It has been published in one of the latest volumes of the papers appended to the American Case. I can only account for this omission upon the supposition that as Mr. Dudley's letter addressed to Mr. Adams on the following day had found its way to him soon after, he inferred that a notice of the latter would do for both. The fact really is, however, that the evidence is of a different kind, and, though not decisive in itself, was calculated to open a way to further investigation if such were desired.

The letter of the 9th July was referred to the Solicitor of the Customs, Mr. Hamel, who replied in the customary manner—"insufficient evidence."

On the 15th of July the Commissioners of Customs wrote to the Collector of Liverpool to the same effect, and on the 17th copies of papers were sent to the Treasury for the information of the Lords Commissioners.

Thus it appears that three weeks had passed since the injunction laid upon the authorities of the Customs at Liverpool to ascertain the truth, and not a syllable had been returned to them excepting of a negative character. No sufficient evidence of intention offered to them, and no disposition to search for any; that was the sum of the whole matter.

Tired of waiting for the action of Her Majesty's Government, Mr. Adams, on the 17th July, wrote instructions to Mr. Dudley to employ a solicitor, and get up affidavits to lay before the Collector. That officer had had abundant reason to know, in the case of the Oreto, how difficult it was, in a city swarming with sympathisers in the success of these adventures, for him to find persons who, however clearly they might know what was going on, were not at all disposed to subject themselves to the odium attending a public declaration of the truth. He did, however, by the 21st succeed in procuring six persons ready to take their depositions before the Collector. The process was completed, and the Collector transmitted them on the 22nd to the Commissioners of Customs, who handed them to the Solicitor, who promptly returned his customary reply, "no sufficient evidence." But the United States' authority might try to stop the vessel at their own risk.

But there were two influences now converging from different quarters which were destined to threaten the sluggish officers of the Customs with responsibilities much greater than their Solicitor had laboured to throw upon the United States.

The one proceeded from the United States' Agents, who had assumed the entire labour of procuring eight depositions to prove what should have been established by the energy of Her Majesty's Government itself, the intent and destination of the gun-boat. But they seem scarcely likely to have had any chance of weight if supported exclusively by the authority of their judgment alone. The first symptom now appeared of the possibility of a doubt of the policy which had been marked out by the Customs Solicitors. The papers had been submitted to the consideration of an eminent gentleman of the law, a Queen's Counsellor, Mr. R. P. Collier, who, in reply, gave the following as his deliberate opinion:—

"I have perused the above affidavits, and I am of opinion that the Collector of Customs would be justified in detaining the vessel. Indeed, I should think it his duty to detain her, and that if after the application which has been made to him, supported by the evidence which has been laid before me, he allows the vessel to leave Liverpool, he will incur a heavy responsibility, of which the Board of Customs, under whose directions he appears to be acting, must take their share."

The last sentence was the most significant of all. It was this:—

"It well deserves consideration whether, if the vessel be allowed to escape, the Federal Government would not have serious grounds of remonstrance."

The idea that, instead of a responsibility for stopping the vessel thrown upon the United States, there was to be a responsibility to be imposed upon the Customs authorities and their superiors in office, appears never to have entered into their conception. It was like a thunderbolt in a clear sky.

The Assistant Solicitor of Customs immediately sought to put himself under the protection of the Law Officers of the Crown. Meanwhile the same papers had been transmitted by Mr. Adams to Lord Russell, and by him likewise referred to the Law Officers of the Crown.

These papers reached their destination at different dates: those sent from the Customs on the 23rd July, in the evening, whilst those from Mr. Adams got to them three days later, though his note appears to have been dated on the 24th. It is obvious that this difference could have no effect in delaying their decision. But one additional deposition was added, which could scarcely have done more than confirm the result.

Five whole days passed before a decision was returned. Meanwhile the vessel was rapidly getting ready to depart. On the 28th, Mr. Dudley's Solicitor sent a communication to the Board of Customs, to the effect that they had every reason to believe the vessel would go on the 29th. This letter did not reach them until the 29th. The vessel sailed on the 29th. That intelligence likewise was obtained from the same source. Meanwhile what becomes of the profession made on the 1st of July by the Commissioners of Customs, that "a strict watch should be kept on the vessel, and that any further information that might be obtained concerning her would be *forthwith* reported."

To be sure, on the 1st of August, Mr. S. Price Edwards addresses a letter to the Commissioners of Customs, in which appears the following significant line, "The Board will see that the vessel has left the port." How they could have seen through the spectacles presented by that officer remains to be explained. The Surveyor, however, is more communicative. On the day before he gravely states that he had followed the Collector's directions to keep a strict watch on the vessel. He is confident she had no ammunition on board. He had visited the tug Hercules, where he found a considerable portion of the crew, some of whom were on their way in that vessel to join the gun-boat. Mr. Dudley had given the same information to the Collector. Even then the vessel could have been traced and stopped by an energetic interposition of Government authority. The Commissioners of Customs preferred to send harmless telegraphic orders to Liverpool and Cork, to Beaumaris and Holyhead, which looked like dispatch, but could by no reasonable probability have been of any avail. And the Collector could promise that "*should opportunity offer*, the vessel should be seized in accordance with the directions given." It is presumed this must have meant if the vessel should voluntarily present itself, and not otherwise. On a calm examination of the evidence presented to us respecting the measures taken by the authorities charged with the duty of prevention, it really looks as if they had chosen to look any way for it rather than the right way.

Upon a careful comparison of the language and the action of Mr. Edwards, the Collector, as it has been heretofore explained in my observations upon the case of the Florida, with the course taken by him in this case, it is very difficult in my mind to resist the suspicion that he was more or less in direct sympathy with the designs of the insurgents, and not unwilling to accord to them all the indirect aid which could be supplied by a purely passive policy on his part. Very surely, if he had wished actively to promote their ends, he could scarcely have hit upon more effective means than those to which he resorted.

It is alleged that the escape of this vessel was effected earlier than originally contemplated, by reason of the reception, by the managers of intelligence from London of the intent of the Government to detain her. This statement appears in the deposition of one of the persons who served as an officer on board from the start and during the whole of her first cruize. Certainly a delay of five whole days in announcing a decision might furnish ample opportunity for active sympathisers, of whom there was notoriously an abundance in that capital, to watch and report every symptom of change that might be gathered from sources of authority. Even the fact of the long delay itself might be construed as ominous. Of the causes of that delay no absolute knowledge has ever yet been completely obtained. Neither is it deemed expedient here to enter into any examination of it. It is sufficient to the present purpose to say that the omission to act in season was due to causes wholly within the province of Her Majesty's Government to control, and that the failure is one which must entail the responsibility for the great injuries that ensued, not upon the innocent parties whom it was the admitted duty of that Government to have protected, but upon those through whom the injuries became possible.

One portion of this transaction having been, by the means already indicated, with difficulty accomplished, the other portion remaining to complete it met with no resistance whatever. The British steamer Bahama, laden with the armament prepared for the vessel by Fawcett, Preston, and Co., and having for passengers the insurgent Americans and others destined to command the cruizer, cleared on the 13th of August on the pretence of going to Nassau. The English barque Agrippina almost simultaneously left London, ostensibly for Demerara, laden with coals and munitions of war.

Somewhere about the third week in August the three steamers met at Angra Bay in the Azores, and under the sanction of the British flag this great fraud reached the point of its full accomplishment. The hospitality so freely extended to strangers of all nations in that kingdom, at once so enlightened and so energetic, had been basely abused, almost with an intent, not merely to gain an undue advantage on the ocean, but to sow the seeds of dissension between it and a kindred nation with which it was under the most solemn obligations to keep the peace.

Thus it was that the vessel which then first received the name of the Alabama commenced her reckless career of destruction on the ocean. Everything on board of her was of British origin, excepting a few of the directing spirits bent on making use of the means thus placed in their hands to do an injury to their fellow-countrymen in America which they could have compassed in no other possible manner.

I pass over the minor details of the mode in which supplies of coal were subsequently obtained exclusively from British sources as matters of relatively little consequence, and come to what appears to me the next essential point in the narrative.

On the 11th of January, Captain Semmes, whilst on his cruise off the coast of the United States, met the United States' gun-boat Hatteras, and, after a short engagement, sent her to the bottom. He was compelled to take the prisoners on board, and having received six large shot-holes at the water line, to navigate the ocean not without peril, in quest of a port of some sovereign Power or other in which he could not only land his excess of numbers but likewise obtain the necessary means wherewith to renew his capacity of cruising at all. The captain seems to have reflected upon the matter carefully, and to have made up his mind that, although at a very considerable distance from his actual position, his best chance of a favourable reception would be in a port of the kingdom whose laws had been so dexterously defied. He accordingly made his way, not without great difficulty, to Port Royal in Her Majesty's Island of Jamaica. In his own statement of this transaction will be most clearly discovered the state of his feelings on approaching this crucial experiment :—

" This was the first English port I had entered since the Alabama had been commissioned, and no question whatever as to the antecedents of my ship was raised. I had, in fact, brought in pretty substantial credentials that I was a ship-of-war, 130 of the officers and men of one of the enemy's sunken ships. Great Britain had the good sense not to listen to the frantic appeals either of Mr. Seward or Minister Adams, both of whom claimed, as the reader has seen, that it was her duty to stultify herself

and ignore the commission of my ship. Nor did Commodore Dunlop say anything to me of my destruction of British property, &c."

From this passage it appears very clearly that the possibility of such an obstacle had not been entirely out of the line of his apprehension. If the objection had been made, it is altogether probable that the career of this vessel would have been terminated in a manner very different from that which subsequently happened. But it was not raised. Governor Eyre, who was then the ruling authority, appears to have acted with some hesitation, and to have been mainly determined by the obvious necessity of landing the great number of prisoners as a pure act of humanity. The order sanctioning the repairs does not appear to have been expressed by him in terms, and he immediately addressed a letter to the Duke of Newcastle, the Colonial Secretary at home, submitting the facts, and soliciting his approbation.

On the 14th of February, by a letter from Mr. Hammond, on behalf of Earl Russell, that approbation appears to have been granted, though not without reluctance, for it is followed by an injunction to get rid of the vessel as soon as possible.

Nevertheless the evil was done. And by this proceeding Her Majesty's Government appear, at least to my eyes, practically to have given their formal assent to the principle in international law that SUCCESS SANCTIFIES A FRAUD. In the Memoir which I have heretofore prepared on the subject of the Florida, I have gone so much into the examination of that question that there is no necessity for my dwelling upon it further. I have always regretted that on this occasion Her Majesty's Government failed to use the occasion for establishing a law on the ocean most consistent with the principles of equity which should prevail upon men, and not unlikely, in the distant future, to enure to the benefit of her own marine quite as largely as to that of any other nation.

The next step in the order of events essential to the purposes of the narrative was the arrival of Captain Semmes at Cape Town. But I do not, at this time, propose to pursue the matter farther, partly because the consideration of it is likely to be renewed in examining the case of the Tuscaloosa, and partly because the facts material to a judgment in the case seem to me to have been already collected.

It thus appears, that this vessel was built and fitted up with the intent to carry on war with the United States, in the kingdom of Great Britain, in violation of her laws, and that, notwithstanding the evidence of the fact was established so far in the opinion of Her Majesty's Law Officers as to justify detention, by reason of the absence of due vigilance, not without suspicion of connivance on the part of some of Her Majesty's officers, and of an extraordinary delay in issuing the necessary orders at the most critical moment, the vessel was suffered to escape out of the jurisdiction. That her armament, her supplies and her crew were all provided and transported from Her Majesty's kingdom without the smallest effort to investigate their nature or their purposes. That though orders were freely given for the detention of the vessel at any of the colonial ports at which she might arrive, the first time that she did actually appear she was received and recognized with all the honours due to the marine of a recognized belligerent Power, without the smallest manifestation of dissatisfaction with the gross violation of laws that had entailed upon Her Majesty's Government a grave responsibility to a Power with which she was at peace.

Thus it appears to me beyond a doubt that in the case of the Alabama, Great Britain, by her omission to exercise due diligence in preventing the fitting out of this vessel, which it had reason to believe intended to cruize against a Power with which it is at peace, has failed to fulfil the duties set forth in the first Article prescribed to the Arbitrators as their guide under the terms of the Treaty of Washington.

The Tuscaloosa.

In the series of papers which it has been my duty to prepare upon the vessels successively brought to the attention of the Tribunal, I have proceeded so far as to deduce from the evidence submitted one general rule, which I believe to be sound. This is, that the assumption of a belligerency on the ocean founded exclusively upon violence and fraud can at no later period have any issue different in its nature from that of its origin.

This rule must receive another illustration from the case of the Tuscaloosa now

before us. This was a merchant-ship belonging to the United States, originally having the name of the Conrad, which was captured by the Alabama on the 21st of June, 1863, on the coast of Brazil. Of the case of that vessel, of its fraudulent origin, and of the unfortunate recognition afterwards made of its character as a legitimate vessel on the ocean by the Government of the nation whose laws it had so impudently set at defiance, I have already submitted my judgment in a preceding paper. That Government was now destined to go through another crucial experiment, the necessary and legitimate consequence of its primal error.

It should here be observed that, in the order of events naturally following what has ever seemed tome the great original mistake of the recognition of this false maritime belligerent, sprang up a necessity of immediately considering the question of the recognition of any prizes which it might take and send in under the established law of nations to any of the ports of Her Majesty's Kingdom, there to await a regular condemnation in the Courts at home. Unless some action were at once taken to prevent it, the practical result would clearly be that the whole commerce of the United States would be in danger of sacrifice to one belligerent in British ports without a single chance of corresponding advantage to the other. For the fact that the insurgents had no commerce of their own whatever had become quite notorious.

In order to guard against this danger Her Majesty's Government promptly resorted to a precautionary measure entirely within its power to take under the law of nations, the prohibition of the use of its ports to either party for the admission of prizes. The same policy having been adopted by all other naval Powers, it became evident to the false belligerent that nothing positive was to be gained to itself from its assumption of a place on the ocean. The only motive left for trying to keep it was the possibility of injuring its opponent. Hence, a resort to the barbarous practice of destroying the property it could not convert into plunder.

But this practice seems at times to have become unpleasant and wearisome to its perpetrators. Hence, it was natural that their attention should be drawn to some manner of evading it. The Commander of the Alabama having made it the occupation of some of his leisure hours to study the best known treatises on the law of nations, seems to have hit upon a passage which he considered exactly to fit his purpose. This was an extract from Wheaton's well-known work, to the effect that a legitimate authority might convert a captured merchant-vessel, without condemnation, into a ship of war, to such an extent at least as to secure the recognition of it by neutral nations.

It was probably from this source that Captain Semmes contrived his scheme of turning the United States' merchantman Conrad, laden with a cargo of wool from a distant market, into the Confederate States' ship Tuscaloosa, tender to the Alabama, having two 12-pound rifle guns, and ten men; and bringing her into Her Majesty's port of Simon's Bay, Cape of Good Hope, to test the disposition of the local authorities to recognize the proceeding.

As usually happened in the course of these transactions, the naval officer in command in the harbour at once penetrated the fraud. Rear-Admiral Sir B. Walker, on the 8th August, addressed a letter to Sir P. Wodehouse, in which he used this language:—

"The admission of this vessel into port will, I fear, open the door for numbers of vessels captured under similar circumstances, being denominated tenders, with a view to avoid the prohibition contained in the Queen's instructions; and I would observe, that the vessel Sea Bride captured by the Alabama off Table Bay a few days since, or all other prizes, might be in like manner styled tenders, making the prohibition entirely null and void.

"I apprehend, that to bring a captured vessel under the denomination of a vessel of war, she must be fitted for warlike purposes, and not merely have a few men and two small guns put on board her (in fact nothing but a prize crew), in order to disguise her real character as a prize.

"Now, this vessel has her original cargo of wool still on board, which cannot be required for warlike purposes; and her armament, and the number of her crew, are quite insufficient for any services other than those of slight defence."

But this sound judgment of the gallant naval officer met with little response from the higher authorities of the Cape.

As usual, the Governor had consulted his Attorney-General, and, as usual, the Attorney-General gave an opinion, giving five reasons why what was a captured merchantman to the eye of everybody else should be regarded by the Government as a legitimate ship of war of a recognized belligerent. He also relied on the extract from the work of Wheaton, having reference to a very different state of things. This was on the 7th August, 1863.

The Governor sent these papers in the regular channel to the authorities at home, and in due course of time they found their way to Earl Russell. He appears to have been so little satisfied with the singular result that had been reached at Cape Town as to desire a reconsideration of the question by the Law Officers of the Crown. This was dated on the 30th September.

The consequence was an opinion, not delivered until nineteen days afterwards and bearing marks of careful consideration, signed by all three of the legal officers, the purport of which was a disavowal of the fiction of law based upon a misconception of the doctrine of Wheaton; and a distinct expression of a proposition so important in connection with all the events submitted to our consideration that I deem it necessary to quote the very language:—

"We think it right to observe that the third reason alleged by the Colonial Attorney-General for his opinion assumes (though the fact had not been made the subject of any inquiry) that 'no means existed for determining whether the ship had or had not been judicially condemned in a Court competent of jurisdiction; and the proposition that, admitting her to have been captured by a ship of war of the Confederate States, she was entitled to refer Her Majesty's Government, in case of dispute, to the Court of her States in order to satisfy it as to her real character,' appears to us to be at variance with Her Majesty's undoubted right to determine, within her own territory, whether her orders, made in vindication of her own neutrality, have been violated or not."

The opinion then went on to declare what the proper course should have been. The allegations of the United States' Consul should at once have been brought to the knowledge of Captain Semmes, while the Tuscaloosa was there; and he should have been obliged to admit or deny their truth. If the result were, in that case, the proof that the Tuscaloosa was an uncondemned prize brought into British waters in violation of Her Majesty's orders for maintaining her neutrality, it would deserve serious consideration whether the most proper course consistent with Her Majesty's dignity would not be to take from the captors, at once, all further control over the Tuscaloosa, and retain it until properly reclaimed by her original owners.

This opinion, so far as I have had occasion to observe, contains the very first indication of a disposition manifested on the part of Her Majesty's Advisers to resent the frauds and insults which had been so continually practised upon her from the outset of this struggle by these insurgent agents. Had it been duly manifested from the beginning, it can hardly be doubted that she would have been materially relieved from the responsibility subsequently incurred.

On the 4th of November the Duke of Newcastle addressed a note to the Governor of Cape Town, communicating the decision of the Law Officers as to what ought to have been done.

On the 19th of December the Governor addressed a note to the Duke of Newcastle, defending himself in regard to the action which had been disapproved, and praying for further directions what to do. The Tuscaloosa had meantime left Simon's Bay on a cruize, from which she did not return until the 26th December, when she put in for supplies. But on the 5th of January Rear-Admiral Sir B. Walker addressed a note to the Secretary of the Admiralty, announcing that, by the request of the Governor, he had taken the necessary steps to ascertain from the insurgent officer then in command the fact that she was an uncondemned prize captured by the Alabama, and thereupon he had taken possession of her for violation of Her Majesty's Orders, to be held until reclaimed by her proper owners.

It was in vain that the insurgent entered a protest against this decided proceeding. The Governor contented himself with a brief answer to the effect that he was acting by orders.

There were at the moment no agents for the proper owners to whom the vessel could be transferred, so that it remained in the hands of the British authorities, until a new letter was received from the Duke of Newcastle, dated the 10th March, rescinding the instructions given in the preceding one, and directing the vessel to be handed over once more to some person having authority from Captain Semmes, of the Alabama, or from the Government of the Confederate States.

Thus it appears to me that Her Majesty's Government, from an oversensibility to the peculiar circumstances of the return of the vessel after once leaving her port, lost all the advantages to which it had entitled itself for maintaining the dignity of the Crown against an unworthy experiment upon her patience. The fact was that it was only making the port of Simon's Bay a base of operations, an additional insult.

The time had gone by, however, when this vessel could be made of any further use by the insurgent Commander of the Alabama. He had succeeded in executing a

fraudulent sale of the cargo of that as well as of another prize, the Sea Bride, and was bound on another cruize, which proved to be his last on the ocean.

Taking into consideration all the circumstances attending this singular narrative, I have arrived at the conclusion that as a prize captured by the Alabama, and turned into a tender, she comes distinctly within the scope of damages awarded by the judgment passed upon the course of Her Majesty's Government respecting that vessel. And if in her own brief career it should appear that she has herself committed any injury to the people of the United States, I am clearly of opinion that Her Majesty's Government has made itself distinctly responsible for the neglect to prevent it under the rules. It is alleged in the Argument on behalf of the United States that she had captured and released one vessel on a ransom bond, before reaching Cape Town; and on the 13th of September, after her visit, she captured and destroyed one more. But I have failed to discover the presence of any distinct claim in damages. Should such be made visible, I hold the claim to be valid.

The Georgia.

This vessel was built at Dumbarton on the Clyde during the winter of 1862-63. She was constructed in a manner to excite very little suspicion of the purpose for which she was intended. Indeed, her frame proved so weak after a few months' trial as to render her unsafe with an armament, and she was laid aside.

When she was launched, on the 16th of January, a person known to be in the insurgent service, by the name of North, was reported in the public journals to have been present with his daughter, and she was said to have given to the vessel the name of *the Virginia.*

It was, however, known by the means of an intercepted letter received by Mr. Adams from his Government, that this officer had incurred the censure of his employers at Richmond to such an extent as to prompt his recall. The name thus given was not adhered to.

On the 17th of January, that is, the day after her launch, she was reported by the measuring surveyor as the *steamer Japan,* and intended for commercial purposes, her framework and plating being of the ordinary sizes for vessels of her class.

On the 20th of March she was registered in the name of Thomas Bold, a British subject resident in Liverpool, as the owner.

On the 27th of March she left for Greenock without exciting observations, and without clearance.

On the 30th of March a large number of men who had been shipped at Liverpool by Jones and Co., a firm of which Mr. Bold was a member, for a voyage to Singapore and Hong Kong, and after arrival there to be employed in trading to and from ports in the China and Indian Seas, the voyage to be completed within two years by arrival at some port of discharge in the United Kingdom, left Liverpool to get on board the vessel at Greenock.

On the 3rd of April she left the British waters.

On the 6th, the Collector of the Customs at Newhaven addressed a letter to the Commissioners of Customs in the following terms:—

"The steam-ship Alar, of London, 85 tons, owned by H. P. Maples, sailed on Sunday morning 5th instant, at 2 A.M., bound, according to the ship's papers, for Alderney and St. Malo. On Saturday, at midnight, thirty men, twenty of whom appeared to be British sailors, ten mechanics, arrived by train. Three gentlemen accompanied them, Mr. Lewis of Alderney, Mr. Ward, and Mr. Jones. The men appeared to be ignorant of their precise destination; some said they were to get 20*l.* each for their trip. A man, rather lame, superintended them. Shortly after midnight, a man arrived from Brighton, on horseback, with a telegram, which, for purposes of secresy, had been sent there and not to Newhaven, it is suspected. Mr. Staniforth, the agent, replied to my inquiries this morning, that the Alar had munitions of war on board, and that they were consigned by to a Mr. Lewis, of Alderney. His answer was brief and with reserve, leaving no doubt on my mind nor on the minds of any here that the thirty men and munitions of war are destined for transfer at sea to some second Alabama. The telegram to Brighton intimated very probably, having been reserved for the last hour, where that vessel would be found. Whether the shipment of the men, who all appeared to be British subjects, can, if it should be hereafter found that they have been transferred to a Federal or Confederate vessel, be held an infringement of the Foreign Enlistment Act, and whether the clearance of the Alar, if hereafter found to be untrue, can render the master amenable under the Customs Consolidation Act, is for your consideration respectfully submitted.

(Signed) "R. J. DOLAN, *Collector.*"

On contrasting the substance of this letter with any or all of those communicated from a similar source at Liverpool in the cases of the Oreto or the Alabama, the difference cannot fail to be apparent to the most ordinary apprehension. There is no equivocation or reservation to be suspected here. The officer seems to me to have faithfully performed his duty, and completely relieved himself from responsibility.

This letter appears to have been received by the Commissioner of Customs on the 7th April, and they on that same day made a report to the Home Office in the following terms:—

"I am desired to transmit, for the information of the Lords Commissioners of Her Majesty's Treasury, and for any directions their Lordships may see fit to give thereon, copy of a Report of the Collector of this Revenue at Newhaven, relative to the clearance of the vessel Alar, having on board a number of sailors and munitions of war, ostensibly for Alderney and St. Malo, but suspected by the Collector to be intended for transfer to some other vessel belonging to one of the belligerents in America; and I am to state that the Board having conferred with their Solicitor on the subject, that officer is of opinion that there is no evidence to call for any interference on the part of the Crown."

It thus appears very clearly that whatever may have been the opinions of the law expressed in this letter, the fact is certain that at that date none of the officers of the Government had received any information of the direction to which it could truly look for the destination of these vessels. The whole operation had been conducted, it must be admitted, with great skill and address. Nobody had ever guessed at the result down to the time in which it was in process of execution within the jurisdiction of another Power.

Meanwhile, let us now turn our attention to the position in which the Representatives and Agents of the United States, the party the most deeply interested in preventing this undertaking if possible, were occupying.

This may most readily be gathered from the testimony of the most vigilant officer they had in that kingdom, a man who spared no pains and no expense to secure all the information that could be had, not simply within his own district, but everywhere in the kingdom where sea-going vessels were in process of construction outside of the capital.

On the 3rd of April Mr. Dudley writes the following letter to Mr. Seward at Washington:—

"Mr. Underwood, our Consul at Glasgow, has no doubt informed you about the steamer now called the Japan, formerly the Virginia, which is about to clear from that port to the East Indies. Some seventy or eighty men, twice the number that would be required for any legitimate voyage, were shipped at Liverpool for this vessel, and sent to Greenock on Monday evening. They are shipped for a voyage of three years. My belief is that she belongs to the Confederates, and is to be converted into a privateer; quite likely to cruize in the East Indies, as Mr. Young, the paymaster of the Alabama, tells me it has always been a favourite idea of Mr. Mallory, the Secretary of the Confederate Navy, to send a privateer in these waters. I sent a man from here to Glasgow to accompany these men, to endeavour to find out the destination of the vessel, &c. He has not been successful as yet in his efforts. He has been on board, and writes that she has no armament, and he is still there watching her, &c."

At the date of this letter the Japan was actually gone to sea; and the vigilant Consul had not even then obtained any testimony whatever upon which to establish the truth of his very just conclusion as to the purpose, though not just as to the destination of the vessel.

Let me now observe what the case was with Mr. Adams, the Minister of the United States at London. It appears, by a letter of his addressed to Mr. Seward on the 9th of April, that "he had been long in the possession of information about the construction and outfit of this vessel on the Clyde;" and upon this part of the paragraph of his letter, singularly enough, I perceive in the Counter-Case presented to us on the part of Her Majesty's Government an attempt made to throw upon him the responsibility for the escape of the vessel. The language is this:—

"If recourse had been had to the Navy, it is probable," the Arbitrators are told, "that the complaints of the United States might not have been necessary. They might not have been necessary if Mr. Adams had communicated in good time such information as he possessed, instead of keeping it undisclosed until six days after the sailing of the Georgia, and more than three days after the departure of the Alar, and if that information had intended to form an actual or contemplated violation of the law."

Now, it should be observed that this passage begins by assuming that the information to which Mr. Adams alludes in his letter of the 9th of April, as having long been in his possession, was the same which he communicated to Earl Russell in his note addressed to him on the 8th. If such had really been the case, the insinuation might

have appeared with some shadow of justice. But if the context of the passage quoted had been given entire, it would show that at the period to which he referred, "nothing had ever been furnished him of a nature to base proceedings upon;" whereas, on the reception of what appeared more distinct evidence of facts just then taking place, he lost not a moment in submitting them to the consideration of Her Majesty's Government, in his note to Earl Russell of the 8th of April. For the rest, it is probable Mr. Adams had had too long an experience of the result attending the transmission of insufficient evidence to be particularly desirous of drawing upon himself the customary replies. If Her Majesty's Government is to be justified at all in the course of the transactions now under consideration, it must be done by assuming the entire responsibility for her action, or failure to act, rather than by attempting to share it with other parties, in whom it could not possibly suspect any motive for indifference or neglect.

It thus appears that it was not until the 8th of April, that is, six days after the escape of the Japan, and three days after the evasion of the Alar, that Mr. Adams appears to have had within his control the requisite means for making a remonstrance. He then addressed to Earl Russell the following note:—

"From information received at this Legation, which appears entitled to credit, I am compelled to the painful conclusion that a steam-vessel has just departed from the Clyde with the intent to depredate on the commerce of the people of the United States. She passed there under the name of the Japan, but is since believed to have assumed the name of the Virginia. Her immediate destination is the Island of Alderney, where it is supposed she may yet be at this moment.

"A small steamer called the Alar, belonging to Newhaven, and commanded by Henry P. Maples, has been loaded with a supply of guns, shells, shot, powder, &c., intended for the equipment of the Virginia, and is either on the way or has arrived there. It is further alleged that a considerable number of British subjects have been enlisted at Liverpool and sent to serve on board this cruizer.

"Should it be yet in the power of Her Majesty's Government to institute some inquiry into the nature of these proceedings in season to establish their character if innocent, or to put a stop to them if criminal, I feel sure that it would be removing a heavy burden of anxiety from the minds of my countrymen in the United States."

The difficulty of the situation in writing so long after the execution of the chief portions of the operation objected to is here frankly conceded. Everything known thus far gave no clear indication towards the unknown, and the only important affirmation of fact made in the letter turned out not to be correct.

On the same day this letter was written and sent, Earl Russell made his reply. After repeating the substance of the complaint, it proceeds as follows:—

"I have to state to you that copies of your letter were sent without loss of time to the Home Department and to the Board of Treasury, with a request that an immediate inquiry might be made into the circumstances stated in it, and that if the result should prove your suspicions to be well founded, the most effectual measures might be taken which the law admits of for defeating any such attempts to fit out a belligerent vessel from British ports."

It is due to the Government of Her Majesty to add that all it could do under the peculiar circumstances it tried to do. Mr. Adams had pointed out the Island of Alderney as the place of destination for the meeting of the Japan and the Alar. This had been to a certain extent confirmed by the report of the Collector of Customs at Newhaven, the only correct information which seems to have been at first obtained. Alderney and St. Malo was the destination specified in the ship's papers.

Misled by this information, Lord Russell took a step extraordinary, and thus far exceptional in the prosecution of preventive measures. He caused a ship of war to be ordered from Guernsey to Alderney with a view to prevent any attempt that might be made to execute the project of armament within that British jurisdiction. Unfortunately the practical consequence of having been put on this false scent was to furnish the time lost there as a means of more completely carrying into effect the projected scheme elsewhere. Even had Her Majesty's Government attempted to go further, it could have been of no use. The object had been completely gained within the jurisdiction of another sovereignty—the Empire of France.

In the Case presented on the part of the United States, it is urged that Her Majesty's Government might have gone so far as to seize the vessel within the French jurisdiction, and the case of the Terceira expedition is cited as a precedent. But it seems to me that the Government of the United States would scarcely be ready to concede the right of a foreign Power to settle questions of justice within its jurisdiction without its knowledge or consent.

It may be urged that the opinions of the officers of the Customs that no violation of law had been committed in the expedition of the Alar, was equivalent to a neglect of due diligence.

Upon which it may be remarked that whether right or wrong, at the date it was given, and with the information then in possession of the Government, there is no reasonable probability that the Alar could have been seized excepting perhaps in the waters of France.

On the 15th of April, Mr. Adams addressed a note to Earl Russell covering certain papers which went to prove the manner in which men had been enlisted in violation of the laws of the kingdom by parties in Liverpool in co-operation with the Insurgent Agents.

In consequence of these and other papers which followed them, Her Majesty's Government were enabled to take the requisite steps to bring the chief offender at Liverpool into the Courts of Justice. The reports of the trials carried on in the Court over which our distinguished colleague presides, are among the papers before us, and they satisfy my mind entirely in regard to the justice and impartiality with which the proceedings were conducted. The parties were all convicted, and though the penalties inflicted were much too light, they appear to have been thought sufficient to establish the efficiency of the law.

It was in connection with such proceedings as these that Mr. Dudley, in one of his letters to Mr. Seward, wrote that "the prosecution of these parties, if conducted vigorously with the view of convicting them, will do more to break up these expeditions and fitting out of vessels in this country than anything else."

Upon a careful review of these facts as they appear before me, I cannot perceive that Her Majesty's Government has made itself in any way liable for the failure to use diligence in this case under the first rule prescribed in the Treaty of Washington.

The Japan had now changed her name and become the Georgia. The fraud had been most successfully perpetrated. An Insurgent officer, by the name of Maury, had taken the command of her, and the next thing we learn is of her depredations on the commerce of the United States.

It is not essential to the present purpose to go into any details of her cruize outside of the possible limits of liability on the part of Her Majesty's Government.

In a report made by Rear-Admiral Sir Baldwin Walker to the Secretary of the Admiralty dated 19th August, 1863, appears the following paragraph:—

"On the 16th instant, the Confederate States' steamer Georgia, Commander Maury, anchored in this (Simon's) Bay. She requires coals, provisions, and caulking."

In a letter addressed by the Governor at Cape Town to the Duke of Newcastle bearing the same date is the following paragraph:—

"On the 16th at noon, the Georgia, another Confederate war steamer, arrived at Simon's Bay in need of repairs, and is still there."

It may perhaps be my fault, but after a careful search I have been unable to discover any official Report other than these as to the arrival, the time of stay, and the treatment of the Georgia during this visit. Inasmuch as this event was cotemporaneous with the arrival of the Alabama and her tender the Tuscaloosa, both of which were engrossing the attention of the authorities of the place, it is possible that the customary detailed Report in regard to her may have been omitted.

The fact is at any rate certain that, notwithstanding her fraudulent escape in defiance of the laws of Great Britain, this vessel was duly recognized at Capetown as a legitimate vessel belonging to a recognized belligerent.

In the cases of the Florida and of the Alabama I have already expressed my deep regret that this mode of proceeding should have been adopted in regard to vessels which had been guilty of a flagrant violation of the laws of the kingdom. The right to exclude them is distinctly recognized by Sir Roundell Palmer in a speech made by him in the House of Commons on the 13th of May, 1864,* whilst he assigned as a chief reason for not exercising it the danger that such a decision might have an effect of appearing to favour too strongly one side in the contest. The fear of doing a thing demanded by what appears to be a paramount duty of upholding the majesty of their laws because it might possibly appear to lean too much against one party and in favour of the other, seems to have been the guiding motive to the policy actually adopted. But the question immediately arises whether that party had, in its extraordinary course of conduct within Her Majesty's dominions, earned any right to such consideration.

Be this as it may, Her Majesty's Government decided otherwise, and admitted the Georgia into the port of Simon's Bay, where she appears to have remained a fortnight,

* American Appendix, vol. v, p. 583.

repairing her decks and receiving supplies and provisions on the footing of a recognized belligerent. It has been argued that in thus deciding, Her Majesty's Government made itself liable under the second rule, as permitting one of its ports to be made a base of operations against the United States by a vessel which had issued from the kingdom in defiance of its laws as a hostile cruizer.

I have given to this view of the matter the most careful consideration; but I regret that I cannot bring myself to concur in it. The vessel escaped from the kingdom under circumstances which have already been detailed in this paper, involving no neglect or failure of duty on behalf of the Government. If on arriving at an English port furnished with a regular commission as a vessel of a recognized belligerent, Her Majesty's Government determines to recognize her in that character, however much I may regret it, I cannot call in question her right to do so on her responsibility as a sovereign Power. This is a right I should not consent to have drawn into question in any case so decided by the United States. It appears to me on the same footing with the original recognition of belligerency, the primal cause of all these unpleasant questions,—a step which I always regretted to have been taken, but which I never doubted the right of Her Majesty's Government to take whenever it should think proper.

The Georgia, after leaving Simon's Bay, had but a short career. She proved utterly unsuitable to the service into which she had been forced, and finally returned to Liverpool, where she was sold, and turned into a merchant-ship. A question has been raised as to the course of Her Majesty's Government in permitting this to be done within her harbours. I cannot myself perceive the importance of the question, provided that she recognized the right of the belligerent to dispute the validity of such operations. That she did so is certain; for the Georgia, after her transfer into private hands, was taken on the high seas by the United States' steamer Niagara, and sent to America as a prize to be disposed of in regular course of law. A reclamation attempted by the owner, in a note addressed to Earl Russell, was met by a reply decisive of the merits of the case.

In view of all the facts attending this case, and of the considerations attending them, I am brought to the conclusion that it does not show any such course on the part of Her Majesty's Government as will suffice to impose any responsibility for damages under the terms of the three rules prescribed by the Treaty of Washington.

The Shenandoah.

We have now reached the last vessel, in the order of events, which is presented to this Tribunal for its consideration.

It appears clearly, from the papers before us, that the steadily growing energy manifested by Her Majesty's Government in preventing the departure of vessels obviously intended to carry on war had not been without its effect upon the parties engaged in procuring them. The seizure of the iron-clad steam-rams, built by Messrs. Laird, seems to have dispelled all further idea of attempting open operations of that description.

Efforts were now directed to the prosecution of schemes that would elude observation. In the execution of this policy, swift vessels, constructed for commercial purposes, were looked up. And when found reasonably adapted for conversion into privateers, measures were taken to procure the control of them so suddenly as to effect their escape from the British jurisdiction before any means of prevention could be put into operation.

A skilful combination of the means of supplying an armament and a crew at some prearranged point on the high seas far beyond the British jurisdiction, in a vessel so quickly and secretly pushed out of a British port as to baffle pursuit, completed the adventure.

This plan had been attended with complete success in the case of the Georgia. It was now resorted to with a few variations in the case of the Shenandoah.

The British steamer Sea King had been built for a merchant-vessel and employed in the China trade, during which period she had gained much reputation for her speed and her sailing qualities. In the year 1864 she appears to have attracted the attention of the insurgent agents in England, and they proceeded through their customary British affiliations to get her into their hands. On the 20th of September the

purchase and transfer were effected in the port of London. A person by the name of Wright a British subject, appeared as the owner. On the 8th of October this vessel cleared from that port in the usual way for Bombay, without exciting observation. The crew had been hired for that voyage.

Simultaneously with this movement, a screw-steamer called the Laurel issued from the port of Liverpool, having a considerable number of passengers on board, and a cargo composed of an armament and ammunition suitable for a vessel of war. Her nominal destination was Matamoras viâ Nassau.

The true destination of both ships was the vicinity of the Island of Madeira. There they actually met, on or about the 21st of October; and there the process of transfer of the armament and the men was effected on the high sea.

This operation had been conducted with a degree of success exceeding that of the Georgia. Even the vigilance of the Consul of the United States at Liverpool had resulted only in the formation of conjectures, reasonable in themselves, and partially well founded in fact, but unsustained by any positive evidence. That was not obtained until the return of many of the crew of the Sea King, who had refused to take the new departure, when it was disclosed to them by the true commander of the vessel now called the Shenandoah.

Thus far I have only to repeat the observations I made in the case of the Georgia. Placing myself in the position of any neutral Power possessing an extensive commercial marine and a large number of ports, it seems to me that no ordinary degree of diligence could be likely to avail to prevent the execution of such skilfully contrived enterprises.

Her Majesty's Consul at the port of Teneriffe appears to have done all that it was in his power to do in the premises. On the arrival of the Laurel at that place, and learning the state of the facts as given to him by the parties on board, he prepared a careful report of the same, and addressed it to Earl Russell. He also assumed the responsibility of seizing the master of the Sea King, P. J. Corbett, and sending him home for trial as having, even though at sea, violated the provisions of the Foreign Enlistment Act.

On the 26th of January, 1865, Commander King, of Her Majesty's ship Bombay, writes to Commodore Sir W. Wiseman.

I copy the essential parts of his letter:—

1. I conceive it to be my duty to report to you that a vessel of war of the Confederate States of America arrived and anchored in Hobson's Bay yesterday the 25th instant.

3. Her name is the Shenandoah, a screw-vessel, &c.

4. Her armament consists of eight guns, viz., four 8-inch (English), two 32-pounders (Whitworth), and two 12-pounders, intended more especially for boat service.

5. The crew at present consists only of 70 men, though her proper complement is 140; the men almost entirely are stated to be either English or Irish.

8. The ship appears to be in good order, her officers a gentlemanly set of men, in a uniform of grey and gold; but, from the paucity of her crew at present, she cannot be very efficient for fighting purposes.

9. Leave had been asked by the Commander for permission to coal and repair machinery, &c.

It is to be noted here that, from the statements made by this officer, it appears he had an opinion clearly formed that, in the condition this vessel was in at the time she arrived in port, and with such a limited crew, she could not be efficient as a fighting ship.

The application made by the master of the Shenandoah to the Governor of the Colony, Sir C. H. Darling, was in these words:—

"I have the honour to announce to your Excellency the arrival of the Confederate States' steamer Shenandoah, under my command, in Port Philip this afternoon, and also to communicate that the steamer's machinery requires repairs, and that I am in want of coals.

"I desire your Excellency to grant permission that I may make the necessary repairs and supply of coals, to enable me to get to sea as quickly as possible."

It is to be noted that the object here mentioned was to get to sea, without the specification of any port of destination.

On the 26th of January, Mr. Francis, Commissioner of Trade and Customs, by direction of the Governor, Sir Charles Darling, addressed a letter to the Commander, Waddell, of which the essential part is as follows:—

"In reply, I have received the instructions of Sir Charles Darling to state that he is willing to

allow the necessary repairs to the Shenandoah, and the coaling of the vessel being at once proceeded with, and that the necessary directions have been given accordingly."

At the same time Mr. Francis communicated to this officer a copy of the general orders of the Duke of Newcastle, in regard to what is called the twenty-four hours rule, and likewise those embraced in a letter of Earl Russell to the Duke of Newcastle, of the 31st January, 1862, covering regulations applicable to all questions ordinarily arising out of the arrival of similar vessels.

On the 26th, the 27th, and 28th of January, Mr. Blanchard, the Consul of the United States, at Melbourne, addressed to Sir Charles Darling three successive letters, protesting against the recognition of this vessel as belonging to a belligerent, on the ground of her origin, her conversion at sea, and her actual condition.

On the 30th of January, his Excellency states to the Council of the Colony :—

"That he had replied to the United States' Consul to the effect that, having given an attentive consideration to his letter, and having consulted with the Law Officers of the Crown, he had come to the decision that the Government of this Colony were bound to treat the Shenandoah as a ship of war belonging to a belligerent Power.

"His Excellency then consults the Council on the only point upon which he thought any doubt could arise, viz., whether it would be expedient to call upon the Lieutenant commanding the Shenandoah to show his commission from the Government of the Confederate States, authorizing him to take command of that vessel for warlike purposes.

"After a brief consultation, a majority of his advisers tender their opinion that it would not be expedient to do so."

I do not find, on the part of Her Majesty's Government, any notice of this decision among the papers before us. Thus, it appears that once more it had been determined to sanction a proceeding known to have been executed in defiance of the laws of Great Britain, and of the pledges of the Government to maintain a strict neutrality in the contest. The principle that success sanctions a fraud had again been ratified, under circumstances which could not fail, and did not fail, to entail upon its supporters the heaviest kind of responsibilities.

For, in the series of consequences that happened at Melbourne, it was no more than natural to expect that the parties guilty of the first offence should be likely to resort to others of the same nature whenever there should appear that any advantages were to be gained by it. The authorities at Melbourne seem at first to have acted as if the baptism of the vessel into a new name had, in their eyes, washed it white of all its past sins. They were destined to learn a different lesson, but nobody seems to have repented, with the exception perhaps of the Governor himself, whose latest significant declaration on that subject I shall have occasion to notice hereafter.*

The application of the insurgent officer Waddell for leave to make repairs and get supplies was made on the 25th of January. Five days passed and he had just discovered, from an examination made by a diver, that repairs were necessary under the water line, which would require that the vessel should be placed on the Government slip, there to continue not more than ten days. Meanwhile he had not yet bethought himself to give to the authorities, who had requested it, any report as to the quantity and the nature of the supplies which he desired.

Thus delays were interposed, for one reason or other, until the 18th of February, when the vessel sailed.

The Commander had in this way managed to secure a period of twenty-three days, during which time he could set in operation the means of starting on his projected expedition in an effective manner.

It should here be observed that, in all his movements, he was much favoured by the almost universal sympathy of the residents at Melbourne and the colony. Whatever he could ask that was permissible they would enthusiastically furnish. Whatever he dared to do that was not, they were indisposed to perceive or to disclose.

Under these circumstances, there cannot be a doubt that, during all this interval of time, he was constantly busy in secretly obtaining additions to his crew. This was indispensable to his ulterior operations.

Had the matter depended on the energy of the authorities and population of Melbourne alone to prevent this, he would have had all he wanted without a word of notice. Unluckily for him, he found the Consul of the United States, Mr. Blanchard, on the watch to check and expose his proceedings by all the means in his power. On the 10th of February, that officer addressed a letter to the Governor inclosing the deposition of John Williams. In it, this witness affirmed that, on the Monday previous,

* British Appendix, vol. i, p. 722.

there had been fifteen or twenty men concealed in different parts of the ship, who had gone on board since her arrival sixteen days before.

This statement it is material to connect with a part of the report made by Captain Payne to the authorities on that same day. He had been instructed to make a careful examination of the vessel. In his report he has this passage:—

"There appears to be a mystery about her fore hold, for the foreman of the patent slip, when asked to go down to that spot to measure her for the cradle, was informed he could not get to the skin at that place. The hatches were always kept on, and the foreman states that he was informed they had all their stuff there."*

Another witness, obtained by Mr. Blanchard, named Walter J. Madden, testified that, when he left the vessel on the 7th of February, "there were men hid in the forecastle of the ship and two working in the galley, all of whom came on board of said vessel since her arrival in that port; that the officers pretend they do not know that said men are so hid."

On the 14th of February Mr. Blanchard sent another deposition, of a man named Herman Wicke, specifically naming one person as having come on board. These are his words:—

"The rations in Hobson's Bay are sent out by the master-at-arms, who gives them to Quarter-Master Vickings, and this latter brings them to the galley to be cooked, by cook known by the name of Charley; that said cook Charley was not on board the Shenandoah on her arrival in the bay; he went on board since her arrival, and he told me he would join the ship as cook; that he dared not to do it in port, but that he would do it when proceeding outwards; that I also saw said cook take rations to a number of men concealed in the forecastle, who went on board since her arrival in Hobson's Bay."

This testimony was laid before the Law Officers, who deemed the first deposition by itself sufficient evidence to lay informations against the man enlisted, and this appears to have prompted the Council, not to take any proceedings against the Commander, but to direct an inquiry to be made when he would be ready to go away.†

It was the tempted on which indignation was to be expended. The true cause of the violation of law was to go his way in peace.

On the heels of this information came a report from the Police Department that twenty men had been discharged from the vessel since her arrival in port.

If this report was correct, then her crew, according to the report of Captain Payne, must have been reduced to fifty men.

On such a basis she could scarcely have ventured on any hostile cruize. It seems tolerably plain that the object of supplying this deficiency was kept in view from the first.

The detective proceeded to state that the captain intended to ship forty hands, to be taken on during the night, and to sign articles when outside the Heads. He wanted foreign seamen only; but, if English were to be taken, they must assume a foreign name.

Further information from other sources given on the same day raised the number of men actually engaged to sixty.

It thus appears that the authorities at Melbourne were, as early as the 13th, fully apprised of what was the movement of the Commander, and in a situation to adopt energetic measures of prevention, if they should think proper.

The only measure which appears actually to have been taken was to issue a warrant against the man Charley.

The officer charged with the warrant proceeded to the steamer in which the man was supposed to be. The Commander was not on board. The officer next in charge at once refused to give him any assistance, and forbid his going over the ship.

The next day he returned, and applied to the Commander himself. That officer is reported to have used these words: "I pledge you my word of honour, as an officer and a gentleman, that I have not any one on board, nor have I engaged any one, nor will I while I am here."

How is this evidence to be reconciled to all the previous testimony, and the suspicious circumstance mentioned by Captain Payne?

The rest of the evidence of the boarding officer is quite important, though not essential to transfer to this paper. The whole is accessible in the first volume of the

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* British Appendix, vol. i, p. 557. † Ibid., p. 521.

Appendix to the British Case. The issue of the application was, that the commander absolutely refused to let the officer look over the ship for himself. On a second demand of a more pressing kind he again refused, and added that "he would fight his ship rather than allow it,"—a threat as absurd in his then situation as it was offensive to the authorities of the Colony.

The Governor in Council, on receiving the news of this open defiance of all recognized authority, at once took notice of it by issuing a prohibition to all the subjects of the Colony of giving further aid or assistance to the vessel then on the slip, which practically exemplified in an instant the folly of the insurgent officer's proceeding.

Had the authorities persevered in this course, it is altogether likely that the commander Waddell would have ultimately been compelled to abandon all his schemes of illegal outfit, and with it perhaps the enterprise he was meditating.

Unfortunately, they listened to weaker counsels. They appealed to the officer to reconsider his determination. The letter containing this appeal was delivered to him on the evening of the 14th. He answered it, protesting against the obstruction thus put in his way. The first sentence is all that is material in this connection. It is in these words:—

"I have to inform his Excellency the Governor that the execution of the warrant was not refused, as no such person as the one therein specified was on board."

There were two falsehoods in this sentence. The reason assigned could not explain the fact of the refusal. Scarcely was the letter placed in the hands of the messenger, when the attention of the water police was attracted to the fact that four men were leaving the Shenandoah in a boat pulled by two watermen. They were headed off and arrested. And then it was discovered that the man Charley so positively alleged not to have been on board was one of the four.

Yet, strange as it may seem, the fact of this discovery of a clear violation of the Foreign Enlistment Act was communicated to the perpetrator in a letter which, by way of compensation, announced to him that the injunction upon British subjects to withhold all aid to his vessel was thenceforth taken off.

The reason assigned for this change of policy was that, in the situation of the vessel on the slip, a sudden storm might endanger its safety, and in that event the authorities would be made responsible for the consequences of their order.

It was a suggestion skilfully made to attain its purpose, and it alarmed the Governor enough to induce him to withdraw his prohibition.

The reply of the Commander is at once fawning, insolent, and untruthful. He thanks the Governor for his observance of the rights of belligerents, to which he had done everything to forfeit a claim. He disavows a knowledge of the fact that the men were there, though it is clearly to my mind the true reason accounting for his absurd threat to fight rather than to show the interior of the ship; and, lastly, he vapors about the disrespectful and insulting tone used towards him, which he should take an early opportunity of bringing to the notice of the Richmond Government.

Simultaneously with the dispatch of this letter, this officer addresses to the Attorney-General of the Colony the following inquiry:—

"Be pleased to inform me if the Crown claims the sea to be British waters three miles from the Port Philip Head lights, or from a straight line drawn from Point Lonsdale and Schanch."

The audacity of this application to that particular officer is its most marked characteristic. The purpose of it could scarcely fail to have been penetrated. It could only have had reference to the possibility of taking on board of his ship at the nearest point outside of British waters such men as he had already engaged to enlist with him. Yet the Attorney-General seems not to have been stimulated by it to take any new precautions. He contented himself with sending an evasive answer that yet clearly betrays his own sense of the nature of the inquiry.

At this moment the Captain of the Shenandoah had forfeited all possible right to respect from the authorities, whether as an officer or as a man. They were fully informed of the fraud which had entered into the origin of his undertaking. They were enlightened in regard to his continuous efforts to violate Her Majesty's laws in their port, and they were warned that detection in one instance had not availed to deter him from meditating more. Yet, so far as the papers before us are concerned, these considerations do not seem to have produced any other effect than a desire to get rid of him as soon as possible by supplying him with all he asked.

The consequences were no other than could have naturally been expected. No