

“From the view I have taken of the facts, as now stated by you, which it is to be presumed are to be regarded as specifications under the more general charges set forth in your letter of the 10th instant, I must really confess I do not at present see grounds sufficient to justify the steps you require me to take against the armed vessels now in this port, and the merchandize which has been permitted to be landed from them and deposited in the public store.”

He then observed that, if the facts alleged as to the original equipment of the *Independencia* were to be taken as true, they did not clearly or unequivocally prove that her original equipment in, or dispatch from, the United States was unlawful; and, with respect to a subsequent alleged enlistment of men in the port of Norfolk, he stated that he was engaged in inquiries, in order to be satisfied upon that point before the vessel was permitted to sail, and to be governed by the result, “although,” (he said,) “it does not appear to be perfectly certain that such an augmentation of their force is interdicted by the Act of Congress of the 3rd of March last, which, being a law highly penal in its nature, will admit of no latitude of construction. (British Appendix, vol. iii. pages 112-114.)

This correspondence has the more interest, as relating to the case, in which the legality of the dispatch of the *Independencia* (fully armed and equipped) from an American port to Buenos Ayres, for sale there to the belligerent Government of that revolted colony, and the illegality of her subsequent augmentation of force, became the subject of decision by Mr. Justice Story in the well-known prize suit of the *Santissima Trinidad*.

On the 16th September, 1817, the Spanish Consul, Mr. Stoughton, wrote to Mr. Fisk (District Attorney for New York), stating a case of illegal enlistment of men, then alleged to be in progress on board a Venezuelan privateer schooner called the *Lively*, or the *Americano Libre*.

“Now” (he said), “as there must be provisions in the laws and Treaties of the United States, vesting an authority in some of its officers to prevent the equipment of vessels and the enlistment of men in the United States, I make this application to you, most urgently requesting you to take whatever measures may be necessary immediately, *in order to prevent the departure of the above vessel, at least until she shall give bonds that she will not commit hostilities against Spanish subjects. The vessel, it is said, will sail to-morrow morning.* Indeed, if an inquiry were instituted, I am induced to believe the above brig would be found to be a pirate.”

In support of this application, two depositions of persons, who stated that attempts had been made to induce them to enlist on board the vessel in question, were sent on that and the following day. Mr. District Attorney Fisk replied, on the 17th September, 1817:—

“I have duly received your notes of yesterday evening and of this day, and have referred to the statutes providing for the punishment of the offences stated. *It is not a case, from the evidence mentioned, that would justify the Collector in detaining the vessel:* the aggression is to be punished in the ordinary mode of prosecuting those who are guilty of misdemeanours. Oath is to be made of the facts by the complainant, who enters into a recognizance to appear and prosecute the offenders before any process can issue. This oath being made and recognizance taken, the Judge of the Circuit Court will issue a warrant to apprehend the accused, and bring them before him, to be further dealt with according to law. When apprehended, it is the province of the Attorney of the United States to conduct the prosecution to judgment. I have no authority to administer an oath, or to issue a warrant, *nor have I the power to issue any process to arrest and detain the vessel in question, unless by the direction of an Executive officer of the United States.* . . . By adverting to the statutes, it will be seen that the vessel is not liable to seizure for the act of any person enlisting himself to go on board, or for hiring or retaining another person to enlist: *the punishment is personal to the offenders.* . . . *It is impracticable for me, or for any other officer of the United States, to take any legal measures against aggressors, upon the indefinite statement of certain persons being concerned in an illegal transaction.*” (British Appendix, vol. iii, pp. 119, 120.)

This precedent will (it is trusted) be borne in mind whenever the Arbitrators may have occasion to consider the questions connected with the enlistment of certain men on board the *Shenandoah* on the night of the departure of that vessel from Melbourne in 1864.

On the 30th September, 1820, Mr. Secretary Adams wrote thus to the Portuguese Minister, the Chevalier de Serra:—

“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 the country by impeachment, and if any Portuguese subject has suffered by the 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.

“The Government of the United States have neither countenanced nor permitted any violation of