Carnegie Endowment for International Peace
DIVISION OF INTERNATIONAL LAW

THE CONTROVERSY OVER NEUTRAL RIGHTS BETWEEN THE UNITED STATES AND FRANCE 1797-1800

A COLLECTION OF AMERICAN STATE PAPERS AND JUDICIAL DECISIONS

EDITED BY
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Prefatory Note

President Wilson, in his address before the Congress on February 26, 1917, said that

> we must defend our commerce and the lives of our people in the midst of the present trying circumstances, with discretion but with clear and steadfast purpose. Only the method and the extent remain to be chosen upon the occasion, if occasion should indeed arise. Since it has unhappily proved impossible to safeguard our neutral rights by diplomatic means against the unwarranted infringements they are suffering at the hands of Germany, there may be no recourse but to *armed* neutrality, which we shall know how to maintain and for which there is abundant American precedent.

In view of the statements contained in the President's address setting forth the difficulties of the Government of the United States concerning its maritime commerce, it has been thought both interesting and timely to collect and to publish the accompanying documents relating to the maritime controversy with France during the presidency of John Adams.

The present volume, which is issued as a contribution to American precedent, contains, in Part I, pertinent extracts from President Adams' messages, the respective replies of the Senate and the House, the laws enacted by Congress to meet the situation, and the proclamations issued by the President. Part II continues the subject by bringing together opinions of the attorneys general and decisions of the Supreme Court of the United States and of the Court of Claims regarding the origin, nature, extent and legal effect of the hostilities between the United States and France at the close of the eighteenth century. Part III is an Appendix which contains the Treaties of Alliance and of Amity and Commerce of 1778, the consular convention of 1788 and the Convention of 1800 terminating the differences between the two Powers. These treaties are in the English and French languages in parallel columns.

By way of introduction, there is prefixed an extract from the learned note of J. C. Bancroft Davis' *Treaties and Conventions between the United States and other Powers,* which gives in summary form the history of the controversy.

James Brown Scott,
Director of the Division of International Law.

Washington, D. C.,
February 28, 1917.

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Note.—Some of the above citations are not now in general use, but as they are reproductions from an older publication, it has not been deemed wise to change them to conform to modern practice.

STATE PAPERS AND JUDICIAL DECISIONS RELATING TO THE CONTROVERSY OVER NEUTRAL RIGHTS BETWEEN THE UNITED STATES AND FRANCE, 1797-1800

Historical Introduction

On the 25th of January, 1782, the Continental Congress passed an act authorizing and directing Dr. Franklin to conclude a Consular Convention with France on the basis of a scheme which was submitted to that body. Dr. Franklin concluded a very different convention, which Jay, the Secretary for Foreign Affairs, and Congress did not approve.[2] Franklin having returned to America, the negotiations then fell upon Jefferson, who concluded the Convention of 1788. This was laid before the Senate by President Washington on the 11th of June, 1789.

On the 21st of July it was ordered that the Secretary of Foreign Affairs attend the Senate to-morrow and bring with him such papers as are requisite to give full information relative to the Consular Convention between France and the United States.[3] Jay was the Secretary thus "ordered." He was holding over, as the new Department was not then created. The Bill to establish a Department of Foreign Affairs had received the assent of both Houses the previous day,[4] but had not yet been approved by the President.[5] Jay appeared, as directed, and made the necessary explanations.[6] The Senate then Resolved that the Secretary of Foreign Affairs under the former Congress be requested to peruse the said Convention, and to give his opinion how far he conceives the faith of the United States to be engaged, either by former agreed stipulations or negotiations entered into by our Minister at the Court of Versailles, to ratify in its present sense or form the Conven-

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[1] This introduction has been taken from pages 983 to 1002 of J. C. Bancroft Davis's notes to the revised edition (1873) of *Treaties and Conventions concluded between the United States of America and other Powers since July 4, 1776.*

[2] 1 D. C., 1783–89, 232.

[3] Annals 1st Sess. 1st Cong. 52.

[4] Ib., 685.

[5] Ib., 52.

[6] Ib.

tion now referred to the Senate.[1] Jay made a written report on the 27th of July that in his judgment the United States ought to ratify the Convention;[2] and the Senate gave its unanimous consent.[3] The Statute to carry the Convention into effect was passed the 14th of April, 1792.[4]

Three articles in the treaties with France concluded before the Constitution became the cause of difference between the two Powers:

1. Article XI of the Treaty of Alliance, by which the United States, for a reciprocal consideration, agreed to guarantee to the King of France his possessions in America, as well present as those which might be acquired by the Treaty of Peace.

2. Article XVII of the Treaty of Amity and Commerce, providing that each party might take into the ports of the other its prizes in time of war, and that they should be permitted to depart without molestation; and that neither should give shelter or refuge to vessels which had made prizes of the other unless forced in by stress of weather, in which case they should be required to depart as soon as possible.

3. Article XXII of the same Treaty, that foreign privateers, the enemies of one party, should not be allowed in the ports of the other to fit their ships or to exchange or sell their captures, or to purchase provisions except in sufficient quantities to take them to the next port of their own State.

Jefferson, who was the Minister of the United States at the Court of Versailles when the Constitution went into operation, was appointed Secretary of State by President Washington on the 26th of September, 1789. He accepted the appointment and presented Short to Neckar as chargé d'affaires of the United States.[5]

Gouverneur Morris, of New York, who had been in Europe from the dawn of the French revolution, and had been in regular friendly correspondence with Washington,[6] was appointed Minister to France on the 12th of January, 1792. At the time of the appointment Washington wrote him a friendly and admonitory letter: "The official communications from the Secretary of State accompanying this letter will convey to you the evidence of my nomination and appointment of you to be Minister Plenipotentiary of the United States at the Court of

[1] Annals 1st Sess. 1st Cong., 52.
[2] Ib., 54.
[3] Ib.
[4] 1 St. at L., 254.
[5] 3 Jefferson's Works, 119.
[6] 1 F. R. F., 379–399.

France; and my assurance that both were made with *all my heart* will, I am persuaded, satisfy you as to that fact. I wish I could add that the advice and consent flowed from a similar source. * * * Not to go further into detail I will place the ideas of your political adversaries in the light in which their arguments have presented them to me, namely, that the promptitude with which your lively and brilliant imagination is displayed allows too little time for deliberation and correction, and is the primary cause of those sallies which too often offend, and of that ridicule of character which begets enmity not easy to be forgotten, but which might easily be avoided if it was under the control of more caution and prudence. In a word, that it is indispensably necessary that more circumspection should be observed by our representatives abroad than they conceive you are inclined to adopt. In this statement you have the *pros* and *cons*. By reciting them I give you a proof of my friendship if I give you none of my policy or judgment."[1]

Morris entered upon the duties of his office with these wise cautions in his hand, but he did not succeed in gaining the good-will of a succession of governments with which he had little sympathy:[2] for he writes Jefferson on the 13th of February, 1793: "Some of the leaders here who are in the diplomatic committee hate me cordially, though it would puzzle them to say why."[3]

When Morris was appointed Minister, the commercial relations between the two countries were satisfactory to neither. Exceptional favors to the commerce of the United States, granted by royal decree in 1787 and 1788,[4] had been withdrawn, and a jealousy was expressed in France in consequence of the Act of Congress putting British and French commerce on the same basis in American ports.[5] No exceptional advantages had come to France from the war of the revolution, and American commerce had reverted to its old British channels.

Jefferson greatly desired to conclude a convention with France which should restore the favors which American commerce had lost, and bring the two countries into closer connection. On the 10th of March, 1792, he instructs Morris: "We had expected, ere this, that in consequence of the recommendation of their predecessors, some overtures would have been made to us on the subject of a Treaty of commerce.

[1] 10 Washington's Writings, 216–18.
[2] 1 F. R. F. 412.
[3] Ib., 350.
[4] Ib., 113, 116.
[5] See Short's correspondence, Ib., 120.

* Perhaps they expect that we should declare our readiness to meet on the ground of Treaty. If they do, we have no hesitation to declare it."[1] Again, on the 28th of April, he writes: "It will be impossible to defer longer than the next session of Congress some counter regulations for the protection of our navigation and commerce. I must entreat you, therefore, to avail yourself of every occasion of friendly remonstrance on this subject. If they wish an equal and cordial treaty with us, we are ready to enter into it. We would wish that this could be the scene of negotiation."[2] Again, on the 16th of June, he writes: "That treaty may be long on the anvil; in the mean time we cannot consent to the late innovations without taking measures to do justice to our own navigation."[3]

The great revolution of the 10th of August, and the imprisonment of the King, were duly reported by Morris;[4] and Jefferson replied on the 7th of November: "It accords with our principles to acknowledge any government to be rightful which is formed by the will of the nation substantially declared. * * There are some matters which I conceive might be transacted with a government *de facto;* such, for instance, as the reforming the unfriendly restrictions on our commerce and navigation."[5]

To these instructions, Morris answered on the 13th of February, 1793, three weeks after the execution of the King, and a fortnight after the declaration of war against England: "You had * instructed me to endeavor to transfer the negotiation for a new treaty to America, and if the revolution of the 10th of August had not taken place, * I should, perhaps, have obtained what you wished. * * * The thing you wished for is done, and you can treat in America if you please."[6] In the same dispatch, Morris spoke of the "sending out of M. Genet, without mentioning to me a syllable either of his mission or his errand," and said that "the pompousness of this embassy could not but excite the attention of England."[7]

On the 7th of March, Morris wrote to Jefferson that "Genet took out with him three hundred blank commissions, which he is to distribute to such as will fit out cruisers in our ports to prey on the

[1] 3 Jefferson's Works, 338-9.
[2] Ib., 356.
[3] Ib., 449.
[4] 1 F. R. F., 333.
[5] 3 Jefferson's Works, 489.
[6] 1 F. R. F., 350.
[7] Ib.

British commerce," and that he had already mentioned the fact to Pinckney, and had desired him to transmit it.[1]

The new condition of affairs caused by the war induced the President to submit a series of questions to the members of his cabinet for their consideration and reply.[2] It would seem from a passage of Mr. Jefferson's Ana that the second of these questions—"Shall a Minister from France be received?" was suggested by the Secretary of State.[3] An account of the meeting of the cabinet at which these questions were discussed will be found in vol. 9 Jefferson's Works, page 142.

The first two questions were unanimously answered in the affirmative—that a proclamation for the purpose of preventing citizens of the United States from interfering in the war between France and Great Britain should issue, and that Genet should be received; but by a compromise, the term "neutrality" was omitted from the text of the proclamation.[4]

When Genet landed in Charleston, on the 8th of April, 1793—even when he arrived in Philadelphia—it may be believed that Washington contemplated the probability of closer relations with France, and the possibility of a war with Great Britain. The relations with the latter Power were in a critical condition. British garrisons were occupying commanding positions on our lake frontiers, within the territory of the United States, in violation of the Treaty of 1783; and an Indian quarrel was on the President's hands, fomented, as he thought, by British intrigue.[5]

The policy which Washington favored, denied France nothing that she could justly demand under the Treaty, except the possible enforcement of the provision of guarantee; and that provision was waived by Genet in his first interview with Jefferson. "We know," he said, "that under present circumstances we have a right to call upon you for the guarantee of our islands. But we do not desire it."[6]

On the other hand, it offered to Great Britain neutrality only, without a right of asylum for prizes, this being conferred exclusively by Treaty upon France; and it demanded the relinquishment of the Forts on the lakes and the abandonment of impressment.

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[1] F. R. F., 354.

[2] 10 Washington's Works, 337, 533.

[3] 9 Jefferson's Works, 140.

[4] 3 Jefferson's Works, 591.

[5] 10 Washington's Works, 239. See also Morris's opinion, 1 F. R. F., 412, and Randolph's, Ib., 678.

[6] 3 Jefferson's Works, 563.

It is not likely that the purposes of Genet's mission were fully comprehended by the American Government. By a Treaty in 1762 (first made public in 1836),[1] France ceded Louisiana to Spain. Genet was instructed to sound the disposition of the inhabitants of Louisiana towards the French Republic, and to omit no opportunity to profit by it should circumstances seem favorable. He was also to direct particular attention to the designs of the Americans upon the Mississippi.[2]

In one of his letters Genet says of himself, "I have been seven years a head of the bureau at Versailles, under the direction of Vergennes; I have passed one year at London, two at Vienna, one at Berlin, and five in Russia."[3] His dealings with the United States showed that he had gathered little wisdom from such varied experience.

Before he left Charleston, which at that time had few regular means of communication with Philadelphia, he had armed and commissioned several vessels, and these vessels, dispatched to sea, had made many prizes.[4] On his arrival at Philadelphia, Jefferson met him with complaints; but he justified his course at Charleston and denounced an interference with it as a "State Inquisition";[5] and, admitting what was complained of, he contended that he had not exceeded the rights conferred upon his country by the Treaty of 1778.

The Secretary of State disputed his reasoning; upon which he retorted: "I wish, Sir, that the Federal Government should observe, as far as in their power, the public engagements contracted by both nations; and that by this generous and prudent conduct, they will give at least to the world the example of a true neutrality, which does not consist in the cowardly abandonment of their friends, in the moment when danger menaces them, but in adhering strictly, if they can do no better, to the obligations they have contracted with them."[6] He continued to claim and exercise the right of using the ports of the United States as a base for warlike operations, and, as the discussions went on, his expressions became stronger, and more contemptuous toward the President and the Government of the United States.

His instructions contemplated a political alliance between the two republics.[7] This was never proposed. He did propose, however, the re-arrangement of the debt due to France on the basis of the payment

[1] 6 Garden, Traités de Paix, 266.
[2] 8 Garden, Traités de Paix, 40–41.
[3] 1 F. R. F., 183.
[4] Ib., 150.
[5] Ib.
[6] 1 F. R. F., 151.
[7] Ib., 708.

of a larger installment than was required by the contract, to be expended in the purchase of provisions in the United States:—and the conclusion of a new commercial Treaty. Jefferson declined the former, and as to the latter said that the participation in matters of Treaty given by the Constitution to the Senate would delay any definite answer.[1]

At length his conduct became so violent and indecent (Garden speaks of Washington as "personnellement insulté dans les actes diplomatiques de M. Genet")[2] that Jefferson, on the 15th of August, 1793, instructed Morris to demand his recall. One of the first acts of his successor was to demand his arrest for punishment, which was refused by the Government of the United States "upon reasons of law and magnanimity."[3]

It was several months before the request for his recall could be complied with. Meanwhile, the United States being without a navy, prizes continued to be brought into their ports, and French Consuls attempted to hold prize courts within their jurisdiction.[4] Genet also applied himself diligently at this time to the greater scheme respecting the Louisianas, which Garden regards as the main object of his mission. An armed expedition was organized in South Carolina and Georgia for an attack upon Florida.[5] Garden says that he had assurances that all Louisiana desired to return under the jurisdiction of France, and he made serious preparations for conquering it. He prepared a co-operation of naval forces, which were to appear off the coast of Florida. The principal land forces were to embark from Kentucky, and, descending the Ohio and the Mississippi, were to fall unexpectedly upon New Orleans."[6] The action of the Government and the recall of Genet put a stop to these expeditions against Spain, although Jefferson at that time thought a war with Spain inevitable.[7]

In retaliation the Executive Provisory Council of the French Republic demanded the recall of Morris.[8] In communicating the fact to him Secretary Randolph said: "You have been assailed, however, from another quarter. Nothing has ever been said to any officer of

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[1] 1 F. R. F., 568.

[2] 8 Garden, Traités de Paix, 43, "personally insulted by the acts of Mr. Genet."

[3] 1 F. R. F., 709.

[4] Ib., 147.

[5] Ib., 309, 426.

[6] 8 Garden, Traités de Paix, 42. More detailed account of this affair will be found in 2 Pitkin's Political History, 379.

[7] 3 Jefferson's Works, 591.

[8] 1 F. R. F., 463.

our Government by the Ministers of France which required attention until the 9th day of April last, when Mr. Fauchet communicated to me a part of his instructions, indirectly but plainly making a wish for your recall. In a few days afterwards a letter was received from the Executive Provisory Council, expressive of the same wish. Mr. Fauchet was answered by me, under the direction of the President, as I am sure your good sense will think inevitable, that the act of reciprocity demanded should be performed."[1]

Washington wrote Morris, when his successor went out: "I have so far departed from my determination as to be seated in order to assure you that my confidence in, and friendship and regard for you, remain undiminished * * and it will be nothing new to assure you that I am always and very sincerely, yours, affectionately;"[2] and when his correspondence was called for by the Senate, Washington himself, in association with Hamilton and Randolph, went over it (and it was voluminous) in order that nothing might be communicated which would put in peril those who had given him information, or which would re-act upon him in France.[3]

When the war broke out in February, 1793, Morris wrote Jefferson: "As to the conduct of the war, I believe it to be on the part of the enemy as follows: first, the maritime powers will try to cut off all supplies of provisions, and take France by famine; that is to say, excite revolt among the people by that strong lever. * * It is not improbable that our vessels bringing provisions to France may be captured and taken into England."[4] His prescience was accurate. Such instructions were given to British men-of-war on the 8th day of June, 1793. The British measure, however, was anticipated by a decree of the National Convention of the 9th of May, authorizing ships of war and privateers to seize and carry into the ports of the Republic merchant-vessels which are wholly or in part loaded with provisions, being neutral property bound to an enemy's port, or having on board merchandise belonging to an enemy.[5] On the 23d of the same month the vessels of the United States were exempted from the operation of this decree;[6] but on the 5th of December, 1793, President Washington sent

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[1] Randolph to Morris, April 29, 1794, MS. Dept. of State.
[2] 1 F. R. F., 409.
[3] Randolph to Morris, April 29, 1794, MS. Dept. of State.
[4] 1 F. R. F., 350.
[5] Ib., 244.
[6] Ib.

a special message to Congress, in which he said: "The representative and executive bodies of France have manifested generally a friendly attachment to this country; have given advantages to our commerce and navigation, and have made overtures for placing these advantages on permanent ground; a decree, however, of the National Assembly, subjecting vessels laden with provisions to be carried into their ports, and making enemies' goods lawful prize in the vessel of a friend, contrary to our Treaty, though revoked at one time as to the United States, has been since extended to their vessels also, and has been recently stated to us."[1]

An embargo was laid upon vessels in the port of Bordeaux, "some exceptions in favor of those vessels said to be loaded on account of the republic" being made.[2] Morris was promised daily that the embargo should be taken off, and indemnification be granted for the losses,[3] but it was not done, and "a number of Americans," injured by it, complained to the Minister.[4] The embargo was not removed until the 18th of November, 1794.[5]

Monroe succeeded Morris, and on the 12th of February, 1795, wrote: "Upon my arrival here I found our affairs * * in the worst possible situation. The Treaty between the two Republics was violated. Our commerce was harassed in every quarter and in every article, even that of tobacco not excepted. * * Our former Minister was not only without the confidence of the government, but an object of particular jealousy and distrust. In addition to which it was suspected that we were about to abandon them for a connection with England, and for which purpose *principally* it was believed that Mr. Jay had been sent there."[6]

Monroe's and Jay's services commenced nearly simultaneously. Monroe's commission was dated the 28th of May, and Jay's the 19th of April, 1794. Jay's Treaty was proclaimed the 29th of February, 1796. Monroe was not recalled until the 22d of the following August,[7] but the angry correspondence which preceded his recall[8] may be said to have been caused by a radical difference of opinion respecting his colleague's mission to London.

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[1] 1 F. R. F., 141.
[2] Ib., 401.
[3] Ib., 403.
[4] Ib., 405.
[5] Ib., 689.
[6] Ib., 694.
[7] Ib., 741.
[8] Ib., 658–741.

Whatever may have been the feeling toward Monroe's predecessor, he himself was well received. The Committee of Public Safety welcomed him "with the most distinguished marks of affection," and offered him a house, which offer he declined.[1] He remained in relations of personal good-will with the different Governments of France, and did not fail to urge in his correspondence with the Secretary of State the policy of settling the differences with Great Britain by an alliance with France:[2] nor did he conceal those opinions from the Government to which he was accredited.[3] While the relations between Great Britain and the United States were balancing themselves in London on the issue of Jay's Treaty, those between the United States and France were held in like suspense in Paris.

Monroe endeavored to obtain from Jay a knowledge of the negotiations and a copy of the Treaty. Jay refused to communicate information, except in confidence, and Monroe declined to receive it unless he should be at liberty to communicate it to the French Government.[4] A copy was, however, officially communicated to the French Minister at Washington.[5] When the fate of that Treaty was ensured, the directory at first resolved (and so informed Monroe) to consider the alliance at an end, but they gave no formal notice to that effect.[6] In lieu of that they lodged with him, on the 11th of March, 1796, a summary exposition of the complaints of the French Government against the Government of the United States, namely, (1.) That the United States Courts took jurisdiction over French Prizes, in violation of the Treaty of 1778. (2.) That British men-of-war were admitted into American ports in violation of the same article. (3.) That the United States had failed to empower any one to enforce consular judgments, which was alleged to be a violation of the Convention of 1788. (4.) That the Captain of the *Cassius* had been arrested in Philadelphia for an offense committed on the high seas. (5.) That an outrage had been committed on the effects of the French Minister within the waters of the United States. (6.) That by Jay's Treaty the number of articles contraband of war, which a neutral might not carry, had been increased above the list specified in the treaties with France, which was

[1] 1 F. R. F., 675.

[2] See, among others, his letters in 1 F. R. F. of Nov. 20, 1794, 685; Dec. 2, 1794, 687; Jan. 13, 1795, 691; Feb. 12, 1795, 694; and March 17, 1795, 700.

[3] Ib., 700.

[4] Ib., 517, 691, 700.

[5] Ib., 594.

[6] Ib., 730.

a favor to England. (7.) That provisions had been recognized in Jay's Treaty as an article contraband of war.[1]

On the 2d of July, 1796, the directory decreed that all neutral or allied powers should, without delay, be notified that the flag of the French Republic would treat neutral vessels, either as to confiscation, or to searches, or capture, in the same manner as they shall suffer the English to treat them.[2] Garden says that a second decree relating to the same object was made on the 16th of the same month, and that neither decree has been printed. The translation of the first one is printed among the American documents cited above, as also the translation of a note transmitting it to Monroe.[3] Garden refers to Rondonneau, Répertoire général de la Législation française, Vol. II, p. 311, for the text of the second.[4]

Pickering, the successor of Randolph, noticed the complaints of the French Government in elaborate instructions to Pinckney, Monroe's successor, on the 16th of January, 1797.[5] His replies were in substance, (1.) That the courts had taken jurisdiction over no prizes, except when they were alleged to have been made in violation of the obligations of the United States as a neutral, and that the cases in which interference had taken place were few in number and insignificant. (2.) That it was no violation of the Treaty with France to admit British ships of war into American ports, provided British privateers and prizes were excluded. (3.) That there was no Treaty obligation upon officers of the United States to enforce French consular judgments, and that the clause referred to was exceptional and ought not to be enlarged by construction. (4.) The facts respecting the *Cassius* were stated in order to show that no offense had been committed. (5.) That the executive had taken as efficacious measures as it could to obtain satisfaction for the outrage upon Fauchet. (6.) That the United States would gladly have put the definition of contraband on the same basis in its Treaties with both countries; but that Great Britain would not consent, and an independent arrangement had been made which did not affect the other Treaty arrangement made with France. (7.) That the stipulation as to provisions, without admitting the principle that provisions were contraband, would tend to promote adventures in that article to France.

[1] 1 F. R. F., 732–3.
[2] Ib., 577.
[3] Ib., 739.
[4] 6 Garden, Traités de Paix, 112, note.
[5] 1 F. R. F., 559.

A correspondence respecting the same subject had also taken place at Washington, in which the same complaints of the directory were repeated and other complaints were urged.[1] To the latter Pickering responded thus, in the same note in which he noticed the complaints which had been made in Paris: (1.) *Charge.*—That the negotiation at London had been "enveloped from its origin in the shadow of mystery, and covered with the veil of dissimulation."[2] *Reply.*—"To whom was our Government bound to unveil it? To France or to her Minister? * Did we stipulate to submit the exercise of our sovereignty * * to the direction of the Government of France? Let the Treaty itself furnish an answer."[3] (2.) *Charge.*—That the Government of the United States had made an insidious proclamation of neutrality. *Reply.*—That "this proclamation received the pointed approbation of Congress," and "of the great body of the citizens of the United States." (3.) *Charge.*—That the United States "suffered England, by insulting its neutrality, to interrupt its commerce with France." *Reply.*—That a satisfaction had been demanded and obtained in a peaceable manner—by Treaty, and not by war. (4.) *Charge.*—That they "allowed the French colonies to be declared in a state of blockade." *Reply.*—That the United States, as a neutral, could only question the sufficiency of a blockade, and that they would do so when facts should warrant it. (5.) *Charge.*—That the United States eluded advances for renewing the Treaties of commerce. *Reply.*—That Genet was the first French Minister who had been empowered to treat on those subjects, and the reasons for not treating with him were well known; that his successor, Fauchet, had not been so empowered, and that the United States had always been ready to negotiate with Adet, and all obstacles had come from him since the ratification of Jay's Treaty. (6.) *Charge.*—That the United States were guilty of ingratitude towards France. *Reply.*—That the United States, appreciating their obligations to France, had done something themselves towards the achievement of their independence; that, "of all the loans received from France in the American war, amounting nearly to 53,000,000 livres, the United States under their late Government had been enabled to pay but 2,500,000 livres; that the present Government, after paying up the arrearages and installments mentioned by Mr. Jefferson, had been continually anticipating the subsequent installments until, in the year 1795, the whole of our debt to France was discharged by the

[1] 1 F. R. F., 579.
[2] Ib., 581.
[3] Ib., 561.

payment of 11,500,000 livres, no part of which would have become due until September 2, 1796, and then only 1,500,000, the residue at subsequent periods, the last not until 1802." (7.) *Charge.*—That English vessels were impressing American seamen. *Reply.*—That this concerned the Government of the United States only; and that as an independent nation they are not obliged to account to any other power respecting the measures which they judge proper to take in order to protect their own citizens. Other less important points were discussed, as will be seen by referring to the correspondence.

The course of the French was giving rise to many claims—for spoliations and maltreatment of vessels at sea, for losses by the embargo at Bordeaux, for the non-payment of drafts drawn by the colonial administrations, for the seizure of cargoes of vessels, for non-performance of contracts by government agents, for condemnation of vessels and their cargoes in violation of the provisions of the Treaties of 1778, and for captures under the decree of May 9, 1793. Skipwith, the Consul-General of the United States in France, was directed to examine into and report upon these claims; his report was made on the 20th November, 1795.[1]

On the 9th of September, 1796, Charles Cotesworth Pinckney was sent out to replace Monroe, with a letter from the Secretary of State, saying: "The claims of the American merchants on the French Republic are of great extent, and they are waiting the issue of them, through the public agents, with much impatience. Mr. Pinckney is particularly charged to look into this business, in which the serious interests, and, in some cases, nearly the whole fortunes of our citizens are involved."[2] But the directory, early in October, 1793, recalled their Minister from the United States.[3] Before Pinckney could arrive in France, they, "in order to strike a mortal blow, at the same moment, to British industry and the profitable trade of Americans in France, promulgated the famous law of the 10th Brumaire, year 5 (31st October, 1796), whereby the importation of manufactured articles, whether of English make or of English commerce, was prohibited both by land and sea throughout the French Republic";[4] and, on his arrival, they informed Monroe that the directory would no longer recognize or receive a Minister Plenipotentiary from the United States, until after a reparation of the grievances demanded of the American Government, and which the French Republic has a right to expect."[5]

[1] 1 F. R. F., 753–758.
[2] Ib., 742.
[3] Ib., 745.
[4] 6 Garden, Traités de Paix. 117.
[5] 1 F. R. F., 746.

Pinckney was thereupon ordered to quit France under circumstances of great indignity,[1] and Monroe took his formal leave on the 30th December, 1796. In reply to his speech at that time, the president of the directory said: "By presenting, this day, to the Executive Directory your letters of recall, you offer a very strange spectacle to Europe. France, rich in her freedom, surrounded by the train of her victories, and strong in the esteem of her allies, will not stoop to calculate the consequences of the condescension of the American Government to the wishes of its ancient tyrants. The French Republic expects, however, that the successors of Columbus, Raleigh, and Penn, always proud of their liberty, will never forget that they owe it to France. They will weigh, in their wisdom, the magnanimous friendship of the French people with the crafty caresses of perfidious men, who meditate to bring them again under their former yoke. Assure the good people of America, Mr. Minister, that, like them, we adore liberty; that they will always possess our esteem, and find in the French people that republican generosity which knows how to grant peace as well as to cause its sovereignty to be respected."[2]

The moment this speech was concluded, the directory, accompanied by the Diplomatic Corps, passed into the audience-hall to receive from an Aide-de-Camp of Bonaparte the four Austrian colors taken at the battle of Arcola.[3] The Diplomatic Corps may, therefore, be presumed to have witnessed this indignity.

A French writer of authority thus characterizes these incidents: "Ainsi ce gouvernement prétendait que les États-unis accédassent à ses demandes sans examen, sans discussion préalable; à cet outrage, le gouvernement français en ajouta un autre: lorsque M. Monroe prit publiquement congé du directoire exécutif, Barras, qui en était le président, lui adressa un discours rempli d'expressions qui durent choquer les Américains."[4]

In closing the sketch of what took place during the administration of President Washington, it only remains to say that in addition to the acts of the 2d of July and the 31st of October, 1796, already re-

[1] 2 F. R. F., 710.

[2] 1 F. R. F., 747.

[3] Rédacteur, No. 382, Jan. 1, 1797.

[4] 6 Garden, Traités de Paix, 118. "Thus this government pretended that the United States should accede to its demands without examination, without discussion. To this outrage the French Government added another: While Mr. Monroe took public leave of the Executive Directory, Barras, who was the president, made him a speech full of expressions calculated to shock the Americans."

ferred to, the Executive Directory, on the 2d of March, 1797, decreed that all neutral ships with enemy's property on board might be captured; that enemy's property in neutral bottoms might be confiscated; that the Treaty of 1778 with the United States should be modified by the operation of the favored nation clause, so as to conform to Jay's Treaty, in the following respects: (1) That property in American bottoms not proved to be neutral should be confiscated; (2) That the list of contraband of war should be made to conform to Jay's Treaty; (3) That Americans taking a commission against France should be treated as pirates: and that every American ship should be good prize which should not have on board a crew-list in the form prescribed by the model annexed to the Treaty of 1778, the observance of which was required by the 25th and 27th Articles.[1] The 25th Article made provision for a passport, and for a certificate of cargo. The 27th Article took notice only of the passport; and the model of the passport only was annexed to the Treaty. The Treaty required that the passport should express the name, property, and bulk of the ship, and the name and place of habitation of the master, but it made no provision respecting the crew-list. After the adoption of the Constitution, Congress, by general laws, made provision for national official documents, for proof of, among other things, the facts referred to in the 25th and 27th Articles of the Treaty with France. The name of the ship was to be painted on her stern, and to be shown in the Register;[2] her ownership was to be proved on oath, and be stated in the Register,[3] and her tonnage was to be stated in the same instrument, as the result of our official survey.[4] Equally cogent laws were made to ensure an accurate crew-list.[5] It is probable, therefore, that when the decree of March 2, 1797, was made, there was not an American ship afloat with the required document; and it is equally probable that the French Government, which, with the whole civilized world, had acquiesced in the sufficiency of the new national system, knew that to be the fact. The decree was, therefore, equivalent in its operation to a declaration of maritime war against American commerce. The United States had at that time no navy against which such a war could be carried on.

The difficulties in dealing with these questions were increased by the attitude of other foreign powers. The Batavian Republic besought the

[1] 2 F. R. F., 31.
[2] 1 St. at L., 288.
[3] Ib., 289.
[4] Ib., 290; see also Ib., 55, *et seq.*
[5] Ib., 31.

United States Minister to represent to his Government "how useful it would be to the interests of the inhabitants of the two republics, that the United States should at last seriously take to heart the numberless insults daily committed on their flag by the English";[1] and the Spanish Minister at Philadelphia formally remonstrated against the British Treaty of 1794 as a violation of a Treaty with Spain concluded a year later, because it did not make the neutral flag secure the goods; because it extended the list of contraband; and because it assumed that Great Britain had the right of navigation of the Mississippi.[2]

President Adams, in his speech at the opening of the first session of the Fifth Congress (May 16, 1797), said: "With this conduct of the French Government it will be proper to take into view the public audience given to the late minister of the United States, on his taking leave of the Executive Directory. The speech of the President discloses sentiments more alarming than the refusal of a minister, because more dangerous to our independence and union, and at the same time studiously marked with indignities towards the Government of the United States. It evinces a disposition to separate the people of the United States from the Government; to persuade them that they have different affections, principles, and interests from those of their fellow-citizens whom they themselves have chosen to manage their common concerns; and thus, to produce divisions fatal to our peace. Such attempts ought to be repelled with a decision which shall convince France and the world that we are not a degraded people, humiliated under a colonial spirit of fear and sense of inferiority, fitted to be the miserable instruments of foreign influence, and regardless of national honor, character, and interest. * * *

"The diplomatic intercourse between the United States and France being at present suspended, the Government has no means of obtaining official information from that country; nevertheless there is reason to believe that the Executive Directory passed a decree on the 2d of March last, contravening, in part, the treaty of amity and commerce of 1778, injurious to our lawful commerce, and endangering the lives of our citizens. A copy of this treaty will be laid before you.

"While we are endeavoring to adjust all of our differences with France, by amicable negotiation, the progress of the war in Europe, the depredations on our commerce, the personal injuries to our citizens, and general complexion of affairs, render it my indispensable duty to recommend to your consideration effectual measures of defence.[3]

[1] 2 F. R. F., 13. [2] Ib., 14. [3] Annals 5th Cong., 55.

"It is impossible to conceal from ourselves, or the world, what has been before observed, that endeavors have been employed to foster and establish a division between the government and people of the United States. To investigate the causes which have encouraged this attempt is not necessary. But to repel, by decided and united counsels, insinuations so derogatory to the honor, and aggression so dangerous to the Constitution, union, and even independence of the nation, is an indispensable duty."[1]

The answer of the House to this speech was in a conciliatory spirit; and on the first of the following June Congress yielded so far as to pass a law providing for passports for ships and vessels of the United States.[2]

Congress adjourned on the 10th of July. On the 13th President Adams commissioned Charles Cotesworth Pinckney, John Marshall, and Elbridge Gerry as Envoys to proceed to France and endeavor to renew the relations which had been so rudely broken by the Directory. Their instructions will be found in the 2d volume of the Folio Foreign Relations, pages 153, *et seq.* Among other matters they were to secure an adjustment of the claims for spoliations of citizens of the United States, by this time amounting to many millions of dollars.

They arrived in Paris on the evening of the 4th of October, 1797,[3] and at once notified the Foreign Minister of their presence and requested an interview. Instead of receiving them, three gentlemen, who have become known in history as X, Y, and Z, waited upon them at various times, sometimes singly and sometimes together, and claimed to speak for Talleyrand and the Directory. They told the Envoys that they must pay money, "a great deal of money";[4] and when they were asked how much, they replied "fifty thousand pounds sterling"[5] as a douceur to the Directory, and a loan to France of thirty-two millions of Dutch florins. They said that the passages in the President's speech, which are quoted above, had offended the Directory, and must be retracted, and they urged upon the commissioners in repeated interviews the necessity of opening the negotiations by proposals to that effect.[6]

The American commissioners listened to their statements, and after consultation determined that they "should hold no more indirect inter-

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[1] Annals 5th Cong. 59.
[2] 1 St. at L., 489.
[3] 2 F. R. F., 157.
[4] Ib., 159.
[5] Ib.
[6] Ib., 158–168.

course with the Government.[1] They addressed a letter to Talleyrand on the 11th of November, informing him that they were ready to negotiate.[2] They got no answer; but on the 14th of December, X appeared again,[3] on the 17th Y appeared,[4] and on the 20th "a lady, who is well acquainted with M. Talleyrand," talked to Pinckney on the subject;[5] still they got no answer from Talleyrand, and on the 18th of January they read the announcement of a decree that every vessel found at sea loaded with merchandise the production of England should be good prize.[6] Though unrecognized, they addressed an elaborate letter on the 27th of January, 1798, to Talleyrand, setting forth in detail and with great ability the grievances of the United States.[7] On the 2d of March, they had an interview with him. He repeated that the Directory had taken offense at Mr. Adams's speech, and added that they had been wounded by the last speech of President Washington. He complained that the Envoys had not been to see him personally; and he urged that they should propose a loan to France.[8] Pinckney said that the propositions seemed to be those made by X and Y. The Envoys then said that they had no power to agree to make such a loan. On the 18th of March, Talleyrand transmitted his reply to their note. He dwelt upon Jay's Treaty as the principal grievance of France. He says "he will content himself with observing, summarily, that in this Treaty everything having been calculated to turn the neutrality of the United States to the disadvantage of the French Republic, and to the advantage of England; that the Federal Government having in this act made to Great Britain concessions the most unheard of, the most incompatible with the interests of the United States, the most derogatory to the alliance which subsisted between the said States and the French Republic, the latter was perfectly free, in order to avoid the inconveniences of the Treaty of London, to avail itself of the preservative means with which the law of nature, the laws of nations, and prior treaties furnish it." He closed by stating "that notwithstanding the kind of prejudice which has been entertained with respect to them, the Executive Directory is disposed to treat with that one of the three whose opinions, presumed to be more impartial, promise, in the course of the explanation, more of that reciprocal confidence which is indispensable."[9]

[1] 2 F. R. F., 164.
[2] Ib., 166.
[3] Ib.
[4] Ib., 177.
[5] Ib., 167.
[6] 1 F. R. F., 182.
[7] Ib., 169.
[8] Ib., 186.
[9] Ib., 190–191.

Gerry was the member referred to. The three Envoys answered that no one of the three was authorized to take the negotiation upon himself.[1] Pinckney and Marshall then left Paris. Gerry remained. Talleyrand tried to induce him to enter into negotiations for a loan to France, but he refused.[2] Before he left Paris, a mail arrived from America bringing printed copies of the despatches of the Envoys, with accounts of their interviews with X, Y, and Z and "the lady." Talleyrand at once asked Gerry for the four names.[3] Gerry gave him the name of Y, Mr. Bellamy, and Z, Mr. Hautval, and said that he could not give the lady's name, and would not give X's name. The name of X is preserved in the Department of State. Gerry left Paris on the 26th July, 1798.

The President transmitted to Congress the reports of the Envoys as fast as they were received; and when he heard of Marshall's arrival in America he said to Congress, "I will never send another Minister to France without assurances that he will be received, respected, and honored as the representative of a great, free, powerful, and independent nation."[4] The statutes of the United States show the impression which the news made upon Congress. The "Act to provide an additional armament for the further protection of the trade of the United States, and for other purposes,"[5] is the first of a series of acts. It was passed in the House amid great excitement. Edward Livingston, who closed the debate on the part of the opposition, said: "Let no man flatter himself that the vote which has been given is not a declaration of war. Gentlemen know that this is the case."[6] This was followed in the course of a few weeks by acts for organizing a Navy Department;[7] for increasing or regulating the Army;[8] for purchasing arms;[9] for construction of vessels;[10] for authorizing the capture of French vessels;[11] for suspending all intercourse with France;[12] for authorizing merchant-vessels to protect themselves;[13] for abrogating the Treaties with France;[14] for establishing a Marine Corps;[15] and

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[1] 1 F. R. F., 199.
[2] Ib., 204–238.
[3] Ib., 210.
[4] Ib., 199.
[5] 1 St. at L., 552.
[6] 2 Annals 5th Cong., 1519.
[7] 1 St. at L., 553.
[8] Ib., 552, 558, 604.
[9] Ib., 555, 576.
[10] Ib., 556, 569, 608.
[11] Ib., 561, 578.
[12] Ib., 565.
[13] Ib., 572.
[14] Ib., 578.
[15] Ib., 594.

for authorizing the borrowing of money.[1] In the next session of Congress further augmentation of the Navy[2] and of the Army[3] was made; the suspension of intercourse was prolonged,[4] and provisions were made for restoring captured French citizens,[5] and for retaliations in case of death from impressments.[6]

Washington was made Lieutenant-General and Commander-in-Chief of the Army, and, in accepting, said: "The conduct of the Directory of France towards our country; their insidious hostility to its Government; their various practices to withdraw the affections of the people from it; the evident tendency of their acts and those of their agents to countenance and invigorate opposition; their disregard of solemn treaties and the law of nations; their war upon our defenceless commerce; their treatment of our Ministers of peace; and their demands, amounting to tribute, could not fail to excite in me corresponding sentiments with those my countrymen have so generally expressed in affectionate addresses to you."[7]

The Attorney-General gave an opinion that a maritime war existed between France and the United States, authorized by both nations,[8] but Congress never made the constitutional declaration of war, nor was such a declaration made on the other side.

It was on the 21st of June that President Adams informed Congress of the terms on which alone he would be willing to send a new Minister to France. Talleyrand immediately opened indirect means of communication with the American Cabinet through Murray, the American Minister at The Hague,[9] and on the 28th of September he sent word through Pichon, the French Secretary of Legation at the same place, that "whatever plenipotentiary the Government of the United States might send to France in order to terminate the existing differences between the two countries, he would be undoubtedly received with the respect due to the representative of a free, independent and powerful nation.[10] To this proffer, embodying the language of the President's message to Congress, the President replied by empowering Chief-Justice Ellsworth, Mr. Davie, and Mr. Murray "to discuss and settle, by a Treaty, all controversies between the United States and France."[11]

When these Envoys arrived in France they found that the Directory

[1] 1 St. at L., 607.
[2] Ib., 621.
[3] Ib., 725.
[4] Ib., 613.
[5] Ib., 624.
[6] Ib., 743.
[7] Annals 5th Cong., 622.
[8] 1 Op. At. Gen., 84, Lee.
[9] 2 F. R. F., 241.
[10] Ib., 242.
[11] Ib., 243.

had been overthrown,[1] and they had to deal with Bonaparte as first Consul. They succeeded in restoring good relations. An account of their negotiations will be found in the 2d volume of the Folio Edition of the Foreign Relations, pages 307 to 345. Their instructions required them to secure, (1) A claims commission. (2) Abrogation of the old treaties. (3) Abolition of the guarantee of 1778. (4) No agreement for a loan. (5) No engagements inconsistent with prior Treaties, meaning doubtless Jay's Treaty. (6) No renewal of the peculiar jurisdiction conferred on consuls by the convention of 1788. (7) Duration of a Treaty not to exceed twelve years.[2]

The negotiators exchanged their powers on the 7th of April, 1800,[3] and concluded a treaty on the 30th of the following September, which (1) declared that the parties could not agree upon the indemnities; (2) nor as to the old treaties; (3) and consequently was silent respecting the guarantee; but (4) made no provisions for a loan; (5) made no engagements inconsistent with prior treaties; (6) did not renew the objectionable consular provisions; and (7) no limitation was set to its operation.

When it was submitted to the Senate that body advised its ratification, provided the second article concerning indemnities should be expunged, and that the convention should be in force for eight years from the date of the exchange of the ratifications. The French Government assented to the limitation of the duration of the Treaty, and to the expunging of the 2d article, upon condition that it should be understood that thereby each party renounced the pretensions which were the objects of the article; which was assented to by the Senate.[4]

On the day following the signature of this Treaty in Paris (Sept. 30, 1800), a secret treaty was concluded at St. Ildefonso between France and Spain, which came to be of importance to the United States. This was the Treaty by which Louisiana was restored to France. In consideration of the elevation of the Duke of Parma to the rank of King, and the enlargement of his territory, it was agreed that "Sa Majesté Catholique donnera les ordres nécessaires pour que la France occupe la Louisiane au moment où S. A. R. le duc de Parme sera mise en possession de ses nouveaux Etats."[5]

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[1] 2 F. R. F., 307.

[2] Ib., 306.

[3] Ib., 313–14.

[4] Ib., 344.

[5] 8 Garden, Traités de Paix, 48; S. Doc. 56, 2d Sess. 23d Cong. "His Catholic Majesty will give the necessary orders so that France may occupy Louisiana the moment when His Royal Highness the Duke of Parma shall be put in possession of his new State."

The United States were anxious concerning the effect of this upon their future.[1] But the failure of the Treaty of Amiens to restore a permanent peace induced Napoleon to determine to transfer all the Louisianas to the United States. He consulted Berthier and Marbois. The conference lasted far into the night. Berthier opposed the cession. Marbois favored it. Early the next morning he called Marbois to him and said, "Je nonce à la Louisiane. Ce n'est point seulement la Nouvelle-Orléans que je veux céder; c'est toute la colonie sans en rien réserver."[2]

The interview took place on the 10th of April;[3] the decision was made on the morning of the 11th. On the afternoon of the same day the negotiations opened by an abrupt question from Talleyrand to Livingston whether the United States wished for the whole of Louisiana. Livingston, who had been instructed only to negotiate for New Orleans, and the Mississippi as a boundary line,[4] said, "No, we only want New Orleans and the Floridas."[5] But he soon found that he was dealing with a much larger question, and Monroe arrived the same day from America with fresh instructions to aid in its disposition. Napoleon empowered Marbois to negotiate for France, and instructed him to consent to the transfer, provided he could secure 50,000,000 francs. He did secure 80,000,000, twenty millions of which were to be applicable to the extinguishment of claims against France, and sixty millions were payable in cash to France. When it was concluded, Napoleon said: "Cette accession de territoire, affermit pour toujours la puissance des Etats-Unis, et je viens de donner à l'Angleterre un rival maritime, qui tôt ou tard abaissera son orgueil."[6]

Between the conclusion of the two Treaties of 1800 and 1803 a correspondence arose respecting the construction of the former Treaty.[7] Robert Livingston, the Minister of the United States, complained that the Council of Prizes (which he regarded "as a political board")[8] was proceeding in violation of the provisions of the Treaty. On the

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[1] 2 F. R. F., 552.

[2] 8 Garden, Traités de Paix, 64. "I renounce Louisiana. It is not New Orleans only that I wish to cede; it is all the colony, reserving nothing."

[3] 8 Garden, Traités de Paix, 54. [5] 2 F. R. F., 552.

[4] 6 F. R. F., 162, No. 460.

[6] 8 Garden, Traités de Paix, 88. "This accession of territory consolidates forever the power of the United States, and I have just given to England a maritime rival who sooner or later will humble her pride."

[7] 6 F. R. F., 154–168. [8] Ib., 156.

26th of January, 1802, he was "almost hopeless" as to the claims.[1] His anxiety communicated itself to Madison.[2] The French Court next proposed to meet the French obligation in paper money,[3] while the appropriations on the American side were payable in coin.[4] Livingston thought Bonaparte stood in the way, and that, should anything happen to him, France would "very soon be able to look all demands in the face."[5] Monroe was sent out to aid in the negotiations, with special powers as to New Orleans and the Floridas.[6] He arrived just in time to find the First Consul bent on parting with Louisiana and settling with the United States. On the 9th of March, 1803, Talleyrand was already giving signs of yielding. He expressed surprise at the amount of the American claims advanced by Livingston (20,000,000 francs), but avowed his purpose of paying them, whatever they might be, and asked for a specified statement.[7] An explanation, which may account for part of this, may be found in two dates. The peace of Amiens was signed the 25th of March, 1802; the declaration of the renewal of the war was dated the 18th of May, 1803.

The Convention of 1800, after providing for the restoration of certain captured property, contained a provision that the debts contracted by one of the two nations with individuals of the other should be paid,[8] but that this clause should not extend to indemnities claimed on account of captures or condemnations. The Convention of 1803 stipulated that these debts, with interest at six per cent., should not exceed twenty millions of francs.

To entitle a claimant to participate in this fund, it was necessary: 1. That he should be a citizen of the United States who had been, and was at the time of the signing of the Treaty, a creditor of France, and who had no established house of commerce in France, England, or other country than the United States, in partnership with foreigners; 2. That, if the claim were for a debt, it should have been contracted for supplies before the 30th of September, 1800, and should have been claimed of the actual Government of France before the 30th of April, 1803; 3. That, if for prizes, it should not be for a prize whose condemnation had been or should be confirmed; 4. That, if for captures, it should not be a case in which the council of prizes had ordered restitu-

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[1] 6 F. R. F., 156.
[2] Ib., 158.
[3] Ib., 161.
[4] Ib., 162.
[5] Ib., 163.
[6] Ib., 166.
[7] Ib., 167–168.
[8] Art. 5.

tion, or in which the claimant could not have had recourse to the government of the French Republic, or where the captors were sufficient; 5. That it should either be for supplies, for embargoes, or for prizes made at sea, in which the appeal had been properly lodged within the time mentioned in the Convention of 1800.

The distribution of this money gave rise to some sharp correspondence.[1] The claims which were excluded from participation in the distribution have become known as the "French Spoliation Claims." They have been often the subject of Congressional discussion and report.[2]

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[1] 6 F. R. F., 182–207.

[2] See particularly 5 F. R. F., 314, 352, and 6 F. R. F., 3–207, 558, 1121, and S. R. 10, 2d Sess. 41st Cong., and the various authorities there cited; also, among others, an elaborate debate in the Senate, 11 Debates, 2d Sess. 23d Cong. [See the Act of Congress approved January 20, 1885 (*post* p. 92) by which the claims were referred for ascertainment as to facts to the Court of Claims.]

PART I.—STATE PAPERS

Extracts from Messages of President Adams, and Replies of the Senate and House

SPECIAL SESSION MESSAGE[1]

UNITED STATES, *May 16, 1797.*

Gentlemen of the Senate and Gentlemen of the House of Representatives:

The personal inconveniences to the members of the Senate and of the House of Representatives in leaving their families and private affairs at this season of the year are so obvious that I the more regret the extraordinary occasion which has rendered the convention of Congress indispensable.

It would have afforded me the highest satisfaction to have been able to congratulate you on a restoration of peace to the nations of Europe whose animosities have endangered our tranquillity; but we have still abundant cause of gratitude to the Supreme Dispenser of National Blessings for general health and promising seasons, for domestic and social happiness, for the rapid progress and ample acquisitions of industry through extensive territories, for civil, political, and religious liberty. While other states are desolated with foreign war or convulsed with intestine divisions, the United States present the pleasing prospect of a nation governed by mild and equal laws, generally satisfied with the possession of their rights, neither envying the advantages nor fearing the power of other nations, solicitous only for the maintenance of order and justice and the preservation of liberty, increasing daily in their attachment to a system of government in proportion to their experience of its utility, yielding a ready and general obedience to laws flowing from the reason and resting on the only solid foundation—the affections of the people.

It is with extreme regret that I shall be obliged to turn your thoughts to other circumstances, which admonish us that some of these felicities may not be lasting. But if the tide of our prosperity is full and a reflux commencing, a vigilant circumspection becomes us, that we may meet out reverses with fortitude and extricate ourselves from their consequences with all the skill we possess and all the efforts in our power.

In giving to Congress information of the state of the Union and rec-

[1] Richardson, Messages, vol. 1, p. 233.

ommending to their consideration such measures as appear to me to be necessary or expedient, according to my constitutional duty, the causes and the objects of the present extraordinary session will be explained.

After the President of the United States received information that the French Government had expressed serious discontents at some proceedings of the Government of these States said to affect the interests of France, he thought it expedient to send to that country a new minister, fully instructed to enter on such amicable discussions and to give such candid explanations as might happily remove the discontents and suspicions of the French Government and vindicate the conduct of the United States. For this purpose he selected from among his fellow-citizens a character whose integrity, talents, experience, and services had placed him in the rank of the most esteemed and respected in the nation. The direct object of his mission was expressed in his letter of credence to the French Republic, being "to maintain that good understanding which from the commencement of the alliance had subsisted between the two nations, and to efface unfavorable impressions, banish suspicions, and restore that cordiality which was at once the evidence and pledge of a friendly union." And his instructions were to the same effect, "faithfully to represent the disposition of the Government and people of the United States (their disposition being one), to remove jealousies and obviate complaints by shewing that they were groundless, to restore that mutual confidence which had been so unfortunately and injuriously impaired, and to explain the relative interests of both countries and the real sentiments of his own."

A minister thus specially commissioned it was expected would have proved the instrument of restoring mutual confidence between the two Republics. The first step of the French Government corresponded with that expectation. A few days before his arrival at Paris the French minister of foreign relations informed the American minister then resident at Paris of the formalities to be observed by himself in taking leave, and by his successor preparatory to his reception. These formalities they observed, and on the 9th of December presented officially to the minister of foreign relations, the one a copy of his letters of recall, the other a copy of his letters of credence.

These were laid before the Executive Directory. Two days afterwards the minister of foreign relations informed the recalled American minister that the Executive Directory had determined not to re-

ceive another minister plenipotentiary from the United States until after the redress of grievances demanded of the American Government, and which the French Republic had a right to expect from it. The American minister immediately endeavored to ascertain whether by refusing to receive him it was intended that he should retire from the territories of the French Republic, and verbal answers were given that such was the intention of the Directory. For his own justification he desired a written answer, but obtained none until toward the last of January, when, receiving notice in writing to quit the territories of the Republic, he proceeded to Amsterdam, where he proposed to wait for instruction from this Government. During his residence at Paris cards of hospitality were refused him, and he was threatened with being subjected to the jurisdiction of the minister of police; but with becoming firmness he insisted on the protection of the law of nations due to him as the known minister of a foreign power. You will derive further information from his dispatches, which will be laid before you.

As it is often necessary that nations should treat for the mutual advantage of their affairs, and especially to accommodate and terminate differences, and as they can treat only by ministers, the right of embassy is well known and established by the law and usage of nations. The refusal on the part of France to receive our minister is, then, the denial of a right; but the refusal to receive him until we have acceded to their demands without discussion and without investigation is to treat us neither as allies nor as friends, nor as a sovereign state.

With this conduct of the French Government it will be proper to take into view the public audience given to the late minister of the United States on his taking leave of the Executive Directory. The speech of the President discloses sentiments more alarming than the refusal of a minister, because more dangerous to our independence and union and at the same time studiously marked with indignities toward the Government of the United States. It evinces a disposition to separate the people of the United States from the Government, to persuade them that they have different affections, principles, and interests from those of their fellow-citizens whom they themselves have chosen to manage their common concerns, and thus to produce divisions fatal to our peace. Such attempts ought to be repelled with a decision which shall convince France and the world that we are not a degraded people, humiliated under a colonial spirit of fear and sense of inferiority,

fitted to be the miserable instruments of foreign influence, and regardless of national honor, character, and interest.

I should have been happy to have thrown a veil over these transactions if it had been possible to conceal them; but they have passed on the great theater of the world, in the face of all Europe and America, and with such circumstances of publicity and solemnity that they can not be disguised and will not soon be forgotten. They have inflicted a wound in the American breast. It is my sincere desire, however, that it may be healed.

It is my sincere desire, and in this I presume I concur with you and with our constituents, to preserve peace and friendship with all nations; and believing that neither the honor nor the interest of the United States absolutely forbid the repetition of advances for securing these desirable objects with France, I shall institute a fresh attempt at negotiation, and shall not fail to promote and accelerate an accommodation on terms compatible with the rights, duties, interests, and honor of the nation. If we have committed errors, and these can be demonstrated, we shall be willing to correct them; if we have done injuries, we shall be willing on conviction to redress them; and equal measures of justice we have a right to expect from France and every other nation.

The diplomatic intercourse between the United States and France being at present suspended, the Government has no means of obtaining official information from that country. Nevertheless, there is reason to believe that the Executive Directory passed a decree on the 2d of March last contravening in part the treaty of amity and commerce of 1778, injurious to our lawful commerce and endangering the lives of our citizens. A copy of this decree will be laid before you.

While we are endeavoring to adjust all our differences with France by amicable negotiation, the progress of the war in Europe, the depredations on our commerce, the personal injuries to our citizens, and the general complexion of affairs render it my indispensable duty to recommend to your consideration effectual measures of defense.

The commerce of the United States has become an interesting object of attention, whether we consider it in relation to the wealth and finances or the strength and resources of the nation. With a seacoast of near 2,000 miles in extent, opening a wide field for fisheries, navigation, and commerce, a great portion of our citizens naturally apply

their industry and enterprise to these objects. Any serious and permanent injury to commerce would not fail to produce the most embarrassing disorders. To prevent it from being undermined and destroyed it is essential that it receive an adequate protection.

The naval establishment must occur to every man who considers the injuries committed on our commerce, the insults offered to our citizens, and the description of vessels by which these abuses have been practiced. As the sufferings of our mercantile and seafaring citizens can not be ascribed to the omission of duties demandable, considering the neutral situation of our country, they are to be attributed to the hope of impunity arising from a supposed inability on our part to afford protection. To resist the consequences of such impressions on the minds of foreign nations and to guard against the degradation and servility which they must finally stamp on the American character is an important duty of Government.

A naval power, next to the militia, is the natural defense of the United States. The experience of the last war would be sufficient to shew that a moderate naval force, such as would be easily within the present abilities of the Union, would have been sufficient to have baffled many formidable transportations of troops from one State to another, which were then practiced. Our seacoasts, from their great extent, are more easily annoyed and more easily defended by a naval force than any other. With all the materials our country abounds; in skill our naval architects and navigators are equal to any, and commanders and seamen will not be wanting.

But although the establishment of a permanent system of naval defense appears to be requisite, I am sensible it can not be formed so speedily and extensively as the present crisis demands. Hitherto I have thought proper to prevent the sailing of armed vessels except on voyages to the East Indies, where general usage and the danger from pirates appeared to render the permission proper. Yet the restriction has originated solely from a wish to prevent collisions with the powers at war, contravening the act of Congress of June, 1794, and not from any doubt entertained by me of the policy and propriety of permitting our vessels to employ means of defense while engaged in a lawful foreign commerce. It remains for Congress to prescribe such regulations as will enable our seafaring citizens to defend themselves against violations of the law of nations, and at the same time restrain them

from committing acts of hostility against the powers at war. In addition to this voluntary provision for defense by individual citizens, it appears to me necessary to equip the frigates, and provide other vessels of inferior force, to take under convoy such merchant vessels as shall remain unarmed.

The greater part of the cruisers whose depredations have been most injurious have been built and some of them partially equipped in the United States. Although an effectual remedy may be attended with difficulty, yet I have thought it my duty to present the subject generally to your consideration. If a mode can be devised by the wisdom of Congress to prevent the resources of the United States from being converted into the means of annoying our trade, a great evil will be prevented. With the same view, I think it proper to mention that some of our citizens resident abroad have fitted out privateers, and others have voluntarily taken the command, or entered on board of them, and committed spoliations on the commerce of the United States. Such unnatural and iniquitous practices can be restrained only by severe punishments.

But besides a protection of our commerce on the seas, I think it highly necessary to protect it at home, where it is collected in our most important ports. The distance of the United States from Europe and the well-known promptitude, ardor, and courage of the people in defense of their country happily diminish the probability of invasion. Nevertheless, to guard against sudden and predatory incursions the situation of some of our principal seaports demands your consideration. And as our country is vulnerable in other interests besides those of its commerce, you will seriously deliberate whether the means of general defense ought not to be increased by an addition to the regular artillery and cavalry, and by arrangements for forming a provisional army.

With the same view, and as a measure which, even in a time of universal peace, ought not to be neglected, I recommend to your consideration a revision of the laws for organizing, arming, and disciplining the militia, to render that natural and safe defense of the country efficacious.

Although it is very true that we ought not to involve ourselves in the political system of Europe, but to keep ourselves always distinct and separate from it if we can, yet to effect this separation, early, punctual, and continual information of the current chain of events and

of the political projects in contemplation is no less necessary than if we were directly concerned in them. It is necessary, in order to the discovery of the efforts made to draw us into the vortex, in season to make preparations against them. However we may consider ourselves, the maritime and commercial powers of the world will consider the United States of America as forming a weight in that balance of power in Europe which never can be forgotten or neglected. It would not only be against our interest, but it would be doing wrong to one-half of Europe, at least, if we should voluntarily throw ourselves into either scale. It is a natural policy for a nation that studies to be neutral to consult with other nations engaged in the same studies and pursuits. At the same time that measures might be pursued with this view, our treaties with Prussia and Sweden, one of which is expired and the other near expiring, might be renewed.

Address of the Senate to John Adams, President of the United States[1]

Sir: The Senate of the United States request you to accept their acknowledgments for the comprehensive and interesting detail you have given in your speech to both Houses of Congress on the existing state of the Union.

While we regret the necessity of the present meeting of the Legislature, we wish to express our entire approbation of your conduct in convening it on this momentous occasion.

The superintendence of our national faith, honor, and dignity being in a great measure constitutionally deposited with the Executive, we observe with singular satisfaction the vigilance, firmness, and promptitude exhibited by you in this critical state of our public affairs, and from thence derive an evidence and pledge of the rectitude and integrity of your Administration. And we are sensible it is an object of primary importance that each branch of the Government should adopt a language and system of conduct which shall be cool, just, and dispassionate, but firm, explicit, and decided.

We are equally desirous with you to preserve peace and friendship with all nations, and are happy to be informed that neither the honor nor interests of the United States forbid advances for securing those

[1] Richardson, Messages, vol. 1, p. 239.

desirable objects by amicable negotiation with the French Republic. This method of adjusting national differences is not only the most mild, but the most rational and humane, and with governments disposed to be just can seldom fail of success when fairly, candidly, and sincerely used. If we have committed errors and can be made sensible of them, we agree with you in opinion that we ought to correct them, and compensate the injuries which may have been consequent thereon; and we trust the French Republic will be actuated by the same just and benevolent principles of national policy.

We do therefore most sincerely approve of your determination to promote and accelerate an accommodation of our existing differences with that Republic by negotiation, on terms compatible with the rights, duties, interests, and honor of our nation. And you may rest assured of our most cordial coöperation so far as it may become necessary in this pursuit.

Peace and harmony with all nations is our sincere wish; but such being the lot of humanity that nations will not always reciprocate peaceable dispositions, it is our firm belief that effectual measures of defense will tend to inspire that national self-respect and confidence at *home* which is the unfailing source of respectability *abroad,* to check aggression and prevent war.

While we are endeavoring to adjust our differences with the French Republic by amicable negotiation, the progress of the war in Europe, the depredations on our commerce, the personal injuries to our citizens, and the general complexion of affairs prove to us your vigilant care in recommending to our attention effectual measures of defense.

Those which you recommend, whether they relate to external defense by permitting our citizens to arm for the purpose of repelling aggressions on their commercial rights, and by providing sea convoys, or to internal defense by increasing the establishments of artillery and cavalry, by forming a provisional army, by revising the militia laws, and fortifying more completely our ports and harbors, will meet our consideration under the influence of the same just regard for the security, interest, and honor of our country which dictated your recommendation.

Practices so unnatural and iniquitous as those you state, of our own citizens converting their property and personal exertions into the means of annoying our trade and injuring their fellow-citizens, deserve legal severity commensurate with their turpitude.

Although the Senate believe that the prosperity and happiness of our country does not depend on general and extensive political connections with European nations, yet we can never lose sight of the propriety as well as necessity of enabling the Executive, by sufficient and liberal supplies, to maintain and even extend our foreign intercourse as exigencies may require, reposing full confidence in the Executive, in whom the Constitution has placed the powers of negotiation.

We learn with sincere concern that attempts are in operation to alienate the affections of our fellow-citizens from their Government. Attempts so wicked, wherever they exist, can not fail to excite our utmost abhorrence. A government chosen by the people for their own safety and happiness, and calculated to secure both, can not lose their affections so long as its administration pursues the principles upon which it was erected; and your resolution to observe a conduct just and impartial to all nations, a sacred regard to our national engagements, and not to impair the rights of our Government, contains principles which can not fail to secure to your Administration the support of the National Legislature to render abortive every attempt to excite dangerous jealousies among us, and to convince the world that our Government and your administration of it can not be separated from the affectionate support of every good citizen. And the Senate can not suffer the present occasion to pass without thus publicly and solemnly expressing their attachment to the Constitution and Government of their country; and as they hold themselves responsible to their constituents, their consciences, and their God, it is their determination by all their exertions to repel every attempt to alienate the affections of the people from the Government, so highly injurious to the honor, safety, and independence of the United States.

We are happy, since our sentiments on the subject are in perfect unison with yours, in this public manner to declare that we believe the conduct of the Government has been just and impartial to foreign nations, and that those internal regulations which have been established for the preservation of peace are in their nature proper and have been fairly executed.

And we are equally happy in possessing an entire confidence in your abilities and exertions in your station to maintain untarinshed the honor, preserve the peace, and support the independence of our country, to acquire and establish which, in connection with your fellow-

citizens, has been the virtuous effort of a principal part of your life.

To aid you in these arduous and honorable exertions, as it is our duty so it shall be our faithful endeavor; and we flatter ourselves, sir, that the proceedings of the present session of Congress will manifest to the world that although the United States love peace, they will be independent; that they are sincere in their declarations to be just to the French and all other nations, and expect the same in return.

If a sense of justice, a love of moderation and peace, shall influence their councils, which we sincerely hope we shall have just grounds to expect, peace and amity between the United States and all nations will be preserved.

But if we are so unfortunate as to experience injuries from any foreign power, and the ordinary methods by which differences are amicably adjusted between nations shall be rejected, the determination "not to surrender in any manner the rights of the Government," being so inseparably connected with the dignity, interest, and independence of our country, shall by us be steadily and inviolably supported.

TH: JEFFERSON,

Vice-President of the United States and President of the Senate.

MAY 23, 1797.

Reply of the President[1]

Mr. Vice-President and Gentlemen of the Senate:

It would be an affectation in me to dissemble the pleasure I feel on receiving this kind address.

My long experience of the wisdom, fortitude, and patriotism of the Senate of the United States enhances in my estimation the value of those obliging expressions of your approbation of my conduct, which are a generous reward for the past and an affecting encouragement to constancy and perseverance in future.

Our sentiments appear to be so entirely in unison that I can not but believe them to be the rational result of the understandings and the natural feelings of the hearts of Americans in general on contemplating the present state of the nation.

While such principles and affections prevail they will form an indissoluble bond of union and a sure pledge that our country has no

[1] Richardson, Messages, vol. 1, p. 242.

essential injury to apprehend from any portentous appearances abroad. In a humble reliance on Divine Providence we may rest assured that while we reiterate with sincerity our endeavors to accommodate all our differences with France, the independence of our country can not be diminished, its dignity degraded, or its glory tarnished by any nation or combination of nations, whether friends or enemies.

JOHN ADAMS.

MAY 24, 1797.

Address of the House of Representatives to John Adams, President of the United States[1]

SIR: The interesting details of those events which have rendered the convention of Congress at this time indispensable (communicated in your speech to both Houses) has excited in us the strongest emotions. Whilst we regret the occasion, we can not omit to testify our approbation of the measure, and pledge ourselves that no considerations of private inconvenience shall prevent on our part a faithful discharge of the duties to which we are called.

We have constantly hoped that the nations of Europe, whilst desolated by foreign wars or convulsed by intestine divisions, would have left the United States to enjoy that peace and tranquillity to which the impartial conduct of our Government has entitled us, and it is now with extreme regret we find the measures of the French Republic tending to endanger a situation so desirable and interesting to our country.

Upon this occasion we feel it our duty to express in the most explicit manner the sensations which the present crisis has excited, and to assure you of our zealous coöperation in those measures which may appear necessary for our security or peace.

Although it is the earnest wish of our hearts that peace may be maintained with the French Republic and with all the world, yet we never will surrender those rights which belong to us as a nation; and whilst we view with satisfaction the wisdom, dignity, and moderation which have marked the measures of the Supreme Executive of our country in his attempt to remove by candid explanations the complaints and jealousies of France, we feel the full force of that indignity which

[1] Richardson, Messages, vol. 1, p. 242.

has been offered our country in the rejection of its minister. No attempts to wound our rights as a sovereign State will escape the notice of our constituents. They will be felt with indignation and repelled with that decision which shall convince the world that we are not a degraded people; that we can never submit to the demands of a foreign power without examination and without discussion.

Knowing as we do the confidence reposed by the people of the United States in their Government, we can not hesitate in expressing our indignation at any sentiments tending to derogate from that confidence. Such sentiments, wherever entertained, serve to evince an imperfect knowledge of the opinions of our constituents. An attempt to separate the people of the United States from their Government is an attempt to separate them from themselves; and although foreigners who know not the genius of our country may have conceived the project, and foreign emissaries may attempt the execution, yet the united efforts of our fellow-citizens will convince the world of its impracticability.

Sensibly as we feel the wound which has been inflicted by the transactions disclosed in your communications, yet we think with you that neither the honor nor the interest of the United States forbid the repetition of advances for preserving peace; we therefore receive with the utmost satisfaction your information that a fresh attempt at negotiation will be instituted, and we cherish the hope that a mutual spirit of conciliation, and a disposition on the part of France to compensate for any injuries which may have been committed upon our neutral rights, and on the part of the United States to place France on grounds similar to those of other countries in their relation and connection with us (if any inequalities shall be found to exist), will produce an accommodation compatible with the engagements, rights, duties, and honor of the United States. Fully, however, impressed with the uncertainty of the result, we shall prepare to meet with fortitude any unfavorable events which may occur, and to extricate ourselves from their consequences with all the skill we possess and all the efforts in our power. Believing with you that the conduct of the Government has been just and impartial to foreign nations, that the laws for the preservation of peace have been proper, and that they have been fairly executed, the Representatives of the people do not hesitate to declare that they will give their most cordial support to the execution of principles so deliberately and uprightly established.

The many interesting subjects which you have recommended to our consideration, and which are so strongly enforced by this momentous occasion, will receive every attention which their importance demands, and we trust that, by the decided and explicit conduct which will govern our deliberations, every insinuation will be repelled which is derogatory to the honor and independence of our country.

Permit us in offering this address to express our satisfaction at your promotion to the first office in the Government and our entire confidence that the preëminent talents and patriotism which have placed you in this distinguished situation will enable you to discharge its various duties with satisfaction to yourself and advantage to our common country.

JUNE 2, 1797.

Reply of the President[1]

Mr. Speaker and Gentlemen of the House of Representatives:

I receive with great satisfaction your candid approbation of the convention of Congress, and thank you for your assurances that the interesting subjects recommended to your consideration shall receive the attention which their importance demands, and that your cooperation may be expected in those measures which may appear necessary for our security or peace.

The declarations of the Representatives of this nation of their satisfaction at my promotion to the first office in this Government and of their confidence in my sincere endeavors to discharge the various duties of it with advantage to our common country have excited my most grateful sensibility.

I pray you, gentlemen, to believe and to communicate such assurance to our constituents that no event which I can foresee to be attainable by any exertions in the discharge of my duties can afford me so much cordial satisfaction as to conduct a negotiation with the French Republic to a removal of prejudices, a correction of errors, a dissipation of umbrages, an accommodation of all differences, and a restoration of harmony and affection to the mutual satisfaction of both nations. And whenever the legitimate organs of intercourse shall be restored and the real sentiments of the two Governments can be candidly communicated

[1] Richardson, Messages, vol. 1, p. 244.

to each other, although strongly impressed with the necessity of collecting ourselves into a manly posture of defense, I nevertheless entertain an encouraging confidence that a mutual spirit of conciliation, a disposition to compensate injuries and accommodate each other in all our relations and connections, will produce an agreement to a treaty consistent with the engagements, rights, duties, and honor of both nations.

JOHN ADAMS.

JUNE 3, 1797.

FIRST ANNUAL ADDRESS[1]

UNITED STATES, *November 22, 1797.*

Gentlemen of the Senate and Gentlemen of the House of Representatives:

Although I can not yet congratulate you on the reëstablishment of peace in Europe and the restoration of security to the persons and properties of our citizens from injustice and violence at sea, we have, nevertheless, abundant cause of gratitude to the source of benevolence and influence for interior tranquillity and personal security, for propitious seasons, prosperous agriculture, productive fisheries, and general improvements, and, above all, for a rational spirit of civil and religious liberty and a calm but steady determination to support our sovereignty, as well as our moral and our religious principles, against all open and secret attacks.

Our envoys extraordinary to the French Republic embarked—one in July, the other early in August—to join their colleague in Holland. I have received intelligence of the arrival of both of them in Holland, from whence they all proceeded on their journeys to Paris within a few days of the 19th of September. Whatever may be the result of this mission, I trust that nothing will have been omitted on my part to conduct the negotiation to a successful conclusion, on such equitable terms as may be compatible with the safety, honor, and interest of the United States. Nothing, in the meantime, will contribute so much to the preservation of peace and the attainment of justice as a manifestation of that energy and unanimity of which on many former occasions the people of the United States have given such memorable proofs,

[1] Richardson, Messages, vol. 1, p. 250.

and the exertion of those resources for national defense which a beneficent Providence has kindly placed within their power.

It may be confidently asserted that nothing has occurred since the adjournment of Congress which renders inexpedient those precautionary measures recommended by me to the consideration of the two Houses at the opening of your late extraordinary session. If that system was then prudent, it is more so now, as increasing depredations strengthen the reasons for its adoption.

Indeed, whatever may be the issue of the negotiation with France. and whether the war in Europe is or is not to continue, I hold it most certain that permanent tranquillity and order will not soon be obtained. The state of society has so long been disturbed, the sense of moral and religious obligations so much weakened, public faith and national honor have been so impaired, respect to treaties has been so diminished, and the law of nations has lost so much of its force, while pride, ambition, avarice, and violence have been so long unrestrained, there remains no reasonable ground on which to raise an expectation that a commerce without protection or defense will not be plundered.

The commerce of the United States is essential, if not to their existence, at least to their comfort, their growth, prosperity, and happiness. The genius, character, and habits of the people are highly commercial. Their cities have been formed and exist upon commerce. Our agriculture, fisheries, arts, and manufactures are connected with and depend upon it. In short, commerce has made this country what it is, and it can not be destroyed or neglected without involving the people in poverty and distress. Great numbers are directly and solely supported by navigation. The faith of society is pledged for the preservation of the rights of commercial and seafaring no less than of the other citizens. Under this view of our affairs, I should hold myself guilty of a neglect of duty if I forbore to recommend that we should make every exertion to protect our commerce and to place our country in a suitable posture of defense as the only sure means of preserving both.

Address of the Senate to John Adams, President of the United States[1]

THE PRESIDENT OF THE UNITED STATES:

It would have given us much pleasure to have received your con-

[1] Richardson, Messages, vol. 1, p. 254.

gratulations on the reëstablishment of peace in Europe and the restoration of security to the persons and property of our citizens from injustice and violence at sea; but though these events, so desirable to our country and the world, have not taken place, yet we have abundant cause of gratitude to the Great Disposer of Human Events for interior tranquillity and personal security, for propitious seasons, prosperous agriculture, productive fisheries, and general improvement, and, above all, for a rational spirit of civil and religious liberty and a calm but steady determination to support our sovereignty against all open and secret attacks.

We learn with satisfaction that our envoys extraordinary to the French Republic had safely arrived in Europe and were proceeding to the scene of negotiation, and whatever may be the result of the mission, we are perfectly satisfied that nothing on your part has been omitted which could in any way conduce to a successful conclusion of the negotiation upon terms compatible with the safety, honor, and interest of the United States; and we are fully convinced that in the meantime a manifestation of that unanimity and energy of which the people of the United States have given such memorable proofs and a proper exertion of those resources of national defense which we possess will essentially contribute to the preservation of peace and the attainment of justice.

We think, sir, with you that the commerce of the United States is essential to the growth, comfort, and prosperity of our country, and that the faith of society is pledged for the preservation of the rights of commercial and seafaring no less than of other citizens. And even if our negotiation with France should terminate favorably and the war in Europe cease, yet the state of society which unhappily prevails in so great a portion of the world and the experience of past times under better circumstances unite in warning us that a commerce so extensive and which holds out so many temptations to lawless plunderers can never be safe without protection; and we hold ourselves obliged by every tie of duty which binds us to our constituents to promote and concur in such measures of marine defense as may convince our merchants and seamen that their rights are not sacrificed nor their injuries forgotten.

Nov. 27, 1797.

Reply of the President[1]

UNITED STATES, *November 28, 1797.*

Gentlemen of the Senate:

I thank you for this address.

When, after the most laborious investigation and serious reflection, without partial considerations or personal motives, measures have been adopted or recommended, I can receive no higher testimony of their rectitude than the approbation of an assembly so independent, patriotic, and enlightened as the Senate of the United States.

Nothing has afforded me more entire satisfaction than the coincidence of your judgment with mine in the opinion of the essential importance of our commerce and the absolute necessity of a maritime defense. What is it that has drawn to Europe the superfluous riches of the three other quarters of the globe but a marine? What is it that has drained the wealth of Europe itself into the coffers of two or three of its principal commercial powers but a marine?

The world has furnished no example of a flourishing commerce without a maritime protection, and a moderate knowledge of man and his history will convince anyone that no such prodigy ever can arise. A mercantile marine and a military marine must grow up together; one can not long exist without the other.

JOHN ADAMS.

Address of the House of Representatives to John Adams, President of the United States[2]

In lamenting the increase of the injuries offered to the persons and property of our citizens at sea we gratefully acknowledge the continuance of interior tranquillity and the attendant blessings of which you remind us as alleviations of these fatal effects of injustice and violence.

Whatever may be the result of the mission to the French Republic, your early and uniform attachment to the interest of our country, your important services in the struggle for its independence, and your unceasing exertions for its welfare afford no room to doubt of the sincerity of your efforts to conduct the negotiation to a successful conclusion on such terms as may be compatible with the safety, honor, and

[1] Richardson, Messages, vol. 1, p. 256.

[2] *Ibid.* p. 257.

interest of the United States. We have also a firm reliance upon the energy and unanimity of the people of these States in the assertion of their rights, and on their determination to exert upon all proper occasions their ample resources in providing for the national defense.

The importance of commerce and its beneficial influence upon agriculture, arts, and manufactures have been verified in the growth and prosperity of our country. It is essentially connected with the other great interests of the community; they must flourish and decline together; and while the extension of our navigation and trade naturally excites the jealousy and tempts the avarice of other nations, we are firmly persuaded that the numerous and deserving class of citizens engaged in these pursuits and dependent on them for their subsistence has a strong and indisputable claim to our support and protection.

Nov. 28, 1797.

Reply of the President[1]

UNITED STATES, *November 29, 1797.*

Gentlemen of the House of Representatives:

I receive this address from the House of Representatives of the United States with peculiar pleasure.

Your approbation of the meeting of Congress in this city and of those other measures of the Executive authority of Government communicated in my address to both Houses at the opening of the session afford me great satisfaction, as the strongest desire of my heart is to give satisfaction to the people and their Representatives by a faithful discharge of my duty.

The confidence you express in the sincerity of my endeavors and in the unanimity of the people does me much honor and gives me great joy.

I rejoice in that harmony which appears in the sentiments of all the branches of the Government on the importance of our commerce and our obligations to defend it, as well as in all the other subjects recommended to your consideration, and sincerely congratulate you and our fellow-citizens at large on this appearance, so auspicious to the honor, interest, and happiness of the nation.

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[1] Richardson, Messages, vol. 1. p, 258.

SECOND ANNUAL ADDRESS[1]

UNITED STATES, *December 8, 1798.*

Gentlemen of the Senate and Gentlemen of the House of Representatives:

The course of the transactions in relation to the United States and France which have come to my knowledge during your recess will be made the subject of a future communication. That communication will confirm the ultimate failure of the measures which have been taken by the Government of the United States toward an amicable adjustment of differences with that power. You will at the same time perceive that the French Government appears solicitous to impress the opinion that it is averse to a rupture with this country, and that it has in a qualified manner declared itself willing to receive a minister from the United States for the purpose of restoring a good understanding. It is unfortunate for professions of this kind that they should be expressed in terms which may countenance the inadmissible pretension of a right to prescribe the qualifications which a minister from the United States should possess, and that while France is asserting the existence of a disposition on her part to conciliate with sincerity the differences which have arisen, the sincerity of a like disposition on the part of the United States, of which so many demonstrative proofs have been given, should even be indirectly questioned. It is also worthy of observation that the decree of the Directory alleged to be intended to restrain the depredations of French cruisers on our commerce has not given, and can not give, any relief. It enjoins them to conform to all the laws of France relative to cruising and prizes, while these laws are themselves the sources of the depredations of which we have so long, so justly, and so fruitlessly complained.

The law of France enacted in January last, which subjects to capture and condemnation neutral vessels and their cargoes if any portion of the latter are of British fabric or produce, although the entire property belong to neutrals, instead of being rescinded has lately received a confirmation by the failure of a proposition for its repeal. While this law, which is an unequivocal act of war on the commerce of the nations it attacks, continues in force those nations can see in the French Government only a power regardless of their essential rights, of their independence and sovereignty; and if they possess the means they can reconcile nothing with their interest and honor but a firm resistance.

[1] Richardson, Messages, vol. 1, p. 271.

Hitherto, therefore, nothing is discoverable in the conduct of France which ought to change or relax our measures of defense. On the contrary, to extend and invigorate them is our true policy. We have no reason to regret that these measures have been thus far adopted and pursued, and in proportion as we enlarge our view of the portentous and incalculable situation of Europe we shall discover new and cogent motives for the full development of our energies and resources.

But in demonstrating by our conduct that we do not fear war in the necessary protection of our rights and honor we shall give no room to infer that we abandon the desire of peace. An efficient preparation for war can alone insure peace. It is peace that we have uniformly and perseveringly cultivated, and harmony between us and France may be restored at her option. But to send another minister without more determinate assurances that he would be received would be an act of humiliation to which the United States ought not to submit. It must therefore be left with France (if she is indeed desirous of accommodation) to take the requisite steps. The United States will steadily observe the maxims by which they have hither been governed. They will respect the sacred rights of embassy; and with a sincere disposition on the part of France to desist from hostility, to make reparation for the injuries heretofore inflicted on our commerce, and to do justice in future, there will be no obstacle to the restoration of a friendly intercourse. In making to you this declaration I give a pledge to France and the world that the Executive authority of this country still adheres to the humane and pacific policy which has invariably governed its proceedings, in conformity with the wishes of the other branches of the Government and of the people of the United States. But considering the late manifestations of her policy toward foreign nations, I deem it a duty deliberately and solemnly to declare my opinion that whether we negotiate with her or not, vigorous preparations for war will be alike indispensable. These alone will give to us an equal treaty and insure its observance.

Among the measures of preparation which appear expedient, I take the liberty to recall your attention to the naval establishment. The beneficial effects of the small naval armament provided under the acts of the last session are known and acknowledged. Perhaps no country ever experienced more sudden and remarkable advantages from any measure of policy than we have derived from the arming for our maritime protection and defense. We ought without loss of time to lay the

foundation for an increase of our Navy to a size sufficient to guard our coast and protect our trade. Such a naval force as it is doubtless in the power of the United States to create and maintain would also afford to them the best means of general defense by facilitating the safe transportation of troops and stores to every part of our extensive coast. To accomplish this important object, a prudent foresight requires that systematical measures be adopted for procuring at all times the requisite timber and other supplies. In what manner this shall be done I leave to your consideration.

Address of the Senate to John Adams, President of the United States[1]

The President of the United States:

Although we have sincerely wished that an adjustment of our differences with the Republic of France might be effected on safe and honorable terms, yet the information you have given us of the ultimate failure of the negotiation has not surprised us. In the general conduct of that Republic we have seen a design of universal influence incompatible with the self-government and destructive of the independence of other States. In its conduct toward these United States we have seen a plan of hostility pursued with unremitted constancy, equally disregarding the obligations of treaties and the rights of individuals. We have seen two embassies, formed for the purpose of mutual explanations and clothed with the most extensive and liberal powers, dismissed without recognition and even without a hearing. The Government of France has not only refused to repeal but has recently enjoined the observance of its former edict respecting merchandise of British fabric or produce the property of neutrals, by which the interruption of our lawful commerce and the spoliation of the property of our citizens have again received a public sanction. These facts indicate no change of system or disposition; they speak a more intelligible language than professions of solicitude to avoid a rupture, however ardently made. But if, after the repeated proofs we have given of a sincere desire for peace, these professions should be accompanied by insinuations implicating the integrity with which it has been pursued; if, neglecting and passing by the constitutional and authorized agents of the Government, they are made through the medium of individuals without public

[1] Richardson, Messages, vol. 1, p. 275.

character or authority, and, above all, if they carry with them a claim to prescribe the political qualifications of the minister of the United States to be employed in the negotiation, they are not entitled to attention or consideration, but ought to be regarded as designed to separate the people from their Government and to bring about by intrigue that which open force could not effect.

We are of opinion with you, sir, that there has nothing yet been discovered in the conduct of France which can justify a relaxation of the means of defense adopted during the last session of Congress, the happy result of which is so strongly and generally marked. If the force by sea and land which the existing laws authorize should be judged inadequate to the public defense, we will perform the indispensable duty of bringing forward such other acts as will effectually call forth the resources and force of our country.

A steady adherence to this wise and manly policy, a proper direction of the noble spirit of patriotism which has arisen in our country, and which ought to be cherished and invigorated by every branch of the Government, will secure our liberty and independence against all open and secret attacks.

We enter on the business of the present session with an anxious solicitude for the public good, and shall bestow that consideration on the several objects pointed out in your communication which they respectively merit.

Your long and important services, your talents and firmness, so often displayed in the most trying times and most critical situations, afford a sure pledge of a zealous coöperation in every measure necessary to secure us justice and respect.

JOHN LAURANCE,
President of the Senate pro tempore.

DECEMBER 11, 1798.

Reply of the President[1]

December 12, 1798.

To the Senate of the United States:

GENTLEMEN: I thank you for this address, so conformable to the spirit of our Constitution and the established character of the Senate of the United States for wisdom, honor, and virtue.

[1] Richardson, Messages, vol. 1, p. 277.

I have seen no real evidence of any change of system or disposition in the French Republic toward the United States. Although the officious interference of individuals without public character or authority is not entitled to any credit, yet it deserves to be considered whether that temerity and impertinence of individuals affecting to interfere in public affairs between France and the United States, whether by their secret correspondence or otherwise, and intended to impose upon the people and separate them from their Government, ought not to be inquired into and corrected.

I thank you, gentlemen, for your assurances that you will bestow that consideration on the several objects pointed out in my communication which they respectively merit.

If I have participated in that understanding, sincerity, and constancy which have been displayed by my fellow-citizens and countrymen in the most trying times and critical situations, and fulfilled my duties to them, I am happy. The testimony of the Senate of the United States in my favor is an high and honorable reward which receives, as it merits, my grateful acknowledgments. My zealous cooperation in measures necessary to secure us justice and consideration may be always depended on.

JOHN ADAMS.

Address of the House of Representatives to John Adams, President of the United States[1]

JOHN ADAMS,

President of the United States.

Desirous as we are that all causes of hostility may be removed by the amicable adjustment of national differences, we learn with satisfaction that in pursuance of our treaties with Spain and with Great Britain advances have been made for definitively settling the controversies relative to the southern and northeastern limits of the United States. With similar sentiments have we received your information that the proceedings under commissions authorized by the same treaties afford to a respectable portion of our citizens the prospect of a final decision on their claims for maritime injuries committed by subjects of those powers.

[1] Richardson, Messages, vol. 1, p. 277.

It would be the theme of mutual felicitation were we assured of experiencing similar moderation and justice from the French Republic, between which and the United States differences have unhappily arisen; but this is denied us by the ultimate failure of the measures which have been taken by this Government toward an amicable adjustment of those differences and by the various inadmissible pretensions on the part of that nation.

The continuing in force the decree of January last, to which you have more particularly pointed our attention, ought of itself to be considered as demonstrative of the real intentions of the French Government. That decree proclaims a predatory warfare against the unquestionable rights of neutral commerce which with our means of defense our interest and our honor command us to repel. It therefore now becomes the United States to be as determined in resistance as they have been patient in suffering and condescending in negotiation.

While those who direct the affairs of France persist in the enforcement of decrees so hostile to our essential rights, their conduct forbids us to confide in any of their professions of amity.

As, therefore, the conduct of France hitherto exhibits nothing which ought to change or relax our measures of defense, the policy of extending and invigorating those measures demands our sedulous attention. The sudden and remarkable advantages which this country has experienced from a small naval armament sufficiently prove the utility of its establishment. As it respects the guarding of our coast, the protection of our trade, and the facility of safely transporting the means of territorial defense to every part of our maritime frontier, an adequate naval force must be considered as an important object of national policy. Nor do we hesitate to adopt the opinion that, whether negotiations with France are resumed or not, vigorous preparations for war will be alike indispensable.

In this conjuncture of affairs, while with you we recognize our abundant cause of gratitude to the Supreme Disposer of Events for the ordinary blessings of Providence, we regard as of high national importance the manifestation in our country of a magnanimous spirit of resistance to foreign domination. This spirit merits to be cherished and invigorated by every branch of Government as the estimable pledge of national prosperity and glory.

Disdaining a reliance on foreign protection, wanting no foreign guaranty of our liberties, resolving to maintain our national independence

against every attempt to despoil us of this inestimable treasure, we confide under Providence in the patriotism and energies of the people of these United States for defeating the hostile enterprises of any foreign power.

To adopt with prudent foresight such systematical measures as may be expedient for calling forth those energies wherever the national exigencies may require, whether on the ocean or on our own territory, and to reconcile with the proper security of revenue the convenience of mercantile enterprise, on which so great a proportion of the public resources depends, are objects of moment which shall be duly regarded in the course of our deliberations.

Fully as we accord with you in the opinion that the United States ought not to submit to the humiliation of sending another minister to France without previous assurances sufficiently determinate that he will be duly accredited, we have heard with cordial approbation the declaration of your purpose steadily to observe those maxims of humane and pacific policy by which the United States have hitherto been governed. While it is left with France to take the requisite steps for accommodation, it is worthy the Chief Magistrate of a free people to make known to the world that justice on the part of France will annihilate every obstacle to the restoration of a friendly intercourse, and that the Executive authority of this country will respect the sacred rights of embassy. At the same time, the wisdom and decision which have characterized your past Administration assure us that no illusory professions will seduce you into any abandonment of the rights which belong to the United States as a free and independent nation.

DECEMBER 13, 1798.

Reply of the President[1]

DECEMBER 14, 1798.

To the House of Representatives of the United States of America.

GENTLEMEN: My sincere acknowledgments are due to the House of Representatives of the United States for this excellent address so consonant to the character of representatives of a great and free people. The judgment and feelings of a nation, I believe, were never more truly expressed by their representatives than those of our constituents

[1] Richardson, Messages, vol. 1, p. 280.

by your decided declaration that with our means of defense our interest and honor command us to repel a predatory warfare against the unquestionable rights of neutral commerce; that it becomes the United States to be as determined in resistance as they have been patient in suffering and condescending in negotiation; that while those who direct the affairs of France persist in the enforcement of decrees so hostile to our essential rights their conduct forbids us to confide in any of their professions of amity; that an adequate naval force must be considered as an important object of national policy, and that, whether negotiations with France are resumed or not, vigorous preparations for war will be alike indispensable.

The generous disdain you so coolly and deliberately express of a reliance on foreign protection, wanting no foreign guaranty of our liberties, resolving to maintain our national independence against every attempt to despoil us of this inestimable treasure, will meet the full approbation of every sound understanding and exulting applauses from the heart of every faithful American.

I thank you, gentlemen, for your candid approbation of my sentiments on the subject of negotiation and for the declaration of your opinion that the policy of extending and invigorating our measures of defense and the adoption with prudent foresight of such systematical measures as may be expedient for calling forth the energies of our country wherever the national exigencies may require, whether on the ocean or on our own territory, will demand your sedulous attention.

At the same time, I take the liberty to assure you it shall be my vigilant endeavor that no illusory professions shall seduce me into any abandonment of the rights which belong to the United States as a free and independent nation.

JOHN ADAMS.

THIRD ANNUAL ADDRESS[1]

UNITED STATES, *December 3, 1799.*

Gentlemen of the Senate and Gentlemen of the House of Representatives:

Persevering in the pacific and humane policy which had been invariably professed and sincerely pursued by the Executive authority of the United States, when indications were made on the part of the

[1] Richardson, Messages, vol. 1, pp. 289–290.

French Republic of a disposition to accommodate the existing differences between the two countries, I felt it to be my duty to prepare for meeting their advances by a nomination of ministers upon certain conditions which the honor of our country dictated, and which its moderation had given it a right to prescribe. The assurances which were required of the French Government previous to the departure of our envoys have been given through their minister of foreign relations, and I have directed them to proceed on their mission to Paris. They have full power to conclude a treaty, subject to the constitutional advice and consent of the Senate. The characters of these gentlemen are sure pledges to their country that nothing incompatible with its honor or interest, nothing inconsistent with our obligations of good faith or friendship to any other nation, will be stipulated.

JOHN ADAMS.

Address of the Senate to John Adams, President of the United States[1]

THE PRESIDENT OF THE UNITED STATES:

When we reflect upon the uncertainty of the result of the late mission to France and upon the uncommon nature, extent, and aspect of the war now raging in Europe, which affects materially our relations with the powers at war, and which has changed the condition of their colonies in our neighborhood, we are of opinion with you that it would be neither wise nor safe to relax our measures of defense or to lessen any of our preparations to repel aggression.

SAMUEL LIVERMORE,
President of the Senate pro tempore.

DECEMBER 9, 1799.

Address of the House of Representatives to John Adams, President of the United States[2]

THE PRESIDENT OF THE UNITED STATES:

Highly approving as we do the pacific and humane policy which has been invariably professed and sincerely pursued by the Executive au-

[1] Richardson, Messages, vol. 1, p. 292.
[2] *Ibid.* p. 293.

thority of the United States, a policy which our best interests enjoined, and of which honor has permitted the observance, we consider as the most unequivocal proof of your inflexible preseverance in the same well-chosen system your preparation to meet the first indications on the part of the French Republic of a disposition to accommodate the existing differences between the two countries by a nomination of ministers, on certain conditions which the honor of our country unquestionably dictated, and which its moderation had certainly given it a right to prescribe. When the assurances thus required of the French Government, previous to the departure of our envoys, had been given through their minister of foreign relations, the direction that they should proceed on their mission was on your part a completion of the measure, and manifests the sincerity with which it was commenced. We offer up our fervent prayers to the Supreme Ruler of the Universe for the success of their embassy, and that it may be productive of peace and happiness to our common country. The uniform tenor of your conduct through a life useful to your fellow-citizens and honorable to yourself gives a sure pledge of the sincerity with which the avowed objects of the negotiation will be pursued on your part, and we earnestly pray that similar dispositions may be displayed on the part of France. The differences which unfortunately subsist between the two nations can not fail in that event to be happily terminated. To produce this end, to all so desirable, firmness, moderation, and union at home constitute, we are persuaded, the surest means. The character of the gentlemen you have deputed, and still more the character of the Government which deputes them, are safe pledges to their country that nothing incompatible with its honor or interest, nothing inconsistent with our obligations of good faith or friendship to any other nation, will be stipulated.

We learn with pleasure that our citizens, with their property, trading to those ports of St. Domingo with which commercial intercourse has been renewed have been duly respected, and that privateering from those ports has ceased.

DECEMBER 9, 1799.

Reply of the President[1]

UNITED STATES, *December 10, 1799.*

Gentlemen of the House of Representatives:

As long as we maintain with harmony and affection the honor of our country consistently with its peace, externally and internally, while that is attainable, or in war when that becomes necessary, assert its real independence and sovereignty, and support the constitutional energies and dignity of its Government, we may be perfectly sure, under the smiles of Divine Providence, that we shall effectually promote and extend our national interest and happiness.

JOHN ADAMS.

FOURTH ANNUAL ADDRESS[2]

UNITED STATES, *November 22, 1800.*

Gentlemen of the Senate and Gentlemen of the House of Representatives:

The envoys extraordinary and ministers plenipotentiary from the United States to France were received by the First Consul with the respect due to their character, and three persons with equal powers were appointed to treat with them. Although at the date of the last official intelligence the negotiation had not terminated, yet it is to be hoped that our efforts to effect an accommodation will at length meet with a success proportioned to the sincerity with which they have been so often repeated.

While our best endeavors for the preservation of harmony with all nations will continue to be used, the experience of the world and our own experience admonish us of the insecurity of trusting too confidently to their success. We can not, without committting a dangerous imprudence, abandon those measures of self-protection which are adapted to our situation and to which, notwithstanding our pacific policy, the violence and injustice of others may again compel us to resort. While our vast extent of seacoast, the commercial and agricultural habits of our people, the great capital they will continue to trust

[1] Richardson, Messages, vol. 1, p. 296.

[2] *Ibid.*, p. 305.

on the ocean, suggest the system of defense which will be most beneficial to ourselves, our distance from Europe and our resources for maritime strength will enable us to employ it with effect. Seasonable and systematic arrangements, so far as our resources will justify, for a navy adapted to defensive war. and which may in case of necessity be quickly brought into use, seem to be as much recommended by a wise and true economy as by a just regard for our future tranquillity, for the safety of our shores, and for the protection of our property committed to the ocean.

The present Navy of the United States, called suddenly into existence by a great national exigency, has raised us in our own esteem, and by the protection afforded to our commerce has effected to the extent of our expectations the objects for which it was created.

Address of the House of Representatives to John Adams, President of the United States[1]

JOHN ADAMS,

President of the United States:

The Constitution of the United States having confided the management of our foreign negotiations to the control of the Executive power, we cheerfully submit to its decisions on this important subject; and in respect to the negotiations now pending with France we sincerly hope that the final result may prove as fortunate to our country as the most ardent mind can wish.

So long as a predatory war is carried on against our commerce we should sacrifice the interests and disappoint the expectations of our constituents should we for a moment relax that system of maritime defense which has resulted in such beneficial effects. At this period it is confidently believed that few persons can be found within the United States who do not admit that a navy, well organized, must constitute the natural and efficient defense of this country against all foreign hostility.

NOVEMBER 26, 1800.

[1] Richardson, Messages, vol. 1, p. 310.

Reply of the President[1]

WASHINGTON, *November 27, 1800.*

Mr. Speaker and Gentlemen of the House of Representatives:

With you, gentlemen, I sincerely hope that the final result of the negotiations now pending with France may prove as fortunate to our country as they have been commenced with sincerity and prosecuted with deliberation and caution. With you I cordially agree that so long as a predatory war is carried on against our commerce we should sacrifice the interests and disappoint the expectations of our constituents should we for a moment relax that system of maritime defense which has resulted in such beneficial effects. With you I confidently believe that few persons can be found within the United States who do not admit that a navy, well organized, must constitute the natural and efficient defense of this country against all foreign hostility.

JOHN ADAMS.

[1] Richardson, Messages, vol. 1, p. 312.

Acts of Congress

An Act more effectually to protect the Commerce and Coasts of the United States[1]

WHEREAS armed vessels sailing under authority or pretense of authority from the Republic of France, have committed depredations on the commerce of the United States, and have recently captured the vessels and property of citizens thereof, on and near the coasts, in violation of the law of nations, and treaties between the United States and the French nation. Therefore:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be lawful for the President of the United States, and he is hereby authorized to instruct and direct the commanders of the armed vessels belonging to the United States to seize, take and bring into any port of the United States, to be proceeded against according to the laws of nations, any such armed vessel which shall have committed or which shall be found hovering on the coasts of the United States, for the purpose of committing depredations on the vessels belonging to citizens thereof;—and also to retake any ship or vessel, of any citizen or citizens of the United States which may have been captured by any such armed vessel.

APPROVED, May 28, 1798.

An Act to suspend the commercial intercourse between the United States and France, and the dependencies thereof[2]

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That no ship or vessel, owned, hired, or employed, wholly or in part, by any person resident within the United States, and which shall depart therefrom after the first day of July next, shall be allowed to proceed directly, or from any intermediate port or place, to any port or place within the territory of the French Republic, or the dependencies thereof, or to any place in the West Indies, or elsewhere under the ac-

[1] Statutes at Large, vol. I, p. 561.

[2] *Ibid.,* p. 565.

knowledged government of France, or shall be employed in any traffic or commerce with, or for any person resident within the jurisdiction, or under the authority of the French Republic. And if any ship or vessel, in any voyage thereafter commencing, and before her return within the United States, shall be voluntarily carried, or suffered to proceed to any French port or place as aforesaid, or shall be employed as aforesaid, contrary to the intent hereof, every such ship or vessel together with her cargo shall be forfeited, and shall accrue, the one half to the use of the United States, and the other half to the use of any person or persons, citizens of the United States, who will inform and prosecute for the same; and shall be liable to be seized, prosecuted and condemned in any circuit or district court of the United States which shall be holden within or for the district where the seizure shall be made.

SEC. 2. *And be it further enacted,* That after the first day of July next, no clearance for a foreign voyage shall be granted to any ship or vessel, owned, hired, or employed, wholly or in part, by any person resident within the United States, until a bond shall be given to the use of the United States, wherein the owner or employer, if usually resident or present, where the clearance shall be required, and otherwise his agent or factor, and the master or captain of such ship or vessel for the intended voyage, shall be parties, in a sum equal to the value of the ship or vessel, and her cargo, and shall find sufficient surety or sureties, to the amount of one half the value thereof, with condition that the same shall not, during her intended voyage or before her return within the United States, proceed, or be carried, directly or indirectly, to any port or place within the territory of the French Republic, or the dependencies thereof, or any place in the West Indies, or elsewhere, under the acknowledged government of France, unless by distress of weather, or want of provisions, or by actual force and violence, to be fully proved and manifested before the acquittance of such bond; and that such vessel is not, and shall not be employed during her intended voyage, or before her return, as aforesaid, in any traffic or commerce with or for any person resident within the territory of that republic, or in any of the dependencies thereof.

SEC. 3. *And be it further enacted,* That from and after due notice of the passing of this act, no French ship or vessel, armed or unarmed, commissioned by or for, or under the authority of the French Republic, or owned, fitted, hired or employed by any person resident within the

territory of that republic, or any of the dependencies thereof, or sailing or coming therefrom, excepting any vessel to which the President of the United States shall grant a passport, which he is hereby authorized to grant in all cases where it shall be requisite for the purposes of any political or national intercourse, shall be allowed an entry, or to remain within the territory of the United States, unless driven there by distress of weather, or in want of provisions. And if contrary to the intent hereof any such ship or vessel shall be found within the jurisdictional limits of the United States, not being liable to seizure for any other cause, the company having charge thereof shall be required to depart and carry away the same, avoiding all unnecessary delay; and if they shall, notwithstanding, remain, it shall be the duty of the collector of the district, wherein, or nearest to which, such ship or vessel shall be, to seize and detain the same, at the expense of the United States: Provided, that ships or vessels which shall be *bona fide* the property of, or hired, or employed by citizens of the United States, shall be excepted from this prohibition until the first day of December next, and no longer: And provided that in the case of vessels hereby prohibited, which shall be driven by distress of weather, or the want of provisions into any port or place of the United States, they may be suffered to remain under the custody of the collector there, or nearest thereto, until suitable repairs or supplies can be obtained, and as soon as may be thereafter shall be required and suffered to depart: but no part of the lading of such vessel shall be taken out or disposed of, unless by the special permit of such collector, or to defray the unavoidable expense of such repairs or supplies.

Sec. 4. *And be it further enacted,* That this act shall continue and be in force until the end of the next session of Congress, and no longer.

Sec. 5. *Provided, and be it further enacted,* That if, before the next session of Congress, the government of France, and all persons acting by or under their authority, shall clearly disavow, and shall be found to refrain from the aggressions, depredations and hostilities which have been, and are by them encouraged and maintained against the vessels and other property of the citizens of the United States, and against their national rights and sovereignty, in violation of the faith of treaties, and the laws of nations, and shall thereby acknowledge the just claims of the United States to be considered as in all respects neutral, and unconnected in the present European war, if the same

shall be continued, then and thereupon it shall be lawful for the President of the United States, being well ascertained of the premises, to remit and discontinue the prohibitions and restraints hereby enacted and declared; and he shall be, and is hereby authorized to make proclamation thereof accordingly: Provided, that nothing in this act contained, shall extend to any ship or vessel to which the President of the United States shall grant a permission to enter or clear; which permission he is hereby authorized to grant to vessels which shall be solely employed in any purpose of political or national intercourse, or to aid the departure of any French persons, with their goods and effects, who shall have been resident within the United States, when he may think it requisite.

APPROVED, June 13, 1798.

An Act to authorize the defence of the Merchant Vessels of the United States against French depredations[1]

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the commander and crew of any merchant vessel of the United States, owned wholly by a citizen or citizens thereof, may oppose and defend against any search, restraint or seizure, which shall be attempted upon such vessel, or upon any other vessel, owned, as aforesaid, by the commander or crew of any armed vessel sailing under French colours, or acting, or pretending to act, by, or under the authority of the French republic; and may repel by force any assault or hostility which shall be made or committed, on the part of such French, or pretended French vessel, pursuing such attempt, and may subdue and capture the same; and may also retake any vessel owned, as aforesaid, which may have been captured by any vessel sailing under French colours, or acting, or pretending to act, by or under authority from the French republic.

SEC. 2. *And be it further enacted,* That whenever the commander and crew of any merchant vessel of the United States shall subdue and capture any French, or pretended French armed vessel, from which an assault or other hostility shall be first made, as aforesaid, such armed vessel with her tackle, appurtenances, ammunition and lading, shall accrue, the one half to the owner or owners of such

[1]Statutes at Large, vol. I, p. 572.

merchant vessel of the United States, and the other half to the captors: And being brought into any port of the United States, shall and may be adjudged and condemned to their use, after due process and trial, in any court of the United States, having admiralty jurisdiction, and which shall be holden for the district into which such captured vessel shall be brought; and the same court shall thereupon order a sale and distribution thereof, accordingly, and at their discretion; saving any agreement, which shall be between the owner or owners, and the commander and crew of such merchant vessel. In all cases of recapture of vessels belonging to citizens of the United States, by any armed merchant vessel, aforesaid, the said vessels, with their cargoes, shall be adjudged to be restored, and shall, by decree of such courts as have jurisdiction, in the premises, be restored to the former owner or owners, he or they paying for salvage, not less than one eighth, nor more than one half of the true value of the said vessels and cargoes, at the discretion of the court; which payments shall be made without any deduction whatsoever.

Sec. 3. *And be it further enacted,* That after notice of this act, at the several custom-houses, no armed merchant vessel of the United States shall receive a clearance or permit, or shall be suffered to depart therefrom, unless the owner or owners, and the master or commander of such vessel for the intended voyage, shall give bond, to the use of the United States, in a sum equal to double the value of such vessel, with condition, that such vessel shall not make or commit any depredation, outrage, unlawful assault, or unprovoked violence upon the high seas, against the vessel of any nation in amity with the United States; and that the guns, arms and ammunition of such vessel shall be returned within the United States, or otherwise accounted for, and shall not be sold or disposed of in any foreign port or place; and that such owner or owners, and the commander and crew of such merchant vessel shall, in all things, observe and perform such further instructions in the premises, as the President of the United States shall establish and order, for the better government of the armed merchant vessels of the United States.

Sec. 4. *And be it further enacted,* That the President of the United States shall be, and he is hereby authorized to establish and order suitable instructions to, and for, the armed merchant vessels of the United States, for the better governing and restraining the commanders and crews who shall be employed therein, and to prevent any out-

'rage, cruelty or injury which they may be disposed to commit; a copy of which instructions shall be delivered by the collector of the customs to the commander of such vessel, when he shall give bond, as aforesaid. And it shall be the duty of the owner or owners, and commander and crew, for the time being, of such armed merchant vessel of the United States, at each return to any port of the United States, to make report to the collector thereof of any rencounter which shall have happened with any foreign vessel, and of the state of the company and crew of any vessel which they shall have subdued or captured; and the persons of such crew or company shall be delivered to the care of such collector, who, with the aid of the marshal of the same district, or the nearest military officer of the United States, or of the civil or military officers of any state, shall take suitable care for the restraint, preservation and comfort of such persons, at the expense of the United States, until the pleasure of the President of the United States shall be known concerning them.

SEC. 5. *And be it further enacted,* That this act shall continue and be in force for the term of one year, and until the end of the next session of Congress thereafter.

SEC. 6. *Provided, and be it further enacted,* That whenever the government of France, and all persons acting by, or under their authority, shall disavow, and shall cause the commanders and crews of all armed French vessels to refrain from the lawless depredations and outrages hitherto encouraged and authorized by that government against the merchant vessel[s] of the United States, and shall cause the laws of nations to be observed by the said armed French vessels, the President of the United States shall be, and he is hereby authorized to instruct the commanders and crews of the merchant vessels of the United States to submit to any regular search by the commanders or crews of French vessels, and to refrain from any force or capture to be exercised by virtue hereof.

APPROVED, June 25, 1798.

An Act in addition to the act more effectually to protect the Commerce and Coasts of the United States[1]

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all

[1] Statutes at Large, vol. I, p. 574.

such armed vessels as may be seized, taken and brought into any port of the United States, in pursuance of the act, entitled "An act more effectually to protect the commerce and coasts of the United States," with the apparel, guns and appurtenances of such vessels, and the goods and effects, which shall be found on board the same, shall be liable to forfeiture and condemnation, and may be libelled and proceeded against in the district courts of the United States, for the district into which the same may beb rought: *Provided,* that such forfeiture shall not extend to any goods or effects, the property of any citizen or person resident within the United States, and which shall have been before taken by the crew of such captured vessel.

Sec. 2. *And be it further enacted,* That whenever any vessel the property of, or employed by any citizen of the United States, or person resident therein, or any goods or effects belonging to any such citizen or resident shall be re-captured by any public armed vessel of the United States, the same shall be restored to the former owner or owners, upon due proof, he or they paying and allowing, as and for salvage to the recaptors, one eighth part of the value of such vessel, goods and effects, free of all deductions and expenses.

Sec. 3. *And be it further enacted,* That whenever any armed vessel, captured and condemned, as aforesaid, shall have been of superior or equal force to the public armed vessel of the United States by which such capture shall have been made, the forfeiture shall be and accrue wholly to the captors: and in other cases, one half thereof shall be to the use of the United States, and the residue to the captors. And all salvage which shall be allowed and recovered upon any vessel, goods or effects re-captured, and to be restored, as aforesaid, shall belong wholly to the officers and crew of the public armed vessel of the United States by which such re-capture shall be made: and the court before whom any condemnation shall be had, as aforesaid, shall and may order the sale of the vessel, goods and effects condemned, to be made at public auction, upon due notice by the marshal of the district in which the same shall be: and all expenses of condemnation and sale, being deducted from the proceeds, the part thereof which shall accrue to the United States, shall be paid into the public treasury, and the residue, and all allowances of salvage, as aforesaid, shall be distributed to, and among the officers and crews concerned therein, in the proportions which the President of the United States shall direct.

SEC. 4. *And be it further enacted,* That it shall be lawful for the President of the United States, to cause the officers and crews of the vessels so captured and hostile persons found on board any vessel, which shall be re-captured, as aforesaid, to be confined in any place of safety within the United States, in such manner as he may think the public interest may require, and all marshals and other officers of the United States are hereby required to execute such orders as the President may issue for the said purpose.

APPROVED, June 28, 1798.

An Act respecting Alien Enemies[1]

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That whenever there shall be a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion shall be perpetrated, attempted, or threatened against the territory of the United States, by any foreign nation or government, and the President of the United States shall make public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of fourteen years and upwards, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured and removed, as alien enemies. And the President of the United States shall be, and he is hereby authorized, in any event, as aforesaid, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, towards the aliens who shall become liable, as aforesaid; the manner and degree of the restraint to which they shall be subject, and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those, who, not being permitted to reside within the United States, shall refuse or neglect to depart therefrom; and to establish any other regulations which shall be found necessary in the premises and for the public safety: Provided, that aliens resident within the United States, who shall become liable as enemies, in the manner aforesaid, and who shall not be chargeable with actual hostility, or other crime against the public safety, shall be allowed, for the recovery, dis-

[1] Statutes at Large, vol. I, p. 577.

posal, and removal of their goods and effects, and for their departure, the full time which is, or shall be stipulated by any treaty, where any shall have been between the United States, and the hostile nation or government, of which they shall be natives, citizens, denizens or subjects: and where no such treaty shall have existed, the President of the United States may ascertain and declare such reasonable time as may be consistent with the public safety, and according to the dictates of humanity and national hospitality.

Sec. 2. *And be it further enacted,* That after any proclamation shall be made as aforesaid, it shall be the duty of the several courts of the United States, and of each state, having criminal jurisdiction, and of the several judges and justices of the courts of the United States, and they shall be, and are hereby respectively, authorized upon complaint, against any alien or alien enemies, as aforesaid, who shall be resident and at large within such jurisdiction or district, to the danger of the public peace or safety, and contrary to the tenor or intent of such proclamation, or other regulations which the President of the United States shall and may establish in the premises, to cause such alien or aliens to be duly apprehended and convened before such court, judge or justice; and after a full examination and hearing on such complaint, and sufficient cause therefor appearing, shall and may order such alien or aliens to be removed out of the territory of the United States, or to give sureties of their good behaviour, or to be otherwise restrained, conformably to the proclamation or regulations which shall and may be established as aforesaid, and may imprison, or otherwise secure such alien or aliens, until the order which shall and may be made, as aforesaid, shall be performed.

Sec. 3. *And be it further enacted,* That it shall be the duty of the marshal of the district in which any alien enemy shall be apprehended, who by the President of the United States, or by order of any court, judge or justice, as aforesaid, shall be required to depart, and to be removed, as aforesaid, to provide therefor, and to execute such order, by himself or his deputy, or other discreet person or persons to be employed by him, by causing a removal of such alien out of the territory of the United States; and for such removal the marshal shall have the warrant of the President of the United States, or of the court, judge or justice ordering the same, as the case may be.

Approved, July 6, 1798.

An Act to declare the treaties heretofore concluded with France, no longer obligatory on the United States[1]

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

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the United States are of right freed and exonerated from the stipulations of the treaties, and of the consular convention, heretofore concluded between the United States and France; and that the same shall not henceforth be regarded as legally obligatory on the government or citizens of the United States.

APPROVED, July 7, 1798.

An Act further to protect the Commerce of the United States[2]

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the President of the United States shall be, and he is hereby authorized to instruct the commanders of the public armed vessels which are, or which shall be employed in the service of the United States, to subdue, seize and take any armed French vessel, which shall be found within the jurisdictional limits of the United States, or elsewhere, on the high seas, and such captured vessel, with her apparel, guns and appurtenances, and the goods or effects which shall be found on board the same, being French property, shall be brought within some port of the United States, and shall be duly proceeded against and condemned as forfeited; and shall accrue and be distributed, as by law is or shall be provided respecting the captures which shall be made by the public armed vessels of the United States.

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[1] Statutes at Large, vol. I, p. 578.

[2] *Ibid.* p. 578.

SEC. 2. *And be it further enacted,* That the President of the United States shall be, and he is hereby authorized to grant to the owners of private armed ships and vessels of the United States, who shall make application therefor, special commissions in the form which he shall direct, and under the seal of the United States; and such private armed vessels, when duly commissioned, as aforesaid, shall have the same license and authority for the subduing, seizing and capturing any armed French vessel, and for the recapture of the vessels, goods and effects of the people of the United States, as the public armed vessels of the United States may by law have; and shall be, in like manner, subject to such instructions as shall be ordered by the President of the United States, for the regulation of their conduct. And the commissions which shall be granted, as aforesaid, shall be revocable at the pleasure of the President of the United States.

SEC. 3. *Provided, and be it further enacted,* That every person intending to set forth and employ an armed vessel, and applying for a commission, as aforesaid, shall produce in writing the name, and a suitable description of the tonnage and force of the vessel, and the name and place of residence of each owner concerned therein, the number of the crew and the name of the commander, and the two officers next in rank, appointed for such vessel; which writing shall be signed by the person or persons making such application, and filed with the Secretary of State, or shall be delivered to any other officer or person who shall be employed to deliver out such commissions, to be by him transmitted to the Secretary of State.

SEC. 4. *And provided, and be it further enacted,* That before any commission, as aforesaid, shall be issued, the owner or owners of the ship or vessel for which the same shall be requested, and the commander thereof, for the time being, shall give bond to the United States, with at least two responsible sureties, not interested in such vessel, in the penal sum of seven thousand dollars; or if such vessel be provided with more than one hundred and fifty men, then in the penal sum of fourteen thousand dollars; with condition that the owners, and officers, and crews who shall be employed on board of such commissioned vessel, shall and will observe the treaties and laws of the United States, and the instructions which shall be given them for the regulation of their conduct: And will satisfy all damages and injuries which shall be done or committed contrary to the tenor thereof, by such vessel, during her commission, and to deliver up the same when revoked by the President of the United States.

SEC. 5. *And be it further enacted,* That all armed French vessels, together with their apparel, guns and appurtenances, and any goods or effects which shall be found on board the same, being French property, and which shall be captured by any private armed vessel or vessels of the United States, duly commissioned, as aforesaid, shall be forfeited, and shall accrue to the owners thereof, and the officers and crews by whom such captures shall be made; and on due condemnation had, shall be distributed according to any agreement which shall be between them; or in failure of such agreement, then by the discretion of the court before whom such condemnation shall be.

SEC. 6. *And be it further enacted,* That all vessels, goods and effects, the property of any citizen of the United States, or person resident therein, which shall be recaptured, as aforesaid, shall be restored to the lawful owners, upon payment by them, respectively, of a just and reasonable salvage, to be determined by the mutual agreement of the parties concerned, or by the decree of any court of the United States having maritime jurisdiction according to the nature of each case: *Provided,* that such allowance shall not be less than one eighth, or exceeding one half of the full value of such recapture, without any deduction. And such salvage shall be distributed to and among the owners, officers and crews of the private armed vessel or vessels entitled thereto, according to any agreement which shall be between them; or in case of no agreement, then by the decree of the court who shall determine upon such salvage.

SEC. 7. *And be it further enacted,* That before breaking bulk of any vessel which shall be captured, as aforesaid, or other disposal or conversion thereof, or of any articles which shall be found on board the same, such capture shall be brought into some port of the United States, and shall be libelled and proceeded against before the district court of the same district; and if after a due course of proceedings, such capture shall be decreed as forfeited in the district court, or in the circuit court of the same district, in the case of any appeal duly allowed, the same shall be delivered to the owners and captors concerned therein, or shall be publicly sold by the marshal of the same court, as shall be finally decreed and ordered by the court. And the same court, who shall have final jurisdiction of any libel or complaint of any capture, as aforesaid, shall and may decree restitution, in whole or in part, when the capture and restraint shall have been made without just cause, as aforesaid; and if made without probable

cause, or otherwise unreasonably, may order and decree damages and costs to the party injured, and for which the owners, officers and crews of the private armed vessel or vessels by which such unjust capture shall have been made, and also such vessel or vessels shall be answerable and liable.

SEC. 8. *And be it further enacted,* That all French persons and others, who shall be found acting on board any French armed vessel, which shall be captured, or on board of any vessel of the United States, which shall be recaptured, as aforesaid, shall be reported to the collector of the port in which they shall first arrive, and shall be delivered to the custody of the marshal, or of some civil or military officer of the United States, or of any state in or near such port; who shall take charge for their safe keeping and support, at the expense of the United States.

APPROVED, July 9, 1798.

An Act further to suspend the Commercial Intercourse between the United States and France, and the dependencies thereof[1]

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That from and after the third day of March next, no ship or vessel owned, hired or employed, wholly, or in part, by any person resident within the United States, and which shall depart thereform, shall be allowed to proceed directly, or from any intermediate port or place, to any port or place within the territory of the French Republic, or the dependencies thereof, or to any place in the West Indies, or elsewhere, under the acknowledged government of France, or shall be employed in any traffic or commerce with or for any person resident within the jurisdiction, or under the authority of the French Republic. And if any ship or vessel, in any voyage thereafter commencing, and before her return within the United States, shall be voluntarily carried or suffered to proceed to any French port or place, as aforesaid, or shall be employed, as aforesaid, contrary to the intent hereof, every such ship or vessel, together with her cargo, shall be forfeited; and shall accrue, the one half to the use of the United States, and the other half to the

[1] Statutes at Large, vol. I, p. 613.

use of any person or persons, citizens of the United States, who will inform and prosecute for the same; and shall be liable to be seized, and may be prosecuted and condemned, and in any circuit or district court of the United States, which shall be holden within or for the district where the seizure shall be made.

SEC. 2. *And be it further enacted,* That from and after the passing of this act, no clearance for a foreign voyage shall be granted to any ship or vessel, owned, hired or employed, wholly or in part, by any person resident within the United States, until a bond shall be given, to the use of the United States, wherein the owner or employer, if usually resident or present where the clearance shall be required, and otherwise his agent or factor, and the master or captain of such ship or vessel, for the intended voyage, shall be parties, in a sum equal to the value of the ship or vessel, and the one third of the value of her cargo, and shall find sufficient surety or sureties to the amount of one half of the principal sum, with condition that the same shall not, during her intended voyage, or before her return within the United States, proceed or be carried, directly or indirectly, to any port or place within the territory of the French Republic, or the dependencies thereof, or any place in the West Indies, or elsewhere, under the acknowledged government of France, unless by actual force and violence, to be fully proved and manifested before the acquittance of such bond, and that such vessel is not, and shall not be employed, during her intended voyage, or before her return, as aforesaid, in any traffic or commerce, with or for any person resident within the territory of that Republic, or in any of the dependencies thereof: *Provided,* that in no case, the surety or sureties shall be answerable for more than ten thousand dollars.

SEC. 3. *And be it further enacted,* That from and after the said third day of March, no French ship or vessel, armed or unarmed, commissioned by or for, or under the authority of the French Republic, or owned, fitted, hired or employed by any person resident within the territory of that Republic, or any of the dependencies thereof, or sailing or coming therefrom (excepting as is hereinafter excepted), shall be allowed an entry, or to remain within the territory of the United States, unless driven thither by distress of weather, or in want of provisions. And if, contrary to the intent hereof, any such ship or vessel shall be found within the jurisdictional limits of the United States, not being liable to seizure for any other cause, the company having

charge thereof, shall be required to depart and carry away the same, avoiding all unnecessary delay; and if they shall, notwithstanding, remain, it shall be the duty of the collector of the district wherein, or nearest to which, such ship or vessel shall be, to seize and detain the same, at the expense of the United States: *Provided,* that in the case of vessels hereby prohibited, which shall be driven by distress of weather, or want of provisions, into any port or place of the United States, they may be suffered to remain under the custody of the collector there, or nearest thereto, until suitable repairs or supplies can be obtained; and as soon as may be thereafter, shall be required and suffered to depart; but no part of the lading of such vessel shall be taken out, or disposed of, unless by the special permit of such collector, to defray the unavoidable expense of such repairs or supplies.

Sec. 4. *Provided, and be it further enacted,* That at any time after the passing of this act, it shall be lawful for the President of the United States, if he shall deem it expedient and consistent with the interest of the United States, by his order, to remit and discontinue, for the time being, the restraints and prohibitions aforesaid, either with respect to the French Republic, or to any island, port or place belonging to the said Republic, with which a commercial intercourse may safely be renewed; and also to revoke such order, whenever, in his opinion, the interest of the United States shall require; and he shall be, and hereby is, authorized to make proclamation thereof accordingly.

Sec. 5. *And be it further enacted,* That it shall be lawful for the President of the United States, to give instructions to the commanders of the public armed ships of the United States, to stop and examine any ship or vessel of the United States on the high sea, which there may be reason to suspect to be engaged in any traffic or commerce contrary to the true tenor hereof; and if, upon examination, it shall appear that such ship or vessel is bound or sailing to any port or place within the territory of the French Republic, or her dependencies, contrary to the intent of this act, it shall be the duty of the commander of such public armed vessel, to seize every ship or vessel engaged in such illicit commerce, and send the same to the nearest port in the United States; and every such ship or vessel, thus bound or sailing to any such port or place, shall upon due proof thereof, be liable to the like penalties and forfeitures, as are provided in and by the first section of this act.

SEC. 6. *And be it further enacted,* That whenever any ship or vessel, owned wholly or in part, or employed by any citizen or citizens of the United States, and coming from any port or place within the territory of the French Republic, or the dependencies thereof, which has arrived within any port or place of the United States since the first day of December last past, or which shall hereafter arrive, hath been or hereafter shall be seized and detained by virtue of this act, or of an act, intituled "An act to suspend the commercial intercourse between the United States and France, and the dependencies thereof," it shall be lawful for any person claiming such ship or vessel, to prefer his petition to the judge of the district in which such seizure shall be made, setting forth the circumstances of his case, and to pray that the same ship or vessel, and her cargo, may be restored; and the said judge shall thereupon inquire, in a summary manner, into the circumstances of the case, first causing reasonable notice to be given to the attorney of the United States for such district, and to the collector of the district by whom such seizure or detention hath been or shall be made, that each may have an opportunity of showing cause against the prayer of such petition; and shall cause the facts which shall appear upon such inquiry, to be stated and annexed to the petition, and direct their transmission to the Secretary of the Treasury; and if it shall appear to his satisfaction, that such ship or vessel was captured or driven into such port or place by distress of weather, or want of provisions, or was unavoidably detained and delayed by some embargo, arrest, capture, contrary winds, or other unavoidable casualty, without any fault, wilful negligence, or intention to evade the provisions of the act before mentioned, or of this act, in any such claimant, the Secretary of the Treasury shall order the restoration of said vessel and cargo to such claimant, upon such terms and conditions as he may deem reasonable and just; otherwise, and in all cases wherein such petition shall not be presented, every ship or vessel that has arrived since the said first day of December, from any port or place in the French Republic, or the dependencies thereof, or which shall hereafter arrive within any port or place of the United States, unless driven by stress of weather or want of provisions, shall be liable to be prosecuted and condemned in the same manner and to the same uses as are provided in and by the first section of this act; and like proceedings shall also be had and like forfeitures incurred, as are herein provided with respect to vessels coming from France, and the dependencies thereof,

in all cases when any ship or vessel shall arrive in any port or place of the United States, from any port or place, with which all commercial intercourse shall be prohibited by proclamation, according to the intent of this act.

SEC. 7. *Provided, and be it further enacted,* That nothing in this act contained shall extend to any ship or vessel to which the President of the United States shall grant a permission to enter or to clear; which permission he is hereby authorized to grant to vessels which shall be solely employed in any purpose of political or national intercourse, or to aid the departure of any French persons, with their goods and effects, who shall have been resident within the United States, when he may think requisite.

SEC. 8. *And be it further enacted,* That this act shall continue and be in force until the third day of March, in the year one thousand eight hundred.

APPROVED, February 9, 1799.

An Act for the Government of the Navy of the United States[1]

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the following rules and regulations be adopted and put in force, for the government of the navy of the United States.

ARTICLE 1. The commanders of all ships and vessels, belonging to the United States, are strictly required to show in themselves a good example of honour and virtue to their officers and men, and to be very vigilant in inspecting the behaviour of all such as are under them, and to discountenance and suppress all dissolute, immoral, and disorderly practices, and also such as are contrary to the rules of discipline and obedience, and to correct those who are guilty of the same, according to the usage of the sea service.

2. The commanders of the ships of the United States, having on board chaplains, are to take care, that divine service be performed twice a day, and a sermon preached on Sundays, unless bad weather, or other extraordinary accidents prevent.

3. Any person who shall be guilty of profane swearing, or of drunk-

[1] Statutes at Large, vol. I, p. 709.

enness, if a seaman or marine, shall be put in irons until sober, and then flogged if the captain shall think proper—but if an officer, he shall forfeit two days pay, or incur such punishment as a court martial shall impose, and as the nature and degree of the offence shall deserve.

4. No commander, for any one offence, shall inflict any punishment upon a seaman or marine beyond twelve lashes upon his bare back with a cat of nine tails, and no other cat shall be made use of on board any ship of war, or other vessel belonging to the United States—if the fault shall deserve a greater punishment, he is to apply to the Secretary of the Navy, the commander in chief of the navy, or the commander of a squadron, in order to the trying of him by a court martial; and in the mean time he may put him under confinement.

5. The commander is never by his own authority to discharge a commission or warrant officer, nor to punish or strike him, but he may suspend or confine him, and shall report the case to the Secretary of the Navy, or commandant of a squadron, as soon as he arrives in port, if at sea, or if in port in ten days, in order that a court martial may decide on the offence.

6. The officer who commands by accident in the captain or commander's absence (unless he be absent for a time by leave) shall not order any correction but confinement, and upon the captain's return on board, he shall then give an account of his reasons for so doing.

7. The captain is to cause the articles of war to be hung up in some public place of the ship, and read to the ship's company once a month.

8. Whenever a captain shall enter or enlist a seaman, he shall take care to enter on his books, the time and terms of his entering, in order to his being justly paid.

9. The captain shall, before he sails, make return to the Secretary of the Navy a complete list of all his officers and men, with the time and terms of their entering, and during his cruise or station, shall keep a true account of the desertion or death of any of them, and of the entering of others, and after the expiration of the time for which they were entered, and before any of them are paid off, he shall make return of a complete list of the same, including those who shall remain on board his ship.

10. The men shall, at their request, be furnished with slops that are necessary, by order of the captain, and the amount delivered to each man, shall be regularly returned by the purser, so that the same be stopped out of his pay.

11. All officers not having commissions or warrants, (or appointed commission or warrant officers for the time being) are termed petty, or inferior officers.

12. Whenever any inferior officer, seaman, or other person, be turned over into the ship of a commander other than the one with whom he entered, he is not to be rated on the ship's books, in a worse quality, or lower degree or station, than he served in the ship he was removed from; and for the guide of the captain, he is to demand from the commander of the ship from which such person or persons were turned over, a list, under his hand, of his or their names, and the quality in which he or they served.

13. Any officer, seaman or other person, entitled to wages or prize money, may have the same paid to his assignee, provided the assignment be attested by the captain and the purser; but the captain or commander of every vessel in the service of the United States, is to discourage his crew from selling any part of their wages or prize money, and never to attest the letter of attorney until he is satisfied that the same is not granted in consideration of money given for the purchase of wages, or shares of prize money.

14. When any officer or other person dies, the captain is forthwith to have his name entered on the books of the ship, in order to the wages being forthwith paid to his executors or administrators.

15. A convenient place shall be set apart for the sick or hurt men, to which they are to be removed with their hammocks and bedding, when the surgeon shall advise the same to be necessary, and some of the crew shall be appointed to attend them, and keep the place clean;—cradles and buckets with covers, shall be made for their use, if necessary.

16. All ships furnished with fishing tackle, being in such places where fish is to be had, the captain is to employ some of the company in fishing: The fish to be daily distributed to such persons as are sick, or upon recovery, provided the surgeon recommend it, and the surplus, by turns, amongst the messes of the officers and seamen, gratis, without any deduction of their allowance of provisions on that account.

17. It is left to the discretion of commanders of squadrons, to shorten the allowance of provisions according to the exigence of the service, taking care that the men be punctually paid for the same—the like power is given to captains of ships acting singly, where it is deemed necessary, and if there should be a want of pork, the captain is to order three pounds of beef to be issued in lieu of two pounds of pork.

18. If any ships of the United States shall happen to come into port in want of provisions, the warrant of the commander of the squadron, or of a captain where there is no commander of a squadron present, shall be sufficient to procure the supply of the quantity wanted, from the agent, or navy agent at such port.

19. The captains are frequently to cause to be inspected the condition of the provision, and if the bread proves damp, to have it aired upon the quarter deck, and other convenient places, and in case of the pickle being leaked out of the flesh casks, he is to have new pickle made and put therein, after such casks are repaired.

20. The captain shall cause the purser to secure the clothes, bedding and other things, of such persons as shall die or be killed, to be delivered to their executors or administrators.

21. All papers, charter-parties, bills of lading, passports, and other writings whatsoever, found on board any ship or ships which shall be taken, shall be carefully preserved and the originals sent to the court of justice for maritime affairs, appointed or to be appointed for judging concerning such prize or prizes, and if any person or persons shall wilfully or negligently destroy or suffer to be destroyed any such paper or papers, he or they so offending shall forfeit his or their share of such prize or prizes, and suffer such other punishment as they shall be judged by a court martial to deserve; and if any person or persons shall embezzle or steal, or take away any cables, anchors, sails or any of the ship's furniture, or any of the powder, arms, ammunition, or provisions of any ship belonging to the United States, or of any prize taken by a ship or ships, aforesaid, or maltreat or steal the effects of any prisoner, he or they so offending shall suffer such punishment as a court martial shall order.

22. When in sight of any ship, ships, or other vessels of the enemy, or at such other times as may appear necessary to prepare for an engagement, the captain shall order all things in his ship in a proper posture for fight, and shall, in his own person, and according to his duty, heart on, and encourage the inferior officers and men to fight courageously, and not to behave themselves faintly or cry for quarters, on pain of such punishment as the offence shall appear to deserve for his neglect.

23. Any captain, officer or other person who shall not exert himself, or who shall basely desert his duty or station in the ship, and run away while the enemy is in sight, or in time of action, or shall entice others

to do so, shall suffer death, or such other punishment as a court martial shall inflict.

24. Any officer, seaman, mariner or other person who shall disobey the orders of his superior, or begin, excite, cause or join in any mutiny or sedition in the ship to which he belongs, or in any other ship or vessel in the service of the United States, on any pretence whatsoever, shall suffer death, or such other punishment as a court martial shall direct; and further, any person in any ship or vessel belonging to the service aforesaid, who shall utter any words of sedition and mutiny, or endeavour to make any mutinous assembly on any pretence whatsoever, shall suffer such punishment as a court martial shall inflict.

25. None shall presume to quarrel with or strike his superior officer, on pain of such punishment as a court martial shall order to be inflicted.

26. If any person shall apprehend he has just cause of complaint, he shall quietly and decently make the same known to his superior officer, or to the captain, as the case may require, who shall take care that justice be done him.

27. There shall be no quarreling or fighting between ship mates on board any ship belonging to the United States, nor shall there be used any reproachful or provoking speeches, tending to make quarrels and disturbances, on pain of imprisonment, or of such punishment as the captain, or a court martial shall judge proper to inflict.

28. If any person shall sleep upon his watch, or negligently perform the duty which shall be enjoined him to do, he shall suffer such punishment as the captain, or a court martial shall inflict.

29. All murder shall be punished with death.

30. All robbery and theft, not exceeding twenty dollars, shall be punished at the discretion of the captain, and above that sum as a court martial shall inflict.

31. Any master of arms, or other person of whom the like duty may be required, refusing to receive such prisoner or prisoners, as shall be committed to his charge, or having received them shall suffer him or them to escape, or dismiss them without orders from his captain, the commander in chief of the navy or the commander of the squadron, for so doing, shall suffer in his or their stead as a court martial shall order and direct.

32. The captains, officers and others shall use their utmost endeavours to detect, apprehend, and bring to punishment all offenders, and shall at

all times readily assist all officers and others appointed for that purpose, in the discharge of such duty, when it is required, on pain of being proceeded against and punished by a court martial at discretion.

33. If any officer whatsoever, mariner, marine soldier, or other person, belonging to any ship or vessel of war in the service of the United States, shall give, hold or entertain intelligence, to or with any enemy or rebel, without leave from the government, commander in chief, or in case of a single ship, from his captain, every such person so offending, and being thereof convicted by the sentence of a court martial, shall be punished with death.

34. If any letter or message from an enemy or a rebel be conveyed to any officer, mariner, marine or other person, belonging to any ship or vessel in the service of the United States, and the person as aforesaid shall not within twelve hours, having opportunity so to do, acquaint his superior or commander in chief with it; or if any superior officer being acquainted therewith, shall not in convenient time reveal the same to the commander in chief, commander of a squadron or other proper officer, appointed to take cognizance of such offence, every such person so offending, and being convicted thereof, by the sentence of a court martial, shall be punished with death, or such other punishment as the nature and degree of the offence shall deserve, and according to the sentence of a court martial.

35. All spies, and all persons whatsoever who shall come or be found in the nature of spies, to bring or deliver any seducing letter or message, from an enemy or rebel, or endeavour to corrupt any captain, officer, mariner, marine, or other person in the fleet, to betray his trust, being convicted of any such offence by the sentence of a court martial, shall be punished with death, or such other punishment as the nature and degree of the offence shall deserve, and the court martial shall impose.

36. No person in a fleet, or in a single ship or vessel, shall supply an enemy or rebel with stores, money, victuals, arms, ammunition, or any kind of stores, directly or indirectly, upon pain of death, or such other punishment as a court martial shall think fit to impose, and as the nature and degree of the crime shall deserve.

37. Every person in or belonging to any ship or vessel in the service of the United States, who shall desert or run away with any vessel or boat, to the enemy or otherwise, or with any effects of the United States, whatsoever, or yield up the same cowardly or treacherously,

shall suffer death, or such other punishment as a court martial shall inflict.

38. The officers and seamen, &c., of all ships appointed for convoy and guard of merchantmen, shall diligently attend upon that charge without delay, according to their instructions, and whosoever shall be faulty therein, shall be punished as a court martial shall direct.

39. If any captain, commander or other officer of any ship or vessel in the service of the United States, shall receive or permit on board his vessel any goods or merchandise, other than for the sole use of his vessel, except gold, silver, or jewels, and except the goods and merchandise of vessels which may be in distress or shipwrecked, or in imminent danger of being shipwrecked in order to preserve them for the proper owner, without legal orders from the naval department, every person so offending being convicted thereof, by the sentence of a court martial, shall be cashiered, and be for ever afterwards rendered incapable to serve in any place or office in the navy service of the United States.

40. There shall be no wasteful expense of any powder, shot, ammunition, or other stores in the vessels belonging to the United States, nor any embezzlement thereof, but the stores and provisions shall be carefully preserved, upon pain of such punishment, to be inflicted upon the offenders, abettors, buyers and receivers, as shall be by a court martial found just in that behalf.

41. Every person in the navy who shall unlawfully burn or set fire to any kind of public property, not then appertaining to an enemy, pirate or rebel, being convicted of any such offence by the sentence of a court martial, shall suffer death.

42. Care shall be taken in steering and conducting every ship belonging to the United States, so that through wilfulness, negligence, or other defaults, no ship be stranded or hazarded, upon pain that such as shall be found guilty therein, be punished as the offence, by a court martial, shall be judged to deserve.

43. Every officer or other person in the navy, who shall knowingly make or sign a false muster, or procure the making or signing thereof, or shall aid or abet in the same, shall be cashiered and rendered incapable of further employment in the navy service of the United States, and shall forfeit all the pay and subsistence money due to him.

44. Every person guilty of mutiny, desertion or disobedience to his superior officer on shore, acting in the proper line of his duty, shall be tried by a court martial, and suffer the like punishment for every such

offence, as if the same had been committed at sea, on board any ship or vessel of war in the service of the United States.

45. If any person belonging to any ship or vessel of war in the service of the United States, shall, when on shore, on duty, or otherwise, plunder, abuse, or maltreat any inhabitant, or injure his property in any way, such person shall be punished as a court martial shall direct.

46. All faults, disorders and misdemeanors which shall be committed on board any ship belonging to the United States, and which are not herein mentioned, shall be punished according to the laws and customs in such cases at sea.

47. No court martial, to be held or appointed by virtue of this act, shall consist of more than thirteen, nor less than five persons, to be composed of such commanders of squadrons, captains and sea lieutenants, as are then and there present, and as are next in seniority to the officer who presides; but no lieutenant shall sit on a court martial, held on a captain, or a junior lieutenant on that of a senior.

48. Every member of a court martial shall take the following oath: "I, A. B. do swear, that I will well and truly try and impartially determine the cause of the prisoner now to be tried, according to the rules of the navy of the United States. So help me God." Which oath shall be administered by the president to the other members, and the president himself shall be sworn by the officer next in rank; and as soon as the above oath shall have been administered, the president of the court is required to administer to the judge advocate, or person officiating as such, an oath in the following words: "I, A. B. do swear, that I will not, upon any account, at any time whatsoever, disclose or discover the vote or opinion of any particular member of this court martial, unless thereto required by an act of Congress. So help me God." And all the witnesses, before they be admitted to give evidence, shall take the following oath: "I, A. B. do swear, that the evidence I shall give in the cause now in hearing, shall be the truth, the whole truth, and nothing but the truth. So help me God."

49. The sentence of a court martial for any capital offence shall not be put in execution, until it be confirmed by the commander in chief of the fleet. And it shall be the duty of the president of every court martial, to transmit to the commander in chief of the fleet, and to the head of the Navy department, every sentence which shall be given, with a summary of the evidence and proceedings thereon, as soon as may be.

50. The commander in chief of the fleet, for the time being, shall have power to pardon and remit any sentence of death, in consequence of any of the aforementioned articles.

SEC. 2. *And it is hereby further enacted,* That if any person in the navy service, being called upon to give evidence at any court martial, shall refuse to give his evidence upon oath, or shall prevaricate in his evidence, or behave with contempt to the court, it shall and may be lawful for such court martial to punish such offender by imprisonment, at the discretion of the court; such imprisonment, in no case, to continue longer than three months; and that all and every person and persons, who shall commit any wilful perjury in any evidence or examination upon oath at such court martial, or who shall corruptly procure or suborn any person to commit such wilful perjury, shall and may be prosecuted in any of the courts of the United States, by indictment or information. And all and every person, lawfully convicted upon any such indictment or information, shall be punished with such pains and penalties as are inflicted for the like offences by the laws therein provided.

SEC. 3. *And it is hereby further enacted, by the authority aforesaid,* That in all cases where the crews of the ships or vessels of the United States shall be separated from their vessels, by the latter being wrecked, lost, or destroyed, all the command, power and authority given to the officers of such ships or vessels, shall remain and be in full force as effectually as if such ship or vessel was not so wrecked, lost or destroyed, until they shall be regularly discharged from the service of the United States, or removed into some other of its said ships, or until a court martial shall be held, to inquire into such loss of the said ship or vessel; and if upon inquiry it shall appear by the sentence of the court martial, that all or any of the officers, seamen, marines, and others of the said ship or vessel, did their utmost to preserve, get off, or recover the said ship or vessel, and after the loss thereof did behave themselves obediently to their superior officers, according to the discipline of the navy, and the said articles and orders herein before established, then all the pay and wages of the said officers and seamen, or such of them as shall have done their duty as aforesaid, shall continue and go on, and be paid to the time of their discharge or death; and every such officer or seaman, who after the wreck or loss of his ship or vessel, shall act contrary to the discipline of the navy, or the articles herein before established, or any of them, shall be sentenced by the said court

martial, and be punished, as if the ship to which he did belong was not so wrecked or destroyed.

SEC. 4. *And be it further enacted,* That all the pay and wages of such officers and seamen of any of the ships of the United States as are taken by the enemy, and upon inquiry at a court martial, shall appear by the sentence of the said court, to have done their utmost to defend the ship or ships, and since the taking thereof, to have behaved themselves obediently to their superior officers, according to the discipline of the navy, and the said articles and orders, herein before established, shall continue and go on as aforesaid, until they be exchanged and discharged, or until they shall die, whichever may first happen: *Provided always,* that persons flying from justice shall be tried and punished for so doing.

SEC. 5. *And be it further enacted,* That all captured national ships or vessels of war shall be the property of the United States—all other ships or vessels, being of superior force to the vessel making the capture, in men or in guns, shall be the sole property of the captors—and all ships or vessels of inferior force shall be divided equally between the United States and the officers and men of the vessel making the capture.

SEC. 6. *And be it further enacted,* That the produce of prizes taken by the ships of the United States, and bounty for taking the ships of the enemy, be proportioned and distributed in the manner following, to wit:—

1. To the captain actually on board at the time of taking any prize, being other than a public or national vessel, or ship of war, three twentieths of that proportion of the proceeds belonging to the captors.

2. If such captain or captains be under the immediate command of a commander in chief, or commander of a squadron, having a captain on board, such commander in chief, or commander of a squadron, to have one of the said twentieth parts, and the captain taking the prize, the other two twentieth parts.

3. To the sea lieutenants and sailing-master, two twentieths.

4. To marine officers, the surgeon, purser, boatswain, gunner, carpenter, master's mate and chaplain, two twentieths.

5. To midshipmen, surgeon's mates, captain's clerks, clergyman or schoolmaster, boatswain's mates, gunner's mates, carpenter's mates, ship's steward, sail-maker, master at arms, armorer, and cockswain, three twentieths.

6. Gunner's yeoman, boatswain's yeoman, quartermasters, quartergunners, cooper, sail-maker's mates, sergeant of marines, corporal of marines, drummer and fifer and extra petty officers, three twentieths.

7. To seamen, ordinary seamen, marines and boys, seven twentieths.

8. Any officer on board having more posts than one, is only entitled to the share belonging to his superior office, according to the regulations aforesaid.

9. Whenever one or more ships of the United States are in sight, at the time of any one or more other ships as aforesaid are taking a prize or prizes, or being engaged with an enemy, and they shall all be so in sight, when the enemy shall strike or surrender, they shall share equally, according to the number of guns and men on board of each ship so in sight—but no privateer or armed ship, being in sight of a national ship of war, at the taking of any prize, shall be entitled to any share in such prize or prizes.

10. Commanders of ships of war taking any prize, are to transmit, as soon as possible, to the naval department, a true list of the officers and men actually on board at the taking of such prize, inserting therein the quality of every person's rating; and the department aforesaid is to examine the said list by the ship's muster book, to see their agreement, and is to grant certificates of the truth of such list transmitted, in order that the agents appointed by the captors, make payment of the shares, agreeably to this act.

11. In order to define the rights and privileges of commanders in chief, commanders of squadrons and captains, in relation to captures—No commander in chief, or commander of a squadron, shall be entitled to receive any share of prizes taken by the ships of war of the United States that are not put under his immediate command, nor of such prizes as may have been taken previous to such ships being placed under his command, and until they have acted under his immediate orders; nor shall a commander in chief, or commander of a squadron, returning home from any station where he had the command, have any share in prizes taken by ships left on such station, after he has got out of the limits of his said command.

12. Captains, sailing specially under orders from the navy department, are clearly to be understood as acting separately from any superior officer.

13. The bounty given by the United States on any national ship of war, taken from the enemy and brought into port, shall be for every

cannon mounted, carrying a ball of twenty-four pounds, or upwards, two hundred dollars; for every cannon carrying a ball of eighteen pounds, one hundred and fifty dollars; for every cannon carrying a ball of twelve pounds, one hundred dollars; and for every cannon carrying a ball of nine pounds, seventy-five dollars; for every smaller cannon, fifty dollars; and for every officer and man taken on board, forty dollars; which sums are to be divided agreeably to the foregoing articles.

SEC. 7. *And be it further enacted,* That for the ships or goods belonging to the citizens of the United States, or to the citizens or subjects of any nation, in amity with the United States, if retaken from the enemy within twenty-four hours, the owners are to allow one eighth part of the whole value for salvage, if after twenty-four hours, and under forty-eight, one fifth thereof, if above that and under ninety-six hours, one third part thereof, and if above that, one half, all of which is to be paid without any deduction whatsoever, agreeable to the articles herein before mentioned.

SEC. 8. *And be it further enacted,* That every officer, seaman or mariner disabled in the line of his duty, shall be entitled to receive for his own life, and the life of his wife, if a married man, at the time of receiving the wound, one half his monthly pay.

SEC. 9. *And be it further enacted,* That all the money accruing, or which has already accrued from the sale of prizes, shall be and remain for ever a fund for the payment of the half pay to the officers and seamen who may be entitled to receive the same—and if the said fund shall be insufficient for this purpose, the public faith is hereby pledged to make up the deficiency. But if it should be more than sufficient, the surplus shall be applied as Congress may hereafter direct by law, to the making of further provision for the comfort of the disabled officers seamen and mariners, and for such as may not be disabled, who may merit by their bravery, or their long and faithful services, the gratitude of their country.

SEC. 10. *And be it further enacted,* That the said fund shall be under the management and direction of the Secretary of the Navy, the Secretary of the Treasury and the Secretary at War for the time being, who are hereby authorized to receive all such sums as the United States may be entitled to, from the sale of prizes, and to invest the same, and the interest arising therefrom, in such of the six per cent., or other stock of the United States, as a majority of them from time to time shall determine to be most advantageous; and it shall be the duty

of the said commissioners to lay before Congress, every year, in the first week of their annual meeting, a minute and correct statement of their proceedings, in relation to the management of said fund.

SEC. 11. *And be it further enacted,* That no rules or regulations made by any commander in chief, or captain, in the service of the United States, for the stationing, designating of duty and government of the fleet, or any of the crews of any ship of war, shall be at variance with this act, but shall be strictly conformable thereto; and that every commander in chief and captain, in making private rules and regulations, and designating the duty of his officers, shall keep in view also the custom and usage of the sea service most common to our nation.

APPROVED, March 2, 1799.

An Act further to suspend the commercial intercourse between the United States and France, and the dependencies thereof[1]

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all commercial intercourse between any person or persons resident within the United States or under their protection, and any person or persons resident within the territories of the French Republic, or any of the dependencies thereof, shall be, and from and after the second day of March next, is hereby prohibited and farther suspended, excepting only in the cases hereinafter provided. And any ship or vessel, owned, hired, or employed wholly or in part by any person or persons resident within the United States, or any citizen or citizens thereof resident elsewhere, and sailing therefrom after that day, which contrary to the intent hereof, shall be voluntarily carried, or shall be destined or permitted to proceed, or shall be sold, bartered, entrusted or transferred, for the purpose that she may proceed, whether directly or from any intermediate port or place, to any port or place within the territories of that Republic, or any of the dependencies thereof; or shall be engaged in any traffic or commerce, by or for any person resident within the territories of that Republic, or within any of the dependencies thereof; and also any cargo which shall be found on board of such ship or vessel, when detected and interrupted in such unlawful

[1] Statutes at Large, vol. II, p. 7.

purpose, or at her return from such voyage to the United States, shall be wholly forfeited, and may be seized and condemned in any court of the United States, having competent jurisdiction.

SEC. 2. *And be it further enacted,* That excepting for foreign ships or vessels owned, hired, and employed by persons permanently residing in Europe, and commanded and wholly navigated by foreigners, no clearance for a foreign voyage shall be granted to any ship or vessel whatever, until the owner or the employer for the voyage, or if not resident within the district where the clearance shall be required, his factor or agent, with the master and one or more sufficient surety or sureties, to the satisfaction of the collector of the district, shall give bond to the United States, such owner, employer, or factor, with the master, in a sum equal to the value of the vessel, and of one-third of her cargo; and such surety or sureties in a like sum, when it shall not exceed ten thousand dollars; and if it shall exceed, then in that sum, with condition that the ship or vessel for which a clearance shall be required, is actually destined, and shall proceed to some port or place without the limits or jurisdiction of the French Republic, or any of the dependencies thereof, and during the intended voyage shall not be voluntarily carried, or permitted to proceed or sold, entrusted or transferred, with the purpose that she may proceed whether directly, or from any intermediate port or place, to any port or place within the territories of that Republic, or any of the dependencies thereof; and shall not, at any such port or place, voluntarily deliver or unlade any part of such cargo; and if compelled by distress of weather, or taken by force into any such port or place, will not there receive on board of such ship or vessel any goods, produce, or merchandise, other than necessary sea stores; and generally, that such ship or vessel shall not be employed in any traffic or commerce with or for any person resident within the territory of the French Republic, or any of the dependencies thereof.

SEC. 3. *Provided, and be it further enacted,* That when any ship or vessel which shall obtain a clearance for a foreign voyage, after a bond shall be given as aforesaid, shall be compelled by distress of weather, or other casualty endangering the safety of such ship or vessel, or of the mariners on board the same, or shall be taken by any armed vessel, or other superior force, into any port or place within the territories of the French Republic, or any of the dependencies thereof, and shall there necessarily unlade and deliver, or shall be de-

prived of any cargo then on board, then, and in such case, the master or other person having charge of such ship or vessel, may receive compensation or payment in bills of exchange, or in money or bullion, for such cargo, but not otherwise, and shall not be understood thereby to contravene this law, or to incure a forfeiture of the said bond.

SEC. 4. *And be it further enacted,* That no ship or vessel coming from any port or place within the territories of the French Republic, or any of the dependencies thereof, whether with or without a cargo, or from any other port or place, with a cargo on board obtained for, or laden on board of such vessel at any port or place within the said territories or dependencies, which shall arrive within the limits of the United States after the said second day of March next, shall be admitted to an entry with the collector of any district; and each and every such ship or vessel which shall arrive as aforesaid, having on board any goods, wares or merchandise, destined to be delivered within the United States, contrary to the intent of this act, or which shall have otherwise contravened the same, together with the cargo which shall be found on board, shall be forfeited, and may be seized and condemned in any court of the United States having competent jurisdiction: *Provided,* that nothing herein contained shall be construed to prohibit the entry of any vessel having a passport granted under the authority of the French Republic, and solely employed for purposes of political or national intercourse with the government of the United States, and not in any commercial intercourse, and which shall be received, and permitted by the President of the United States to remain within the same: *And provided also,* that until the first day of August next, and no longer, any ship or vessel, wholly owned or employed by a foreigner, other than any person resident in France, or in any of the dependencies of the French Republic, and which coming therefrom shall be destined to the United States, and shall arrive within the same, not having otherwise contravened this act, shall be required and permitted to depart therefrom, and in case she shall accordingly depart, without any unreasonable delay, and without delivery, or attempting to deliver, any cargo or lading within the United States, such ship or vessel, or any cargo which may be on board the same, shall not be liable to the forfeiture aforesaid.

SEC. 5. *And be it further enacted,* That if any ship or vessel, coming from any port or place within the territories of the French Republic,

or any of the dependencies thereof, or with any cargo there obtained on board, but not destined to any port or place within the United States, shall be compelled by distress of weather, or other necessity, to put into any port or place within the limits of the United States, such ship or vessel shall be there hospitably received in the manner prescribed by the act, intituled "An act to regulate the collection of duties on imports and tonnage"; and shall be permitted to make such repairs, and to obtain such supplies as shall be necessary to enable her to proceed according to her destination; and such repairs and supplies being obtained, shall be thereafter required and permitted to depart. But if such ship or vessel shall not conform to the regulations prescribed by the act last mentioned, or shall unlade any part of her cargo, or shall take on board any cargo or supplies whatever, without the permit of the collector of the district previously obtained therefor, or shall refuse, or unreasonably delay to depart from and out of the United States, after having received a written notice to depart, which such collector may, and shall give, as soon as such ship or vessel shall be fit for sea; or having departed shall return to the United States, not being compelled thereto by further distress or necessity, in each and every such case, such ship or vessel and her cargo shall be forfeited and may be seized, and condemned in any court of the United States having competent jurisdiction.

Sec. 6 *And be it further enacted,* That at any time after the passing of this act, it shall be lawful for the President of the United States, by his order to remit and discontinue for the time being, whenever he shall deem it expedient, and for the interest of the United States, all or any of the restraints and prohibitions imposed by this act, in respect to the territories of the French Republic, or to any island, port or place belonging to the said Republic, with which in his opinion a commercial intercourse may be safely renewed; and also it shall be lawful for the President of the United States, whenever he shall afterwards deem it expedient, to revoke such order, and hereby to re-establish such restraints and prohibitions. And the President of the United States shall be, and he is hereby authorized, to make proclamation thereof accordingly.

Sec. 7. *And be it further enacted,* That the whole of the island of Hispaniola shall for the purposes of this act be considered as a dependency of the French Republic: *Provided,* that nothing herein contained shall be deemed to repeal or annul in any part, the order or

proclamation of the President of the United States, heretofore issued for permitting commercial intercourse with certain ports of that island.

SEC. 8. *And be it further enacted,* That it shall be lawful for the President of the United States, to give instructions to the public armed vessels of the United States, to stop and examine any ship or vessel of the United States on the high sea, which there may be reason to suspect to be engaged in any traffic or commerce contrary to this act, and if upon examination, it shall appear that such ship or vessel is bound or sailing to, or from any port or place, contrary to the true intent and meaning of this act, it shall be the duty of the commander of such public armed vessel, to seize every ship or vessel engaged in such illicit commerce, and send the same to the nearest convenient port of the United States, to be there prosecuted in due course of law, and held liable to the penalties and forfeitures provided by this act.

SEC. 9. *And be it further enacted,* That all penalties and forfeitures incurred by force of this act, shall, and may be examined, mitigated and remitted in like manner, and under the like conditions, regulations and restrictions, as are prescribed, authorized and directed by the act, intituled "An act to provide for mitigating, or remitting, the forfeitures, penalties and disabilities accruing in certain cases therein mentioned"; and all penalties and forfeitures, which may be recovered in pursuance of this act in consequence of any seizure made by the commander of any public armed vessel of the United States, shall be distributed according to the rules prescribed by the act, intituled "An act for the government of the navy of the United States"; and all other penalties arising under this act, and which may be recovered, shall be distributed and accounted for in the manner prescribed by the act, intituled "An act to regulate the collection of duties on imports and tonnage."

SEC. 10. *And be it further enacted,* That nothing contained in this act shall extend to any ship or vessel to which the President of the United States shall grant a permission to enter and clear; provided such ship or vessel shall be solely employed, pursuant to such permission, for purposes of national intercourse; and shall not be permitted to proceed with, or to bring to the United States any cargo or lading whatever other than necessary sea-stores.

SEC. 11. *And be it further enacted,* That the act, intituled "An act further to suspend the commercial intercourse between the United

States and France, and the dependencies thereof," shall be, and is hereby continued and shall be taken to be in force in respect to all offences, which shall have been committed against the same, before the expiration thereof; and to the intent that all seizures, forfeitures and penalties arising upon such offences, may be had, sued for, prosecuted and recovered, any limitation of the said act to the contrary hereof notwithstanding.

SEC. 12. *And be it further enacted,* That this act shall be and remain in force until the third day of March, one thousand eight hundred and one: *Provided, however,* the expiration thereof shall not prevent or defeat any seizure, or prosecution for a forfeiture incurred under this act, and during the continuance thereof.

APPROVED, February 27, 1800.

An Act providing for Salvage in cases of Recapture[1]

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That when any vessel other than a vessel of war or privateer, or when any goods which shall hereafter be taken as prize by any vessel, acting under authority from the government of the United States, shall appear to have before belonged to any person or persons, resident within or under the protection of the United States, and to have been taken by an enemy of the United States, or under authority, or pretence of authority, from any prince, government or state, against which the United States have authorized, or shall authorize, defence or reprisals, such vessel or goods not having been condemned as prize by competent authority before the recapture thereof, the same shall be restored to the former owner or owners thereof, he or they paying for and in lieu of salvage, if retaken by a public vessel of the United States, one eighth part, and if retaken by a private vessel of the United States, one sixth part, of the true value of the vessel or goods so to be restored, allowing and excepting all imposts and public duties to which the same may be liable. And if the vessel so retaken shall appear to have been set forth and armed as a vessel of war, before such capture

[1] Statutes at Large, vol. II, p. 16.

or afterwards, and before the retaking thereof as aforesaid, the former owner or owners, on the restoration thereof, shall be adjudged to pay for and in lieu of salvage, one moiety of the true value of such vessel of war, or privateer.

SEC. 2. *And be it further enacted,* That when any vessel or goods, which shall hereafter be taken as prize, by any vessel acting under authority from the government of the United States, shall appear to have before belonged to the United States and to have been taken by an enemy of the United States, or under authority, or pretence of authority from any prince, government or state, against which the United States have authorized, or shall authorize, defence or reprisals, such public vessel not having been condemned as prize by competent authority before the recapture thereof, the same shall be restored to the United States. And for and in lieu of salvage, there shall be paid from the treasury of the United States, pursuant to the final decree which shall be made in such case by any court of the United States, having competent jurisdiction thereof, to the parties who shall be thereby entitled to receive the same, for the recapture as aforesaid, of an unarmed vessel, or any goods therein, one sixth part of the true value thereof, when made by a private vessel of the United States, and one twelfth part of such value when the recapture shall be made by a public armed vessel of the United States; and for the recapture as aforesaid of a public armed vessel, or any goods therein, one moiety of the true value thereof, when made by a private vessel of the United States, and one fourth part of such value, when such recapture shall be made by a public armed vessel of the United States.

SEC. 3. *And be it further enacted,* That when any vessel or goods which shall be taken as prize, as aforesaid, shall appear to have before belonged to any person or persons permanently resident within the territory, and under the protection of any foreign prince, government or state, in amity with the United States, and to have been taken by an enemy of the United States, or by authority or pretence of authority from any prince, government or state, against which the United States have authorized, or shall authorize, defence or reprisals, then such vessel or goods shall be adjudged to be restored to the former owner or owners thereof, he or they paying for and in lieu of salvage, such proportion of the true value of the vessel or goods

so to be restored, as by the law or usage of such prince, government or state, within whose territory such former owner or owners shall be so resident, shall be required on the restoration of any vessel or goods of a citizen of the United States, under like circumstances of recapture, made by the authority of such foreign prince, government or state; and where no such law or usage shall be known, the same salvage shall be allowed as is provided by the first section of this act: *Provided,* that no such vessel or goods shall be adjudged to be restored to such former owner or owners, in any case where the same shall have been, before the recapture thereof, condemned as prize by competent authority, nor in any case where by the law or usage of the prince, government, or state, within whose territory such former owner or owners shall be resident as aforesaid, the vessel or goods of a citizen of the United States, under like circumstances of recapture, would not be restored to such citizen of the United States: *Provided also,* that nothing herein shall be construed to contravene or alter the terms of restoration in cases of recapture, which are or shall be agreed on in any treaty between the United States, and any foreign prince, government or state.

Sec. 4. *And be it further enacted,* That all sums of money which may be paid for salvage, as aforesaid, when accruing to any public armed vessel, shall be divided to and among the commanders, officers and crew thereof, in such proportions as are or may be provided by law, respecting the distribution of prize money: and when accruing to any private armed vessel, shall be distributed to and among the owners and company concerned in such recapture, according to their agreements, if any such there be; and in case there be no such agreement, then to and among such persons, and in such proportions, as the court having jurisdiction thereof shall appoint.

Sec. 5. *And be it further enacted,* That such parts of any acts of Congress of the United States, as respect the salvage to be allowed in cases of recapture, shall be, and are hereby repealed, except as to cases of recapture made before the passing of this act.

Approved, March 3, 1800.

An Act to continue in force the act intituled "An act to authorize the defence of the merchant vessels of the United States against French depredations."[1]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act passed on the twenty-fifth day of June, one thousand seven hundred and ninety-eight, intituled "An act to authorize the defence of the merchant vessels of the United States against French depredations," excepting such parts of the said act as relate to salvage in cases of recapture, shall continue and be in force for and during the term of one year, and from thence to the end of the next session of Congress thereafter, and no longer.

APPROVED, April 22, 1800.

An act to provide for the ascertainment of claims of American citizens for spoliations committed by the French prior to the thirty-first day of July, eighteen hundred and one.[2]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That such citizens of the United States, or their legal representatives, as had valid claims to indemnity upon the French Government arising out of illegal captures, detentions, seizures, condemnations, and confiscations prior to the ratification of the convention between the United States and the French Republic concluded on the thirtieth day of September, eighteen hundred, the ratifications of which were exchanged on the thirty-first day of July following, may apply by petition to the Court of Claims, within two years from the passage of this act, as hereinafter provided: *Provided,* That the provisions of this act shall not extend to such claims as were embraced in the convention between the United States and the French Republic concluded on the thirtieth day of April, eighteen hundred and three; nor to such claims growing out of the acts of France as were allowed and paid, in whole or in part, under the provisions of the treaty between the United States and Spain con-

[1] Statutes at Large, vol. II, p. 39.

[2] Statutes at Large, vol. XXIII, p. 283.

cluded on the twenty-second day of February, eighteen hundred and nineteen; nor to such claims as were allowed, in whole or in part, under the provisions of the treaty between the United States and France concluded on the fourth day of July, eighteen hundred and thirty-one.

SEC. 2. That the court is hereby authorized to make all needful rules and regulations, not contravening the laws of the land or the provisions of this act, for executing the provisions hereof.

SEC. 3. That the court shall examine and determine the validity and amount of all the claims included within the description above mentioned, together with their present ownership, and, if by assignee, the date of the assignment, with the consideration paid therefor: *Provided,* That in the course of their proceedings they shall receive all suitable testimony on oath or affirmation, and all other proper evidence, historical and documentary, concerning the same; and they shall decide upon the validity of said claims according to the rules of law, municipal and international, and the treaties of the United States applicable to the same, and shall report all such conclusions of fact and law as in their judgment may affect the liability of the United States therefor.

SEC. 4. That the court shall cause notice of all petitions presented under this act to be served on the Attorney-General of the United States, who shall be authorized, by himself or his assistant, to examine witnesses, to cause testimony to be taken, to have access to all testimony taken under this act, and to be heard by the court. He shall resist all claims presented under this act by all proper legal defenses.

SEC. 5. That it shall be the duty of the Secretary of State to procure, as soon as possible after the passage of this act, through the American minister at Paris or otherwise, all such evidence and documents relating to the claims above mentioned as can be obtained from abroad; which, together with the like evidence and documents on file in the Department of State, or which may be filed in the Department, may be used before the court by the claimants interested therein, or by the United States, but the same shall not be removed from the files of the court; and after the hearings are closed the record of the proceedings of the court and the documents produced before them shall be deposited in the Department of State.

SEC. 6. That on the first Monday of December in each year the court shall report to Congress, for final action, the facts found by it, and its conclusions in all cases which it has disposed of and not pre-

viously reported. Such finding and report of the court shall be taken to be merely advisory as to the law and facts found, and shall not conclude either the claimant or Congress; and all claims not finally presented to said court within the period of two years limited by this act shall be forever barred; and nothing in this act shall be construed as committing the United States to the payment of any such claims.

Approved, January 20th, 1885.

Proclamations

Proclamation of June 26, 1799[1]

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A Proclamation

Whereas by an act of the Congress of the United States passed the 9th day of February last, entitled "An act further to suspend the commercial intercourse between the United States and France and the dependencies thereof," it is provided that at any time after the passing of this act it shall be lawful for the President of the United States, if he shall deem it expedient and consistent with the interests of the United States, by his order to remit and discontinue for the time being the restraints and prohibitions by the said act imposed, either with respect to the French Republic or to any island, port, or place belonging to the said Republic with which a commercial intercourse may safely be renewed, and also to revoke such order whenever, in his opinion, the interest of the United States shall require; and he is authorized to make proclamation thereof accordingly; and

Whereas the arrangements which have been made at St. Domingo for the safety of the commerce of the United States and for the admission of American vessels into certain ports of that island do, in my opinion, render it expedient and for the interest of the United States to renew a commercial intercourse with such ports:

Therefore I, John Adams, President of the United States, by virtue of the powers vested in me by the above-recited act, do hereby remit and discontinue the restraints and prohibitions therein contained within the limits and under the regulations here following, to wit:

1. It shall be lawful for vessels which have departed or may depart from the United States to enter the ports of Cape François and Port Republicain, formerly called Port-au-Prince, in the said island of St. Domingo, on and after the 1st day of August next.

2. No vessel shall be cleared for any other port in St. Domingo than Cape François and Port Republicain.

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[1] Richardson, Messages, vol. I, p. 288.

3. It shall be lawful for vessels which shall enter the said ports of Cape François and Port Republicain after the 31st day of July next to depart from thence to any other port in said island between Monte Christi on the north and Petit Goave on the west; provided it be done with the consent of the Government of St. Domingo and pursuant to certificates or passports expressing such consent, signed by the consul-general of the United States or consul residing at the port of departure.

4. All vessels sailing in contravention of these regulations will be out of the protection of the United States and be, moreover, liable to capture, seizure, and confiscation.

Given under my hand and the seal of the United States, at Philadelphia, the 26th day of June, A. D. 1799, and of the Independence of the said States the twenty-third.

(Seal.) JOHN ADAMS.

By the President:

TIMOTHY PICKERING,
Secretary of State.

Proclamation of May 9, 1800[1]

PROCLAMATION

MAY 9, 1800.

Whereas by an act of Congress of the United States passed the 27th day of February last, entitled "An act further to suspend the commercial intercourse betwen the United States and France and the dependencies thereof," it is enacted that at any time after the passing of the said act it shall be lawful for the President of the United States, by his order, to remit and discontinue for the time being, whenever he shall deem it expedient and for the interest of the United States, all or any of the restraints and prohibitions imposed by the said act in respect to the territories of the French Republic, or to any island, port, or place belonging to the said Republic with which, in his opinion, a commercial intercourse may be safely renewed, and to make proclamation thereof accordingly; and it is also thereby further enacted that the whole of the island of Hispaniola shall, for the purposes of the said act, be considered as a dependence of the French Republic; and

[1]Richardson, Messages, vol. I, p. 302.

Whereas the circumstances of certain ports and places of the said island not comprised in the proclamation of the 26th day of June, 1799, are such that I deem it expedient and for the interest of the United States to remit and discontinue the restraints and prohibitions imposed by the said act in respect to those ports and places in order that a commercial intercourse with the same may be renewed:

Therefore I, John Adams, President of the United States, by virtue of the powers vested in me as aforesaid, do hereby remit and discontinue the restraints and prohibitions imposed by the act aforesaid in respect to all the ports and places in the said island of Hispaniola from Monte Christi on the north, round by the eastern end thereof as far as the port of Jacmel on the south, inclusively. And it shall henceforth be lawful for vessels of the United States to enter and trade at any of the said ports and places, provided it be done with the consent of the Government of St. Domingo. And for this purpose it is hereby required that such vessels first enter the port of Cape François or Port Republicain, in the said island, and there obtain the passports of the said Government, which shall also be signed by the consul-general or consul of the United States residing at Cape François or Port Republicain, permitting such vessel to go thence to the other ports and places of the said island hereinbefore mentioned and described. Of all which the collectors of the customs and all other officers and citizens of the United States are to take due notice and govern themselves.

In testimony, etc.

JOHN ADAMS.

Proclamation of September 6, 1800[1]

BY JOHN ADAMS, PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

Whereas by an act of the Congress of the United States passed on the 27th day of February last, entitled "An act further to suspend the commercial intercourse between the United States and France and the dependencies thereof," it is enacted "that at any time after the pass-

[1] Richardson, Messages, vol. I, p. 304.

ing of the said act it shall be lawful for the President of the United States, by his order, to remit and discontinue for the time being, whenever he shall deem it expedient and for the interest of the United States, all or any of the restraints and prohibitions imposed by the said act in respect to the territories of the French Republic, or to any island, port, or place belonging to said Republic with which, in his opinion, a commercial intercourse may be safely renewed, and to make proclamation thereof accordingly;" and it is also thereby further enacted that the whole of the island of Hispaniola shall, for the purposes of the said act, be considered as a dependence of the French Republic; and

Whereas the circumstances of the said island are such that, in my opinion, a commercial intercourse may safely be renewed with every part thereof, under the limitations and restrictions hereinafter mentioned:

Therefore I, John Adams, President of the United States, by virtue of the powers vested in me as aforesaid, do hereby remit and discontinue the restraints and prohibitions imposed by the act aforesaid in respect to every part of the said island, so that it shall be lawful for vessels of the United States to trade at any of the ports and places thereof, provided it be done with the consent of the Government of St. Domingo; and for this purpose it is hereby required that such vessels first clear for and enter the port of Cape Français or Port Republicain, in the said island, and there obtain the passports of the said Government, which shall also be signed by the consul-general of the United States, or their consul residing at Cape Français, or their consul residing at Port Republicain, permitting such vessels to go thence to the other ports and places of the said island. Of all which the collectors of the customs and all other officers and citizens of the United States are to take due notice and govern themselves accordingly.

Given under my hand and the seal of the United States of America, at the city of Washington, this 6th day of September, A. D. 1800, and of the Independence of the said States the twenty-fifth.

(Seal.) JOHN ADAMS.

By the President:

J. MARSHALL,

Secretary of State.

PART II—OPINIONS OF THE ATTORNEYS GENERAL AND JUDGMENTS OF THE SUPREME COURT AND COURT OF CLAIMS OF THE UNITED STATES

Opinions of the Attorneys General of the United States

TREASON[1]

It is treason for a citizen or other person not commissioned, within the United States, to abet France during a maritime war with her.

BUCK TAVERN, *August 21, 1798.*

SIR: Having taken into consideration the acts of the French Republic relative to the United States, and the laws of Congress passed at the last session, it is my opinion that there exists not only an *actual* maritime war between France and the United States, but a maritime war *authorized* by both nations. Consequently, France is our enemy; and to aid, assist, and abet that nation in her maritime warfare, will be treason in a citizen or any other person within the United States not commissioned under France. But in a French subject, commissioned by France, acting openly according to his commission, such assistance will be hostility. The former may be tried and punished according to our laws; the latter must be treated according to the laws of war.

I have thought it my duty to make this communication in consequence of the information you received from Rhode Island, of the intentions of a Frenchman, whose name I do not now call to mind, who is said to be somewhere in this country, on the business of buying ships and supplies of a military kind, for the West Indies. He should be apprehended and tried as a traitor, unless he has a commission, and acts according to it; in which case he should be treated as an enemy, and confined as a prisoner of war.

I have the honor, etc., etc.,

CHARLES LEE.

To the Secretary of State.

[1] Official Opinions of the Attorneys General of the United States, vol. i, page 84.

PRIZE SHIP AND CREW—HOW TO BE DISPOSED OF[1]

If the prize be a pirate, the officers and crew are to be prosecuted in the circuit court of the United States, without respect to the nation to which each individual may belong.

If it be regularly commissioned as a ship-of-war, the officers and crew are to be detained as prisoners, except such as are citizens of the United States.

Citizens of the United States who aid a nation with whom we are at war on the high seas, against the United States, are guilty of treason.

Offenders against the United States may be arrested, imprisoned, or bailed, agreeably to the usual mode of process in a State, but can be tried only before the court of the United States having cognizance of the offense.

Proceedings against the ship and cargo are to be had before the district court of the United States, according to the laws of Congress and the usage and practice of courts of admiralty in prize causes.

ALEXANDRIA, *September 20, 1798.*

SIR: I take the liberty of writing to you on an interesting subject, concerning which you will perhaps hear from the Secretary of State.

According to the account given in the Norfolk paper of the 15th, it seems probable that the ship *Nigre,* prize to the *Constitution,* will be found to be a pirate. If, after due inquiry (which you are requested to make, and for that purpose to go to Norfolk), it shall appear to be the case, the officers and crew, and all others on board having any agency in the ship, are to be prosecuted (witnesses excepted) in the circuit court of the United States for the district of Virginia, according to the laws of the United States, without respect to the nation to which each individual may belong, whether he be British, French, American, or of any other nation.

On the other hand, if the ship is regularly commissioned and authorized by France as a public or private ship of war, all the officers and crew are to be detained as prisoners, at the expense of the United States—except such as are citizens of the United States, or of some one of them, who may be tried for treason in adhering to, and aiding, the enemies of the United States. After mature consideration of the decrees of France, and of the laws of the United States, and the conduct of each nation to the other, it is my opinion that the two nations are in a state of maritime war; and, consequently, that the citizens of the United States who aid and adhere to France in acts of hostility on the high sea, against the United States and their fellow-citizens, are

[1] Official Opinions of the Attorneys General of the United States, vol. i, page 85.

guilty of treason. Perhaps this opinion may be found erroneous; if so, such citizens, if acquitted of treason, may be indicted for felony, under the ninth section of the act passed 30th April, 1790, entitled "An act for the punishment of certain crimes against the United States."

I conceive the law of Virginia, which requires the examination before a county or corporation court, of criminals triable in the State courts, does not apply to criminals triable before the courts of the United States in the Virginia district. Upon this point, reference may be had to the 23d section of the 20th chapter of the acts of Congress of 1789. By this section, an offender against the United States is, agreeably to the usual mode of process against offenders in such State where he is found, to be arrested and imprisoned, or bailed, as the case may be, for trial before the court of the United States having cognizance of the offense. The *arrest* is to be agreeably to the usual mode of process in the State; the *imprisonment* or *bailment* is also to be agreeably to the usual mode of process in the State; but the *trial* is to be only before the court of the United States having cognizance of the offense. The examination preparatory to the trial is to be before a magistrate, who is to send to the clerk's office of the court, copies of the process and the recognizance of the witnesses, for their appearance to testify. To admit a different construction of this section, would be to admit a different mode of *trial* of the same offense against the United States, in their courts, as it might happen to be cognizable in one district or in another; for the examination before a county or corporation court, according to the law of Virginia, is a species of trial that gives a chance of acquittal unknown in other States. Besides, the text of the Virginia law seems to be confined to offenders amenable to the courts of the State.

Against the ship and cargo, proceedings are to be had before the *district* court of the United States in Virginia, according to the laws of Congress and the usage and practice of courts of admiralty in prize causes.

It will afford me satisfaction to receive from you a statement of facts relative to this ship, and your ideas on the matters of law which have been the subject of these remarks.

I am, etc., etc.,

CHARLES LEE.

To THOMAS NELSON, ESQ.,
District Attorney, U. S., Yorktown, Virginia.

TALBOT v. The Ship *AMELIA*, SEEMAN, Claimant[1]

Salvage

The officers and crew of a ship of war are entitled to salvage, for the recapture of an armed neutral vessel, from a foreign belligerent, by whom she had been manned with a prize crew.

Error from the Circuit Court of New York. It appeared on the record, that Captain Talbot, of the frigate *Constitution,* having recaptured the *Amelia,* an armed Hamburg vessel, which had been captured by a French national corvette, and ordered to St. Domingo for adjudication, brought her into the port of New York. A libel was, thereupon, filed in the district court, by the recaptor, setting forth the facts, and praying that the vessel and cargo might be condemned as prize; or that such other decree might be pronounced as the court should deem just and proper.

A claim was filed by H. F. Seeman, for Chapeau Rouge & Co., of Hamburg, the owners, insisting that the property had not been changed by the capture, and praying restitution, with damages and costs. The District Judge, Hobart, decreed one-half of the gross amount of sales of ship and cargo, without deduction (a sale having been made by consent), to be paid to the recaptors, in the proportions directed by the act of Congress for the government of the navy; and the other half, deducting all costs and charges, to be paid to the claimants.

The cause was brought by appeal before the circuit court, Washington, Justice, presiding, who reversed the decree of the district court, so far as it ordered payment of one-half of the gross sales to the recaptors, "considering that, as the nation to which the owners of the said ship and cargo belong, is in amity with the French Republic, the ship and cargo could not, consistently with the laws of nations, be condemned by the French, as a lawful prize; and that, therefore, no service was rendered by the *Constitution,* or by the commander, officers or crew thereof, by the recapture aforesaid;" and affirmed the rest of the

[1] 4 Dallas, 34; August term, 1800. Same case, 1 Cranch, 1. [*Infra,* p. 116.]

decree. On the decree of the circuit court, the present writ of error was instituted; and the following statement of facts made a part of the record by consent:

> The following case is agreed upon by the parties, to be annexed to the writ of error in this cause, viz.: The ship *Amelia* sailed from Calcutta, in Bengal, in the month of April, 1799, loaded with a cargo of the produce and manufacture of that country, consisting of cotton, sugars and dry goods in bales, bound to Hamburg. On the 6th of September, in the same year, the same was captured, whilst in the pursuit of her said voyage, by the French national corvette *La Diligente,* L. I. Dubois, commander, who took out her captain and part of her crew, together with most of her papers, and placed a prize-master and French sailors on board of her, ordering the prize-master to conduct her to St. Domingo, to be judged according to the laws of war. On the 15th of the same month of September, the United States ship of war, the *Constitution,* commanded by Silas Talbot, Esquire, the libellant, fell in with, and recaptured the *Amelia,* she being then in full possession of the French, and pursuing her course for St. Domingo, according to the orders received from the captain of the French corvette. At the time of the recapture, the *Amelia* had eight iron cannon mounted, and eight wooden guns, with which she had left Calcutta, as before stated. From such of the ship's papers as were found on board, and the testimony in the cause, the ship *Amelia,* and her cargo, appear to have been the property of Chapeau Rouge, a citizen of Hamburg, residing and carrying on commerce in that place. It is conceded, that the Republic of France and the city of Hamburg are not in a state of hostility to each other, and that Hamburg is to be considered as neutral between the present belligerent powers. The *Amelia* and her cargo, having been sent by Captain Talbot to New York, were there libelled in the district court, and such proceedings were thereupon had in that court, and the circuit court for that district, as may appear by the writ of error and return.
>
> Alexander Hamilton, of counsel for plaintiff in error.
> B. Livingston, of counsel for defendant in error.

The cause was argued, on the 11th, 12th and 13th of August, 1800, by *Ingersoll* and *Lewis,* for the plaintiff in error; and by *M. Levy* and *Dallas,* for the defendant in error. The general points of the discussion were these:

1st. Whether the *Amelia* could be considered, at the time of the recapture, as a French armed vessel, within the meaning of the act of

Congress, which authorizes the seizure of French armed vessels? (1 U. S. Stat. 572.)

2d. Whether Captain Talbot was authorized to make a recapture, the *Amelia* belonging to a power, equally in amity with the United States, and with France?

3. Whether on positive statute, or general principles, a salvage was due to the recaptors, for rescuing the *Amelia* from the French?

On the 18th of August, PATERSON, Justice, stated, that it was the wish of the court to postpone the cause, for further argument, before a fuller bench. It was accordingly, argued again, at Washington, in August term, 1801, by *Ingersoll* and *Bayard* (of Delaware), for the plaintiff in error; and by *M. Levy, J. T. Mason* (of Maryland) and *Dallas,* for the defendant in error. And MARSHALL, Chief Justice, delivered the judgment of the court, "that the decree of the circuit court was correct, in reversing the decree of the district court, but not correct in decreeing the restoration of the *Amelia,* without paying salvage. This court, therefore, is of opinion, that the decree, so far as the restoration of the *Amelia* without salvage is ordered, ought to be reversed: and that the *Amelia* and her cargo ought to be restored to the claimant, on paying for salvage one-sixth part of the net value, after deducting therefrom the charges which have been incurred."[1]

BAS v. TINGY, (*THE ELIZA*)[2]

State of war.—Salvage

Every contention, by force, between two nations, in external matters, under authority of their respective governments, is a *public* war.

If a general war be declared, its extent and operations are only restricted and regulated by the *jus belli,* forming part of the law of nations; but if a *partial* war be waged, its extent and operation depend on our municipal laws. CHASE, J.

A belligerent power has a right, by the laws of nations, to search a neutral vessel; and upon suspicion of a violation of her neutral obligations, to seize and carry her into port for further examination. *Ibid.*

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[1] A full report of the arguments, on the first hearing of this cause, was prepared; but they are found so ably incorporated with the arguments on the second hearing, in Mr. Cranch's Reports, that it has been thought unnecessary to publish it in this volume. 1 Cranch, 1. [*Infra,* p. 116.]

[2] 4 Dallas, 37; August term, 1800.

An American vessel, captured by a French privateer, on the 31st March, 1799, and recaptured by a public armed American ship, on the 21st of April, 1799, was condemned to pay salvage, under the act of Congress of the 2d March, 1799.

In error from the Circuit Court for the district of Pennsylvania. On the return of the record, it appeared by a case stated, that the defendant in error had filed a libel in the district court, as commander of the public armed ship, the *Ganges,* for himself and others, against the ship *Eliza,* John Bas, master, her cargo, etc., in which he set forth that the said ship and cargo belonged to citizens of the United States; that they were taken on the high seas, by a French privateer, on the 31st of March, 1799; and that they were retaken by the libellant, on the 21st of April following, after having been above ninety-six hours in possession of the captors. The libel prayed for salvage, conformable to the acts of Congress; and the facts being admitted by the answer of the respondents, the district court decreed to the libellants one-half of the whole value of ship and cargo. This decree was affirmed in the circuit court, without argument, and by consent of the parties, in order to expedite a final decision on the present writ of error.

The controversy involved a consideration of the following sections in two acts of Congress: By an act of the 28th of June, 1798 (1 U. S. Stat. 574, § 2), it is declared, "That whenever any vessel the property of, or employed by, any citizen of the United States, or person resident therein, or any goods or effects belonging to any such citizen or resident, shall be recaptured by any public armed vessel of the United States, the same shall be restored to the former owner or owners, upon due proof, he or they paying and allowing, as and for salvage to the recaptors, one-eighth part of the value of such vessel, goods and effects, free from all deduction and expenses."

By an act of the 2d of March, 1799 (1 U. S. Stat. 716), it is declared, "That for the ships or goods belonging to the citizens of the United States, or to the citizens or subjects of any nation in amity with the United States, if retaken from the enemy within twenty-four hours, the owners are to allow one-eighth part of the whole value for salvage, etc.; and if above ninety-six hours, one-half, all of which is to be paid, without any deduction whatsoever, etc. And by the 9th section of the same act, it is declared, "That all the money accruing, or which has already accrued from the sale of prizes, shall be and remain

forever a fund for the payment of the half-pay to the officers and seamen, who may be entitled to receive the same."

The case was argued by *Lewis* and *E. Tilghman,* for the plaintiff in error, and by *Rawle* and *W. Tilghman,* for the defendant; and the argument turned principally upon two inquiries: 1st. Whether the act of March, 1799, applied only to the event of a future general war? 2d. Whether France was an enemy of the United States, within the meaning of the law?

For the *plaintiff* in error, it was urged, that the acts, passed in immediate relation to France, were of a restricted temporary nature; but that the act of March, 1799, established a permanent system for the government of the navy; and the designation of "the enemy" in that act, applies only to future hostilities, in case of a declared war. That on the just principles of government, every citizen has a right to the public protection; and therefore, no salvage ought, in strictness, to be allowed for the recapture of the property of a citizen by a public ship of war. Vatt. lib. 2, c. 6, § 71. And Congress has manifested, in some degree, their sense on the subject, by making the salvage in that case less than in the case of recapture by a private armed vessel. That the word "enemy" must be construed according to its legal import (1 Str. 278); and that, according to legal interpretation, the differences between the United States and France do not constitute war, nor render the citizens of France enemies of the United States. Vatt. lib. 3, §§ 69, 70; 1 Black. Com. 257; 2 *ibid.* 259; 2 Burl. 258, § 31; 261, § 39; 262. That a subsequent law does not abrogate a prior law, unless it contains contradictory matter; and where there are no negative or repealing words, both must be so construed as to stand together. 11 Co. 61, 63; Show. 439; 10 Mod. 118; 6 Co. 19 *b.* That the act of March, 1799, contains no repealing or negative words; and may be applied, consistently, to the case of a future public war, leaving the qualified state of hostility with France, for the operation of the preceding law.

For the *defendant* in error, it was contended, that the relative situation of the United States and France, is that of "a qualified maritime war;" on the part of the French, aggressive; on our part, defensive; proceeding from a legitimate expression of the public will, through its constitutional organ, the congress, manifested by public declarations

and open acts. That from such a state, the character of enemy necessarily arises; and that the designation being so understood by congress, was intended to be applied, and was actually applied, to France. That the act of March, 1799, speaks of prizes, which could only be such as had been captured from France; and that taking the word prize, according to its legal signification, it means a capture, or acquisition by right of war, in a state of war. 3 Bl. Com. 69, 108; 2 Wood. 441; Doug. 585, 591; Rob. Adm. 283. That if a prize means a capture in war, it follows, of course, that it means a capture from an enemy; for war can only be waged against enemies. That war may exist, without a declaration; a defensive war requires no declaration; and an imperfect or qualified public war, is still distinct from the case of letters of marque and reprisal, for the redress of a private wrong, by the employment of a private force. 1 Ruth., lib. 1, c. 19, § 1, p. 470–1; 2 *ibid.* 497–8, 503, 507, 511; Burl. 196, 189; Vatt. 475; 2 Burl. 204, § 7; Lee on Capt. 13–39; Puff. 843; Grot., lib. 3, c. 3, § 6; Molloy, 46. That congress, by repealing the regulations respecting salvage, contained in the act of March, 1798, has virtually declared, that those regulations were in force, in relation to France; and that the provisions in the act of March, 1799, being inconsistent with the provision in the act of June, 1798, the elder law is so far repealed.[1]

The judges delivered their opinions *seriatim* in the following manner:

Moore, Justice.—This case depends on the construction of the act for the regulation of the navy. It is objected, indeed, that the act applies only to future wars; but its provisions are obviously applicable to the present situation of things, and there is nothing to prevent an immediate commencement of its operation.

It is, however, more particularly urged, that the word "enemy" can not be applied to the French; because the section in which it is used, is confined to such a state of war, as would authorize a recapture of property belonging to a nation in amity with the United States, and such a state of war, it is said, does not exist between America and France. A number of books have been cited to furnish a glossary on the word enemy; yet, our situation is so extraordinary, that I doubt

[1] All the acts of Congress, passed in relation to France, were cited and discussed by both sides, in the course of the argument; but it is thought unnecessary to refer to them more particularly in this report.

whether a parallel case can be traced in the history of nations. But if words are the representatives of ideas, let me ask, by what other word, the idea of the relative situation of America and France could be communicated, than by that of hostility or war? And how can the characters of the parties engaged in hostility or war, be otherwise described, than by the denomination of enemies? It is for the honor and dignity of both nations, therefore, that they should be called enemies; for it is by that description alone, that either could justify or excuse the scene of bloodshed, depredation and confiscation, which has unhappily occurred; and surely, Congress could only employ the language of the act of June 13, 1798, towards a nation whom she considered as an enemy.

Nor does it follow, that the act of March, 1799, is to have no operation, because all the cases in which it might operate, are not in existence at the time of passing it. During the present hostilities, it affects the case of recaptured property belonging to our own citizens, and in the event of a future war, it might also be applied to the case of recaptured property belonging to a nation in amity with the United States. But it is further to be remarked, that all the expressions of the act may be satisfied, even at this very time: for by former laws, the recapture of property, belonging to persons resident within the United States, is authorized; those residents may be aliens; and if they are subjects of a nation in amity with the United States, they answer completely the description of the law.

The only remaining objection, offered on behalf of the plaintiff in error, supposes, that, because there are no repealing or negative words, the last law must be confined to future cases, in order to have a subject for the first law to regulate. But if two laws are inconsistent (as, in my judgment, the laws in question are), the latter is a virtual repeal of the former, without any express declaration on the subject.

On these grounds, I am clearly of opinion, that the decree of the circuit court ought to be affirmed.

WASHINGTON, Justice.—It is admitted, on all hands, that the defendant in error is entitled to some compensation: but the plaintiff in error contends, that the compensation should be regulated by the act of the 28th June, 1798 (1 U. S. Stat. 574, § 2), which allows only one-eighth for salvage; while the defendant in error refers his claim to the act of the 2d March (*ibid.* 716, § 7), which makes an allowance of

one-half, upon a recapture from the enemy, after an adverse possession of ninety-six hours. If the defendant's claim is well founded, it follows, that the latter law must virtually have worked a repeal of the former; but this has been denied, for a variety of reasons:

1st. Because the former law relates to recaptures from the French, and the latter law relates to recaptures from the enemy; and it is said, that "the enemy" is not descriptive of France or of her armed vessels, according to the correct and technical understanding of the word.

The decision of this question must depend upon another; which is, whether, at the time of passing the act of Congress of the 2d of March, 1799, there subsisted a state of war between the two nations? It may, I believe, be safely laid down, that every contention by force, between two nations, in external matters, under the authority of their respective governments, is not only war, but public war. If it be declared in form, it is called solemn, and is of the perfect kind; because one whole nation is at war with another whole nation; and all the members of the nation declaring war are authorized to commit hostilities against all the members of the other, in every place and under every circumstance. In such a war, all the members act under a general authority, and all the rights and consequences of war attach to their condition.

But hostilities may subsist between two nations, more confined in its nature and extent; being limited as to places, persons and things; and this is more properly termed imperfect war; because not solemn, and because those who are authorized to commit hostilities act under special authority, and can go no further than to the extent of their commission. Still, however, it is public war, because it is an external contention by force, between some of the members of the two nations, authorized by the legitimate powers. It is a war between the two nations, though all the members are not authorized to commit hostilities, such as in a solemn war, where the government restrain the general power.

Now, if this be the true definition of war, let us see, what was the situation of the United States in relation to France. In March, 1799, Congress had raised an army: stopped all intercourse with France; dissolved our treaty; built and equipped ships of war; and commissioned private armed ships; enjoining the former, and authorizing the latter, to defend themselves against the armed ships of France, to attack them on the high seas, to subdue and take them as prize, and

to recapture armed vessels found in their possession. Here, then, let me ask, what were the technical characters of an American and French armed vessel, combating on the high seas, with a view, the one to subdue the other, and to make prize of his property? They certainly were not friends, because there was a contention by force; nor were they private enemies, because the contention was external, and authorized by the legitimate authority of the two governments. If they were not our enemies, I know not what constitutes an enemy.

2d. But secondly, it is said, that a war of the imperfect kind, is more properly called acts of hostility or reprisal, and that Congress did not mean to consider the hostility subsisting between France and the United States, as constituting a state of war. In support of this position, it has been observed, that in no law, prior to March, 1799, is France styled our enemy, nor are we said to be at war. This is true; but neither of these things were necessary to be done: because, as to France, she was sufficiently described by the title of the French Republic; and as to America, the degree of hostility meant to be carried on, was sufficiently described, without declaring war, or declaring that we were at war. Such a declaration by Congress, might have constituted a perfect state of war, which was not intended by the government.

3d. It has likewise been said, that the 7th section of the act of March, 1799, embraces cases which, according to preexisting laws, could not then take place, because no authority had been given to recapture friendly vessels from the French; and this argument was strongly and forcibly pressed. But because every case provided for by this law was not then existing, it does not follow, that the law should not operate upon such as did exist, and upon the rest, whenever they should arise. It is a permanent law, embracing a variety of subjects, not made in relation to the present war with France only, but in relation to any future war with her, or with any other nation. It might then very properly allow salvage for recapturing of American vessels from France, which had previously been authorized by law, though it could not immediately apply to the vessels of friends: and whenever such a war should exist between the United States and France, or any other nation, as, according to the law of nations, or special authority, would justify the recapture of friendly vessels, it might, on that event, with similar propriety, apply to them, which furnishes, I think, the true construction of the act. The opinion which I delivered at New York,

in *Talbot* v. *Seeman*, was, that although an American vessel could not justify the retaking of a neutral vessel from the French, because neither the sort of war that subsisted, nor the special commission under which the American acted, authorized the proceeding; yet, that the 7th section of the act of 1799, applied to recaptures from France, as an enemy, in all cases authorized by Congress. And on both points, my opinion remains unshaken; or rather has been confirmed by the very able discussion which the subject has lately undergone in this court, on the appeal from my decree.

Another reason has been assigned by the defendant's counsel, why the former law is not to be regarded as repealed by the latter, to wit, that a subsequent affirmative general law can not repeal a former affirmative special law, if both may stand together. This ground is not taken, because such an effect involves an indecent censure upon the legislature for passing contradictory laws, since the censure only applies where the contradiction appears in the same law; and it does not follow, that a provision which is proper at one time, may not be improper at another, when circumstances are changed: but the ground of argument is, that a change ought not to be presumed. Yet, if there is sufficient evidence of such a change in the legislative will, and the two laws are in collision, we are forced to presume it. What, then, is the evidence of legislative will? In fact and in law, we are at war: an American vessel, fighting with a French vessel, to subdue and make her prize, is fighting with an enemy, accurately and technically speaking: and if this be not sufficient evidence of the legislative mind, it is explained in the same law. The sixth and the ninth sections of the act speak of prizes, which can only be of property taken at sea from an enemy, *jure belli;* and the ninth section speaks of prizes as taken from an enemy, in so many words, alluding to prizes which had been previously taken; but no prize could have been then taken except from France: prizes taken from France were, therefore, taken from the enemy. This then, is a legislative interpretation of the word enemy; and if the enemy, as to prizes, surely they preserve the same character as to recaptures.

Besides, it may be fairly asked, why should the rate of salvage be different in such a war as the present, from the salvage in a war more solemn or general? And it must be recollected, that the occasion of making the law of March, 1799, was not only to raise the salvage, but to apportion it to the hazard in which the property retaken was placed;

a circumstance for which the former salvage law had not provided. The two laws, upon the whole, can not be rendered consistent, unless the court could wink so hard as not to see and know, that in fact, in the view of Congress, and to every intent and purpose, the possession by a French armed vessel of an American vessel, was the possession of an enemy: and therefore, in my opinion, the decree of the circuit court ought to be affirmed.

CHASE, Justice.—The judges agreeing unanimously in their opinion, I presumed, that the sense of the court would have been delivered by the president and therefore, I have not prepared a formal argument on the occasion. I find no difficulty, however, in assigning the general reasons which induce me to concur in affirming the decree of the circuit court.

An American public vessel of war recaptures an American merchant vessel from a French privateer, after ninety-six hours possession, and the question is stated, what salvage ought to be allowed? There are two laws on the subject: by the first of which, only one-eighth of the value of the recaptured property is allowed; but by the second, the recaptor is entitled to a moiety. The recapture happened after the passing of the latter law; and the whole controversy turns on the single question, whether France was, at that time, an enemy? If France was an enemy, then the law obliges us to decree one-half of the value of the ship and cargo for salvage: but if France was not an enemy, then no more than one-eighth can be allowed.

The decree of the circuit court (in which I presided) passed by consent; but although I never gave an opinion, I have never entertained a doubt on the subject. Congress is empowered to declare a general war, or Congress may wage a limited war; limited in place, in objects, and in time. If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law of nations; but if a partial war is waged, its extent and operation depend on our municipal laws.

What, then, is the nature of the contest subsisting between America and France? In my judgment, it is a limited, partial war. Congress has not declared war, in general terms; but Congress has authorized hostilities on the high seas, by certain persons, in certain cases. There is no authority given to commit hostilities on land; to capture unarmed French vessels, nor even to capture French armed

vessels, lying in a French port; and the authority is not given indiscriminately to every citizen of America, against every citizen of France, but only to citizens appointed by commissions, or exposed to immediate outrage and violence. So far it is, unquestionably, a partial war; but. nevertheless, it is a public war, on account of the public authority from which it emanates.

There are four acts, authorized by our government, that are demonstrative of a state of war. A belligerent power has a right, by the law of nations, to search a neutral vessel; and upon suspicion of a violation of her neutral obligations, to seize and carry her into port for further examination. But by the acts of Congress, an American vessel is authorized: 1st. To resist the search of a French public vessel: 2d. To capture any vessel that should attempt, by force, to compel submission to a search: 3d. To recapture any American vessel, seized by a French vessel: and 4th. To capture any French armed vessel, wherever found, on the high seas. This suspension of the law of nations, this right of capture and recapture, can only be authorized by an act of the government, which is, in itself, an act of hostility. But still, it is a restrained or limited hostility; and there are, undoubtedly, many rights attached to a general war, which do not attach to this modification of the powers of defense and aggression. Hence, whether such shall be the denomination of the relative situation of America and France, has occasioned great controversy at the bar; and it appears, that Sir William Scott also was embarrassed in describing it, when he observed, "that in the present state of hostility (if so it may be called) between America and France," it is the practice of the English court of admiralty, to restore recaptured American property, on payment of a salvage. (*The Santa Cruz,* 1 Rob. 54.) But, for my part, I can not perceive the difficulty of the case. As there may be a public general war, and a public qualified war; so there may, upon correspondent principles, be a general enemy, and a partial enemy. The designation of "enemy" extends to a case of perfect war; but as a general designation, it surely includes the less, as well as the greater, species of warfare. If Congress had chosen to declare a general war, France would have been a general enemy; having chosen to wage a partial war, France was, at the time of the capture, only a partial enemy; but still she was an enemy.

It has been urged, however, that Congress did not intend the provisions of the act of March, 1799, for the case of our subsisting quali-

fied hostility with France, but for the case of a future state of general war with any nation: I think, however, that the contrary appears from the terms of the law itself, and from the subsequent repeal. In the 9th section, it is said, that all the money accruing, "or which has already accrued from the sale of prizes," shall constitute a fund for the half-pay of officers and seamen. Now, at the time of making this appropriation, no prizes (which *ex vi termini* implies a capture in a state of war) had been taken from any nation but France, those which had been taken, were not taken from France as a friend; they must, consequently, have been taken from her as an enemy; and the retrospective provision of the law can only operate on such prizes. Besides, when the 13th section regulates "the bounty given by the United States on any national ship of war, taken from the enemy, and brought into port," it is obvious, that even if the bounty has no relation to previous captures, it must operate from the moment of passing the act, and embraces the case of a national ship of war, taken from France as an enemy, according to the existing qualified state of hostilities. But the repealing act, passed on the 3d of March, 1800 (subsequent to the recapture in the present case) ought to silence all doubt as to the intention of the legislature; for, if the act of March, 1799, did not apply to the French Republic, as an enemy, there could be no reason for altering or repealing that part of it, which regulates the rate of salvage on recaptures.

The acts of Congress have been analyzed, to show, that a war is not openly denounced against France, and that France is nowhere expressly called the enemy of America: but this only proves the circumspection and prudence of the legislature. Considering our national prepossessions in favor of the French Republic, Congress had an arduous task to perform, even in preparing for necessary defense and just retaliation. As the temper of the people rose, however, in resentment of accumulated wrongs, the language and the measures of the government became more and more energetic and indignant; though hitherto the popular feeling may not have been ripe for a solemn declaration of war; and an active and powerful opposition in our public councils, has postponed, if not prevented, that decisive event, which many thought would have best suited the interest, as well as the honor, of the United States. The progress of our contest with France, indeed, resembles much the progress of our revolutionary contest; in which, watching the current of public sentiment, the patriots of that day pro-

ceeded, step by step, from the supplicatory language of petitions for a redress of grievances, to the bold and noble declaration of national independence. Having, then, no hesitation in pronouncing that a partial war exists between America and France, and that France was an enemy, within the meaning of the act of March, 1799, my voice must be given for affirming the decree of the circuit court.

PATERSON, Justice.—As the case appears on the record, and has been accurately stated by the counsel, and by the judges who have delivered their opinions, it is not necessary to recapitulate the facts. My opinion shall be expressed in a few words. The United States and the French Republic are in a qualified state of hostility. An imperfect war, or a war, as to certain objects, and to a certain extent, exists between the two nations; and this modified warfare is authorized by the constitutional authority of our country. It is a war *quoad hoc*. As far as Congress tolerated and authorized the war on our part, so far may we proceed in hostile operations. It is a maritime war, a war at sea, as to certain purposes. The national armed vessels of France attack and capture the national armed vessels of the United States; and the national armed vessels of the United States are expressly authorized and directed to attack, subdue and take the national armed vessels of France, and also to recapture American vessels. It is, therefore, a public war between the two nations, qualified on our part, in the manner prescribed by the constitutional organ of our country. In such a state of things, it is scarcely necessary to add, that the term "enemy," applies; it is the appropriate expression, to be limited in its signification, import and use, by the qualified nature and operation of the war on our part. The word enemy proceeds the full length of the war, and no further. Besides, the intention of the legislature as to the meaning of this word, enemy, is clearly deducible from the act for the government of the navy, passed the 2d of March, 1799. This act embraces the past, present and future, and contains passages which point the character of enemy at the French, in the most clear and irresistible manner. I shall select one paragraph, namely, that which refers to prizes taken by our public vessels, anterior to the passing of the latter act. The word prizes in this section can apply to the French, and the French only. This is decisive on the subject of legislative intention.

BY THE COURT.—Let the decree of the circuit court be affirmed.

TALBOT v. SEEMAN, (*THE AMELIA*)[1]

Salvage.—Partial war.—Foreign laws

Salvage allowed to the United States ship of war, for the recapture of a Hamburg vessel out of the hands of the French (France and Hamburg being neutral to each other), on the ground that she was in danger of condemnation under the French decree of the 18th January, 1798.

The United States and France, in the year 1799, were in a state of partial war.

To support a demand for salvage, the recapture must be lawful, and a meritorious service must be rendered.

Probable cause is sufficient to render the recapture lawful.

Where the amount of salvage is not regulated by statute, it must be determined by the principles of general law.

Marine ordinances of foreign countries, promulgated by the executive, by order of the legislature of the United States, may be read in the courts of the United States, without further authentication or proof.

Municipal laws of foreign countries are generally to be proved as facts.

This was a writ of error to reverse a decree of the Circuit Court, which reversed the decree of the District Court of New York, so far as it allowed salvage to the recaptors of the ship *Amelia* and her cargo.

The libel in the district court was filed November 5, 1799, by Captain Talbot, in behalf of himself and the other officers and crew of the United States ship of war the *Constitution,* against the ship *Amelia,* her tackle, furniture and cargo; and set forth—

1. That in pursuance of instructions from the President of the United States he subdued, seized, etc., on the high seas, the said ship *Amelia* and cargo, etc., and brought her into the port of New York.

2. That at the time of capture, she was armed with eight carriage-guns, and was under the command of citizen Etienne Prevost, a French officer of marine, and had on board, besides the commander, eleven French mariners. That the libellant had been informed, that she, being the property of some person to him unknown, sailed from Calcutta, an English port in the East Indies, bound for some port in Europe; that upon her said voyage she was met with and captured by a French national corvette, called *La Diligente,* commanded by L. J. Dubois, who took out of her the master and crew of the *Amelia,* with all the papers relating to her and her cargo, and placed the said Etienne Prevost, and the said French mariners, on board of her, and ordered her to St. Domingo for adjudication, as a good and lawful

[1] 1 Cranch, 1; August term, 1801.

prize; and that she remained in the full and peaceable possession of the French from the time of her capture, for the space of ten days, whereby, the libellant was advised, that, as well by the law of nations as by the particular laws of France, the said ship became, and was to be considered, as a French ship.

Whereupon, he prayed usual process, etc., and condemnation; or, in case restoration should be decreed, that it might be on payment of such salvage as by law ought to be paid for the same.

The claim and answer of Hans Frederic Seeman, in behalf of Messrs. Chapeau Rouge & Co., of Hamburg, owners of the ship *Amelia* and her cargo, stated, that the said ship, commanded by Jacob F. Engelbrecht, as master, sailed on the 20th of February, 1798, from Hamburg, on a voyage to the East Indies, where she arrived safe; that in April, 1799, she left Calcutta, bound to Hamburg; that during her voyage, and at the time of her capture by the French, she and her cargo belonged to Messrs. Chapeau Rouge & Co., citizens of Hamburg, and if restored, she will be wholly their property; that on the 6th of September, on her voyage home, she was captured on the high seas by a French armed vessel, commanded by citizen Dubois, who took out the master and thirteen of her crew, and all her papers, leaving on board the claimant, who was mate of the *Amelia,* the doctor and five other men. That the French commander put on board twelve hands, and ordered her to St. Domingo, and parted from her on the fifth day after her capture. That on the 15th of September, the *Amelia,* while in possession of the French, was captured, without any resistance on her part, by the said ship of war the *Constitution,* and brought into New York. That the *Amelia* had eight carriage guns, it being usual for all vessels, in the trade she was carrying on, to be armed, even in times of general peace. That there being peace between France and Hamburg, at the time of the first capture, and also between the United States and Hamburg, and between the United States and France, the possession of the *Amelia* by the French, in the manner, and for the time stated in the said libel, could, neither by the law of nations, nor by the laws of France, nor by those of the United States, change the property of the said ship *Amelia* and her cargo, or make the same liable to condemnation in a French court of admiralty; that the same could not, therefore, be considered as French property: wherefore, he prayed restoration in like plight as at the time of capture by the ship *Constitution,* with costs and charges.

On the 16th of December, 1799, the district judge, by consent of parties made an interlocutory decree, directing the marshal to sell the ship and cargo, and bring the money into court; and that the clerk should pay half of the amount of sales to the claimant, on his giving security to refund, in case the court should so decree; and that the clerk should retain the other half in his hands, together with all costs and charges, etc.

Afterwards, on the 25th of February, 1800, the judge of the district court (Hobart) made his final decree, directing half of the gross amount of sales of the ship and cargo, without any deduction whatever, to be paid to the libellant for the use of the officers and crew of the ship *Constitution,* to be distributed according to the act of Congress for the government of the navy of the United States. And that out of the other moiety, the clerk should pay the officers of the court, and the proctors for the libellant and claimant, their taxed costs and charges, and that the residue should be paid to the owners of the *Amelia,* or their agent. From this decree, the claimant appealed to the circuit court.

At the Circuit Court for the district of New York, in April, 1800, before Judge WASHINGTON and the district judge, the cause was argued by *B. Livingston* and *Burr* for the appellant, and *Harrison* and *Hamilton,* for the respondent; and on the 9th of April, 1800, the circuit court made the following decree, viz.:

> That the decree of the district court, so far forth as it orders a payment, by the clerk, of a moiety of the gross amount of sales, to Silas Talbot, commander, etc., and to the officers and crew of the said ship *Constitution,* is erroneous, and so far forth, be reversed without costs; that is to say, the court considering the admission on the part of the respondent, that the papers brought here by Jacob Frederic Engelbrecht, master of the ship *Amelia,* prove her and her cargo to be Hamburg property, and also considering that as the nation to which the owners of the said ship and cargo belong, is in amity with the French Republic, the said ship and cargo could not, consistently with the laws of nations, be condemned by the French as a lawful prize, and that, therefore, no service was rendered by the United States ship of war the *Constitution,* or by the commander, officers or crew thereof, by the recapture aforesaid.
>
> Whereupon, it is ordered, adjudged and decreed by the court, and it is hereby ordered, adjudged and decreed by the authority of the same, that the former part of the decree of the district

court, by which a moiety of the proceeds is allowed to the commander, officers and crew aforesaid, be and the same is hereby reversed. And the court further considering all the circumstances of the present case, arising from the capture and recapture stated in the libel and claim and answer, and that by the sale of the said ship *Amelia* and her cargo, made with the express consent of the appellant, the costs and charges in this cause have nearly all accrued, and that, therefore, the expenses should be defrayed out of the proceeds, thereupon, it is hereby further ordered, adjudged and decreed by the court, that so much of the said decree of the said district court as relates to the payment by the clerk, to the several officers of the court, and to the proctors of the libellant and claimant in this cause, of their taxed costs and charges, out of the other moiety of the said proceeds, and also of the residue of the said last-mentioned moiety, after deducting the costs and charges aforesaid, to the owner or owners of the said ship *Amelia* and her cargo, or to their legal representatives, be and the same is hereby affirmed.

To reverse this decree, the libellant sued out a writ of error to the Supreme Court, and by consent of parties, the following statement of facts was annexed to the record which came up:

The ship *Amelia* sailed from Calcutta, in Bengal, in the month of April, 1799, loaded with a cargo of the product and manufacture of that country, consisting of cotton, sugars and dry goods in bales, and was bound to Hamburg. On the 6th of September, in the same year, she was captured, while in the pursuit of her said voyage, by the French national corvette *La Diligente,* L. J. Dubois, commander, who took out her master and part of her crew, together with most of her papers, and placed a prize-master and French sailors on board of her, ordering the prize-master to conduct her to St. Domingo, to be judged according to the laws of war. On the 15th of the same month of September, the United States ship of war the *Constitution,* commanded by Silas Talbot, Esq., the libellant, fell in with and recaptured the *Amelia,* she being then in full possession of the French, and pursuing her course for St. Domingo, according to the orders received from the captain of the French corvette.

At the time of the recapture, the *Amelia* had eight iron cannon mounted, and eight wooden guns, with which she left Calcutta, as before stated. From such of the ship's papers as were found on board, and the testimony in the cause, the ship *Amelia* and her cargo appear to have been the property of Chapeau Rouge, a citizen of Hamburg, residing and carrying on commerce in that place. It is conceded, that the Republic of France and the city of

Hamburg are not in a state of hostility to each other; and that Hamburg is to be considered as neutral between the present belligerent powers.

The *Amelia* and her cargo, having been sent by Captain Talbot to New York, were there libelled in the district court, and such proceedings were thereupon had in that court, and the circuit court for that district, as may appear by the writ of error and return.

The cause now came on to be argued, at August term, 1801, by *Bayard* and *Ingersoll,* for the libellant, and *Dallas, Mason* and *Levy,* for the claimant.

For the *libellant,* three points were made. 1. That at the time, and under the circumstances, the ship *Amelia* was liable to capture by the law, and instructions to seize French armed vessels, for the purpose of being brought into port, and submitted to legal adjudication in the courts of the United States. 2. That Captain Talbot, by this capture, saved the ship *Amelia* from condemnation in a French court of admiralty. 3. That for this service, upon abstract principles of equity and justice, according to the law of nations, and the acts of Congress, the recaptors are entitled to a compensation for salvage.

I. Had Captain Talbot a right to seize the *Amelia,* and bring her into port for adjudication?

The acts of Congress on this subject ought all to be considered together and in one view. This is the general rule of construction, where several acts are made *in pari materia.* Plowd. 206; 1 Atk. 457, 458.

The first act authorizing captures of French vessels, is that of 28th May, 1798. (1 U. S. Stat. 561.) The preamble recites, that "whereas, armed vessels sailing under authority, or pretense of authority, from the Republic of France, have committed depredations on the commerce of the United States," etc., therefore it is enacted, that the President be authorized to instruct and direct the commanders of the armed vessels of the United States "to seize, take and bring into any port of the United States, to be proceeded against according to the laws of nations, any such armed vessel, which shall have committed, or which shall be found hovering on the coasts of the United States, for the purpose of committing, depredations on the vessels belonging to citizens thereof; and also to retake any ship or vessel of any citizen

or citizens of the United States, which may have been captured by any such armed vessel."

The *Amelia* was "an armed vessel, sailing under authority from the Republic of France," and if she had committed, or had been found hovering on the coast, for the purpose of committing, depredations on the vessels of the citizens of the United States, she would have been clearly liable to capture under this act of Congress. This act is entitled "an act more effectually to protect the commerce and coasts of the United States;" and by it, the objects of capture are limited to "armed vessels, sailing under authority, or pretense of authority, from the Republic of France, which shall have committed, or which shall be found hovering on the coasts of the United States, for the purpose of committing, depredations," etc.

It was soon perceived, that a right of capture, so limited, would not afford, what the act contemplated, an effectual protection to the commerce of the United States. Congress, therefore, on the 9th July, 1798, at the same session, passed the "act further to protect the commerce of the United States" (1 U. S. Stat. 578), and thereby took off the restriction of the former act, which limited captures to vessels having actually committed depredation, or which were hovering on the coast for that purpose. This act authorizes the capture of any "armed French vessel, on the high seas," and if the *Amelia* was such an armed French vessel as is contemplated by this act, she was liable to capture, and it was the duty of Captain Talbot to take her and bring her into port.

Another act was passed at the same session, on the 25th June, 1798 (1 U. S. Stat. 572), entitled "an act to authorize the defense of the merchant vessels of the United States against French depredations," which, as it constitutes a part of that system of defense and opposition which the legislature had in view, ought to be taken into consideration. It enacts, that merchant vessels of citizens of the United States may oppose and defend against any search, restraint or seizure which shall be attempted "by the commander or crew of any armed vessel, sailing under French colors, or acting, or pretending to act, by or under the authority of the French Republic;" and in case of attack, may repel the same, and subdue and capture the vessel.

The court, in construing any one of these laws, will not confine themselves to the strict letter of that particular law, but will consider the spirit of the times, and the object and intention of the legislature.

It is evident, by the title of the act of the 9th July, 1798, and by the general complexion of all the acts of that session upon the subject, that it was not the intention of Congress, by the act of July 9th, to restrict the cases of capture contemplated by the act of 28th May, but to enlarge them. The spirit of the people was roused; they demanded a more vigorous and a more effectual opposition to the aggressions of France, and the spirit of Congress rose with that of the people. It can not be supposed, that having, in May, used the expression, "armed vessels, sailing under authority, or pretense of authority, from the Republic of France," and in June the expression, "any armed vessel, sailing under French colors, or acting, or pretending to act, by or under the authority of the French Republic," they meant to restrict the cases of capture, in July, when they used the words "any armed French vessel." On the contrary, the confidence in the national opinion was increased, and further measures of defense were adopted, intending not to recede from anything done before, but to amplify the opposition. The act of July was in addition to, not in derogation from, the act of May. Congress evidently meant the same description of vessels, in each of those acts. "Armed vessels, sailing under authority, or pretense of authority, of France," and "armed vessels sailing under French colors, or acting, or pretending to act, under the authority of the French Republic," and "armed French vessels," must be understood to be the same.

If there is a difference, no reason can be given for it. A vessel, in the circumstances of the *Amelia,* was as capable of annoying our commerce, as if she had been owned by Frenchmen. Her force was at the command of France, and there can be no doubt, but she would have captured any unarmed American that might have fallen in her way. She was, therefore, one of the objects of that hostility which Congress had authorized. Congress have the power of declaring war: they may declare a general war or a partial war: so, it may be a general maritime war, or a partial maritime war.

This court, in the case of *Bas* v. *Tingy* (*The Eliza,* 4 Dall. 37), have decided, that the situation of this country with regard to France, was that of a partial and limited war. The substantial question here is, whether the case of the *Amelia* is a *casus belli?* whether she was an object of that limited war? The kind of war which existed was a war against all French force found upon the ocean, to seize it and bring it in, that it might not injure our commerce. It is precisely as if Con-

gress had authorized the capture of all French vessels, excepting those unarmed. If such had been the expressions, there could be no doubt of the right to capture. The object of the war being to destroy French armed force, and not French property, it made no difference in whom the absolute property of the vessel was, if her force was under the command of France. Suppose, the *Amelia* had captured an American, by what nation would the capture be made? by Hamburg or by France? There can be no doubt, but the injury would be attributed to France. She was under French colors, armed, and to every intent an object of the partial war which existed; and if so, her case is governed by the rights of war, and by the law of nations, as they exist in a state of general war.

Perhaps, it may be said, that this proves too much, and that, if true, the *Amelia* must be condemned as prize. This would be true, if the rights of a third party did not interfere. Having accomplished the object of the war, as it relates to this case, in wresting from France the armed force, we must now respect the rights of a neutral nation, and restore the property to its lawful owner. But this is a subsequent consideration: it is only necessary now to show that the capture was so far a lawful act, as to be capable of supporting a claim of salvage. At first view, she certainly presented the appearance of such an armed French ship as the libellant was bound in duty to seize and bring in, at least, for further examination. He had probable cause, at least, which is sufficient to justify the seizure and detention. But if she was liable to be condemned by France, being in the hands and possession of the French, she was within the scope of the war which existed between the United States and France; she was within the meaning of the act of Congress.[1]

The act of July gives no new authority to recapture American vessels; it only gives to private armed vessels the same right which the act of May gives to the public armed vessels, to make captures and recaptures. But the act of May only authorizes the recapture of American vessels, "which may have been captured by any such armed vessel," *i. e.*, by armed vessels sailing under authority from the Republic of

[1] *Bayard.*—What authority is there for American armed vessels to recapture British vessels taken by the French?

CHASE, J.—Is there any case, where it has been decided in our courts, that such a recapture was lawful? It has been so decided in the English courts.

The counsel on both sides admitted that no such case had occurred in this country.

France, and which shall have committed, or be found hovering on the coasts, for the purpose of committing, depredations on our commerce." Yet, the instructions from the President were to recapture all American vessels. These instructions show the opinion of the executive upon the construction of the acts of Congress—and for that purpose they were offered to be read.

The counsel for the *claimant* objected to their being read, because they were not in the record. The counsel for the *libellant* contended, they had a right to read them as matter of opinion, but did not offer them as matter of fact.[1] The court refused to hear them.

II. The second point is, that a service was rendered to the owners of the *Amelia,* by the recapture, inasmuch as she was thereby saved from condemnation in a French court of admiralty. To support this position, the counsel for the *libellant* relied on the general system of violation of neutral rights adopted by France.

In general cases, when belligerents respect the law of nations, no salvage can be claimed for the recapture of a neutral vessel, because no service is rendered; but rather a disservice, because the captured would, in the courts of the captors, recover damages and costs for the illegal capture and detention.

The principle upon which the circuit court decided, is not denied; but it is contended, that a service was rendered by the recapture. To show this, the counsel for the libellant offered to read the message from the President to both Houses of Congress, of 4th May, 1798, containing the communications from our envoys extraordinary at Paris, to the Department of State, and sundry *arrêts* and decrees of

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[1] CHASE, J.—I am against reading the instructions, because I am against bringing the executive into court on any occasion. It has been decided, as I think, in this court that instructions should not be read. I think it was in a case of instructions to the collectors. It was opposed by Judge Iredell, and the opposition acquiesced in by the court.

PATERSON, J.—The instructions can only be evidence of the opinion of the executive, which is not binding upon us.

MARSHALL, C. J.—I have no objection to hearing them, but they will have no influence on my opinion.

MOORE, J.—Mr. Bayard can state all they contain, and they may be considered as part of his argument.

Bayard.—May I be permitted to read them as a part of my speech?

THE COURT.—We are willing to hear them as the opinion of Mr. Bayard, but not as the opinion of the executive.

Bayard.—I acquiesce in the opinion of the court. My reasons for wishing to read them were, because the opinion of learned men, and men of science, will always have some weight with other learned men. And the court would consider well the opinion of the executive, before they would decide contrary to it.

the Government of France, in violation of neutral rights, and of the law of nations; and particularly the decree of the council of five hundred of 29th Nivose, an 6 (Jan. 18, 1798), which declares, "that the character of vessels, relative to their quality of neuter or enemy, shall be determined by their cargo; in consequence, every vessel found at sea, loaded, in whole or in part, with merchandise, the production of England, or of her possessions, shall be declared good prize, whoever the owner of these goods or merchandise may be."

The counsel for the *claimant* objected to the reading of those dispatches, because they were matter of fact. No new fact can be shown on the writ of error. Neither the pleadings, nor the statement of facts accompanying the record, give notice of introducing this new matter. By the act of Congress (1 U. S. Stat. 83, § 19), a state of the case must come up with the record; and is conclusive on this court. *Wiscart* v. *D'Auchy,* 3 Dall. 321. On p. 327, Ellsworth, Chief Justice, said a writ of error removes only matter of law. *Arrêts* and decrees of foreign governments are matters of fact, and must be proved as such, and the court can not notice them unless shown in the pleadings, admitted or proved. *Freemoult* v. *Dedire,* 1 P. Wms. 429, 431; *Bernardi* v. *Motteux,* Doug. 557. The same case in the 2d edition, pp. 575–79. In that case, the court could not take notice of the *arrêt* of July, 1778, as it had not been given in evidence at the trial.

The general conduct of France is a matter of fact, which can only be noticed by the sovereign of the state. Judgment upon a writ of error must be upon the same facts upon which the judgment below was predicated. 3 Bl. Com. 405 (Williams's edit. 407); 8 T. R. 434, 438, 566. If it is matter of law, it is not such law as is binding upon this court, and therefore, they can not officially take notice of it. Foreign laws must be proved as facts. 3 Woodeson, 306; 2 Eq. Cas. Abr. 289, 476; *Way* v. *Yally,* 2 Salk. 651; s. c. 6 Mod. 195; *Mostyn* v. *Fabrigas,* Cowp. 174–5. The law must be given in evidence. 1 Bos. & Pul. 138, 171, 175, 8 T. R. 566. Facts can not be adduced to contradict the record. 8 T. R. 438. In *The Providentia,* 2 Rob. 126 (Am. edit.), Dr. Scott relied on the king's instructions, but that was because the king has the power of war and peace.

A state of the case is like a special verdict; nothing new can be added to it. In *The Santa Cruz,* 1 Rob. 57, Dr. Scott required the ordinances of Portugal to be proved, and evidence of the decisions of their tribunals upon them.

On the contrary, it was said by the counsel for the *libellant,* that this case differs from evidence offered to a jury. In chancery, if evidence is not legal, the chancellor will hear it, but will give it no weight. The pamphlet containing the dispatches is offered to be read, not to show what are the municipal laws of France, but what is the law of nations in France; to show how it has been modified by that government. We are before this court as a court of admiralty, and not as a court of common law. All the world are parties to a decree of a court of admiralty. *Bernardi* v. *Motteux,* Doug. 560 or 581. This court is now to decide by the law of nations, not by municipal regulations. All the cases cited against us are cases in common-law courts. But courts of admiralty take notice of foreign ordinances which affect the law of nations, without their being shown in evidence. *The Maria,* 1 Rob. 288 (Eng. ed. 341); and s. c. 1 Rob. 304 (Eng. ed. 363).

The object in reading these dispatches is to show that the law of nations was not respected in France; that the construction of their courts of admiralty was such, that their decisions could not conform to the law of nations; that the law of nations has been so modified in France, that there was no certainty of indemnity for neutrals, and that by the decrees and *arrêts* of that government, the *Amelia* would have been condemned. They are offered as the official communications of our authorized agents abroad to the executive, and by that department communicated to Congress, and published, in conformity to an act of Congress (1 U. S. Stat. 612), for the information of the citizens of the United States. This act of Congress has made them proper evidence before this court; who are, therefore, bound to notice them. On the subject of admitting foreign ordinances in a court of admiralty, no difficulty ever occurred. The objections are only to private municipal regulations. Such, it is admitted, must be proved as facts, but not when they are offered as explaining the law of nations. In *The Maria,* 1 Rob. 288 (Am. ed.), this very decree is cited; and it is immaterial to us, whether we read it out of the dispatches or out of the book which the opposite counsel have already cited for other purposes. By the same rule that they read pages 57 and 126, we may surely read page 288.

On the part of the *claimant* it was replied: That this decree is not an act of Congress, nor the law of nations, but simply a law of France. The record is confined to the facts which originally came up with the

writ of error, or such as may afterwards be procured upon a suggestion of diminution. It is admitted, that in equity, on an appeal to the House of Lords, nothing new can be received. And nothing ought now to be read which was not before the circuit court, or which that court was bound to notice. In the cases cited by the opposite counsel, the *arrêts* were read by consent. A common-law court is as much bound as a court of admiralty, to take notice of the law of nations, on a question where that law applies; and the rules by which common-law courts are bound, as to evidence of the law of nations, are equally binding on courts of admiralty.

The court suffered the dispatches and decrees of France to be read, but reserved the question, whether they ought to be considered in their decision of this cause, until the whole argument of the case should be finished.

The counsel for the *libellant* proceeded in the argument on the second point. The decree of the 18th of January, 1798, was not repealed, until the 14th of December, 1799, and consequently, was in full force at the time of the capture, on the 6th of September, 1799. The facts stated in the appendix to vol. 2 of Robinson's Reports, show that the French had discarded the law of nations, and that their conduct towards neutrals had been such as to exclude every possibility of escape. So notorious was this conduct, that Sir William Scott makes it the ground of his decision in various cases.

It is not necessary to show, that the *Amelia* would certainly have been condemned. To entitle to salvage, it is only necessary to show that she was in a better condition by the recapture. Her cargo was the production of the possessions of England, and therefore, by the decree of the 18th January, 1798, was liable to condemnation. The general conduct of France and of the French courts of admiralty towards neutrals has been repeatedly adjudged by Sir William Scott a good ground for salvage. (*The Two Friends,* 1 Rob. 232; *The War Onskan,* 2 *ibid.* 246.)

III. But without resorting to the general principle of a service being a ground for salvage, we claim it under the express terms of the act of Congress of the 2d of March, 1799, entitled "an act for the government of the navy of the United States," § 7 (1 U. S. Stat. 716), by which it is enacted, "that for the ships or goods belonging to the citizens of the United States, or to the citizens or subjects of

any nation in amity with the United States, if retaken from the enemy, within twenty-four hours, the owners are to allow one-eighth part of the whole value for salvage, etc., and if after ninety-six hours, one-half; all of which is to be paid without any deduction whatsoever."

In the case of *Bas* v. *Tingy* (4 Dall. 37), it was decided by this court, that France was to be considered as an enemy. The case of the *Amelia* comes within the very words of this act of Congress. She is a ship belonging to citizens of a nation in amity with the United States, retaken from the enemy, after a possession of ninety-six hours.

By the act of Congress of 25th June, 1798 (1 U. S. Stat. 572), property of American citizens, recaptured by armed merchant vessels, is to be restored, on the payment of not less than one-eighth, and not more than one-half, for salvage. And by the act of the 3d March, 1800, not less than one-sixth is allowed on recapture by a private armed vessel, and one-eighth by a public ship-of-war. If, then, the recapture of this vessel was a lawful act, and if service was rendered thereby to the owners, the recaptors are entitled to salvage, and the rate of that salvage is, by the act of Congress, fixed at one-half of the value of the ship and cargo.

On the part of the *claimant,* it was said, that if France and America were at peace, the recapture was not authorized by the law of nations. The claim of salvage must rest on two grounds: 1. A right to interfere. 2. A benefit conferred on the owners.

I. It is admitted, that a belligerent has a right to detain a neutral vessel and carry her into port for the purpose of examination. The possession of a belligerent must, by third parties, be considered as lawful, whatever may be the motive or intent of such possession. (2 Woodeson, 424.) The belligerent has a lawful right to search merchant vessels, and this right can not be considered as injurious to the fair neutral trader. Resistance to such search is unlawful, and such resistance, a rescue, or an escape, are sufficient causes to condemn the neutral vessel. (Vattel, lib. 3, c. 7, § 114, p. 507; *The Maria,* 1 Rob. 304.)

The act of the recaptors, then, being in aid of the unlawful resistance of the neutral, must in itself be illegal. The courts of the captors only are competent to decide the question of prize or no prize. American citizens have no right to interfere, and wrest the neutral vessel from the possession of the belligerent.

The French have been represented as pirates, *hostes humani generis.*

But if France has waged so general a war on neutral property, has not England done the same? We find in their courts, that when a benefit is to accrue to British subjects, by such a decision, they decide that France must be presumed to respect the law of nations and to decree the restitution. *The Betsey,* 1 Rob. 84–5; *Geyer* v. *Aguilar,* 7 T. R. 695; but when salvage is to be given to British recaptors of neutral property, then it appears that France has lost all regard for the law of nations, and there is no chance of escape from her courts of admiralty. *The Two Friends,* 1 Rob. 232; *The War Onskan,* 2 *ibid.* 246.

But it is contended, that the courts of France would have decided according to the decree of the 18th January, 1798, and not according to the law of nations. This is not to be presumed; but if it was, however tyrannical the conduct of a belligerent may be, no neutral can lawfully interfere, unless she herself is injured, or her property or rights are affected; and even then individuals can not act. The injury must be redressed by the government, in the way of negotiation or war. What was the conduct of our government in such a case? It first chose to negotiate, and then to prepare for war. At the time the negotiation was begun, all the injurious decrees were in force, full in the view of the legislature, who authorized certain measures of hostility: but no citizen could go one step beyond what was authorized. The liability of the *Amelia* to condemnation in a French court of admiralty, created no right in Captain Talbot to capture her, even if that condemnation was certain.

But the facts of this case do not warrant such a conclusion. The fact stated is, that "the ship *Amelia* sailed from Calcutta, in Bengal, in the month of April, 1799, loaded with a cargo of the product and manufacture of that country." What country? Bengal. But Bengal is not stated to be one of the possessions of England. Not long since, the province of Bengal was in possession of sovereign princes; but it does not appear how far they have been subdued by the English. It is true, that the libel speaks of Calcutta as being an English port in the East Indies, but it does not follow, that the whole country of Bengal has been subjected to the British power. Besides, it is not the port from whence the vessel sails which taints the cargo, but its quality, as being the production of an English possession. Hence, it does not appear, that the *Amelia* was liable to condemnation under the decree of the 18th January, 1798, and we can not presume that she

would have been condemned. The French captors did not pretend she was liable under that decree, but sent her in to be judged according to the laws of war; that is, according to the law of nations as applicable to a state of war; and there being no fact stated to the contrary, we are to suppose, that she would have been so judged, and not otherwise. To have interfered on our part to prevent this would have been a just cause of hostilities against us. No citizen ought to be allowed to come into our courts to claim a reward, for an act which hazards the peace of the country.

If benefit be the criterion of salvage, then the greater the service the greater ought to be the salvage. But if the construction given by the opposite counsel to the act of 2d March, 1799, be correct, then the same salvage is due for the recapture of a clear neutral, as of a belligerent. And yet, in common wars, no salvage at all is due for the recapture of a neutral.

Every neutral nation has a right to choose her own manner of redress. We have no right to interfere, or to decide how far her vessels are liable to condemnation under French decrees. She may be willing to trust to the chances of acquittal or indemnification. We have no right to legislate upon the property of a foreign independent nation, and to say, that we will, whether you consent or not, rescue your vessels from the French, and then make you pay us salvage. (Vatt., lib. 2, c. 1, § 7, p. 123.) If an act, intended solely for my benefit, is advantageous to another, I am not entitled to reward. (*The Vryheid,* 2 Rob. 23–4.) In order to ground a claim of salvage, the danger of the property must have been, not hypothetical, but absolute; not distant and uncertain, but immediate and imminent: the act of saving must have been done with that sole intent, and must have been attended with labor, loss, expense or hazard to the salvor. The *Amelia* was taken by Captain Talbot, and libelled as a French vessel; his object was not to save a neutral, but to capture a belligerent. Under such a mistake, he might have a right to examine her further, but the moment she proved to be neutral property, he ought to have released her. His mistake can be no ground for a claim of salvage: it is a mere justification of an act of force, and as such may save him from the payment of damages and costs. In this case, there was no danger to the property, no trouble in saving it, nor any intention to benefit the owners. In Beawes' *Lex Mer.,* vol. 1, p. 158, it is said,

that to support a claim of salvage, the vessel must be in evident hazard, and must be saved by means used with that sole view.

The owner was a citizen of an independent nation, and ought to have had his election. Where is the law or the authority that allows salvage to one belligerent taking from another the property of a neutral? By the state of the case, this vessel was neutral as to all the belligerent powers. If the captor had applied for her, she must have been given up, upon the authority of the case of *Glass* v. *Gibbs,* 3 Dall. 6, without any compensation for recapture. Among the cases cited, the only one against us is *The War Onskan,* 2 Rob. 246. In that case, Sir William Scott says, that "lately" it has been the practice of his court to give salvage on recapture of neutral property out of the hands of the French; but that such is not the modern practice of the law of nations; and upon this plain principle, that the liberation of a clear neutral from the hand of the enemy, is no essential service rendered to him; inasmuch as that same enemy would be compelled by the tribunals of his own country, after he had carried the neutral into port, to release him, with costs and damages for the injurious seizure and detention. But in that very case, however, we see that he might shortly change his course of decisions on that subject, so that, very probably, had that case been decided in the next term it would have been decided differently. No judge has a right to decide upon the departure of other nations from the law of nations, whatever evidence of such departure he may possess. There will be a variance in the decisions of the lower courts; it should, therefore, be put upon such a footing, as to make it clear and plain to all the judges of the inferior courts. This decision of Sir William Scott is a creature of his own, which he himself promises to change, when the situation of affairs will allow.

Sir William Scott gives salvage expressly on the ground of service rendered, on account of the kind of hostility which France exercised towards neutrals. But in this case, the statement of facts excludes the idea of hostility between France and Hamburg. The law of nations gave no right to recapture. The authority under the acts of Congress must be construed strictly, and confined to their express provisions. Neither the executive, nor individuals, nor the courts, have a right to alter them.

So far as war is not authorized by Congress, there is peace. It was

not contemplated by any act of Congress, that our vessels should capture Hamburg vessels. The mischief to be remedied by the act of May was, that the small armed vessels of France were hovering on our coasts, and taking our vessels almost in our ports. The act of Congress has completely met the evil, by authorizing the capture of such French vessels as had taken, or were found hovering, for the purpose of taking our vessels. This act, therefore, does not authorize the capture of a Hamburg vessel. There is no law which authorizes a capture for two purposes, viz., to be condemned as a French vessel, or to be subjected to salvage as a neutral. The *Amelia* was not navigating under the authority or pretended authority of France: she was engaged in a lawful trade. But if the French took possession of her, under suspicion of unlawful trade, that gave us no authority to take her from the possession of France, the property, under the law of nations, not being changed. The taking, being unlawful, can support no claim of salvage.

The act of July, 1798, authorizes only the capture of armed French vessels, and confines the cases of recapture to the ships or goods of citizens or residents of the United States. The capture can only be justified by the doubtful character of the vessel, and as soon as that was known to be neutral, Captain Talbot ought to have dismissed her; the detention afterwards was unlawful, and will not justify a decree for salvage. This vessel, it is true, might have been used to distress our commerce, and this might possibly be an excuse for detaining her, or even dismantling her, but will not entitle him to salvage.

If this vessel was lawful prize to France, then France has a claim for indemnity; but as she has made no claim, we must presume, the vessel would have been restored by her to the owners.

The act of Congress of March 2, 1799, upon which the counsel for the libellant rely, does not contemplate a case like the present. That is a permanent law, not made for the present war only, but intended to apply to all future wars. It could not, therefore, intend to give salvage, on the recapture of a neutral from a belligerent, which is not given by the law of nations, and which, it is allowed on all hands, is given, this war, for the first time, only on account of the conduct of France towards neutrals, and will cease, when that conduct shall be altered. Besides, it would give the same reward for taking the property of a neutral out of the hand of his friend, as out of the hand of his enemy. The word "enemy," in the 7th section of that act, means

the enemy of us and our ally, whose vessel is recaptured by our armed vessels, and not our enemy, who is the friend of our ally.

If, then, this is not a statutory case of salvage, we must recur to the question of benefit. In the court below they relied wholly on the act of Congress: not a word was said respecting the service rendered. Let us then consider the claim of *quantum meruit.* To support this, there must be, 1. A lawful consideration; and 2. A contract, express or implied.

To make the consideration lawful, it must be permitted by law; *a fortiori,* it must not be contrary to law. It is not authorized by our law, to take the property of a neutral out of the possession of his friend, and it is in direct opposition to policy, as it tends to commit the peace of the country. It is not alleged, that there was any express contract; and a contract can not be implied, because the intent with which she was taken, viz., to be condemned as a French armed vessel, excludes the idea. Nor can an implied contract be raised, on the retaining her, because that was a state of duress, which can not be made the ground of a reward.

But if this case is to be considered upon a *quantum meruit,* then the amount of salvage must depend upon the danger and the exertion. *The San Bernardo,* 1 Rob. 151; and *The Two Friends, ibid.* 240. It is said, that in cases of unauthorized capture or recapture, the property goes to the crown (*The Princessa,* 2 Rob. 45), and it is sometimes referred to the court to fix the reward of the captors. It follows, then, that the property goes to the government, and they alone can fix the reward; but our code gives no right to salvage in this case, nor does the state of hostilities between the two countries, as disclosed on the record, justify it. But if the decree and the notoriety of the misconduct of France, are to be admitted to prove a benefit conferred, who can say it was worth $94,000, the half of the gross amount of sales of the ship and cargo? Neither the service rendered, the danger to the property, nor the exertion in saving it, can justify so enormous a reward. The decree of France might be only *in terrorem,* and so no danger. If the *Amelia* was not liable to condemnation in the French courts, then no service was rendered, and consequently, no salvage ought to be allowed.

But if she was liable to condemnation, then the recapture is a violation of the rights of France. If France violates the laws of nations, it is no justification of a violation of them on our part. An

illegal power to take, given by France to her cruisers, does not authorize us to retake. In the case of *Bas* v. *Tingy* (4 Dall. 37), the reasoning of the court seems to admit that the act of 2d March, 1799, will not apply, in the present state of hostilities, to recaptures of the vessels of nations in amity with the United States, unless the owners are residents of the United States; because there could be no lawful recapture of a neutral from the hand of a belligerent. Judge Moore, in delivering his opinion in that case, says, "It is, however, more particularly urged that the word 'enemy' can not be applied to the French; because the section in which it is used, is confined to such a state of war as would authorize a recapture of property belonging to a nation in amity with the United States, and such a state of war does not exist between America and France. A number of books have been cited, to furnish a glossary on the word enemy; yet, our situation is so extraordinary, that I doubt whether a parallel case can be traced in the history of nations. But if words are the representatives of ideas, let me ask, by what other word the idea of the relative situation of America and France could be communicated, than by that of hostility or war? And how can the characters of the parties engaged in hostility or war, be otherwise described than by the denomination of 'enemies.' It is for the honor and dignity of both nations, therefore, that they should be called enemies; for it is by that description alone, that either could justify or excuse the scene of bloodshed, depredation and confiscation, which has unhappily occurred; and surely, Congress could only employ the language of the act of June 13, 1798, towards a nation whom she considered as an enemy. Nor does it follow, that the act of March, 1799, is to have no operation, because all the cases in which it might operate, are not in existence at the time of passing it. During the present hostilities, it affects the case of recaptured property belonging to our own citizens, and in the event of a future war, it might also be applied to the case of recaptured property belonging to a nation in amity with the United States."

And in the same case, Judge Washington observed, "that hostilities may subsist between two nations, more confined in its nature and extent, being limited as to places, persons and things; and this is more properly termed imperfect war; because not solemn, and because those who are authorized to commit hostilities, act under special authority, and can go no further than to the extent of their commission." And again he says, "It has likewise been said, that the 7th

section of the act of March, 1799, embraces cases which, according to preexisting laws, could not then take place, because no authority had been given to recapture friendly vessels from the French, and this argument was strongly and forcibly pressed. But because every case provided for by this law was not then existing, it does not follow, that the law should not operate upon such as did exist, and upon the rest whenever they should arise. It is a permanent law, embracing a variety of subjects; not made in relation to the present war with France only, but in relation to any future war with her, or with any other nation. It might, then, very properly allow salvage for recapturing of American vessels from France, which had previously been authorized by law, though it could not immediately apply to the vessels of friends; and whenever such a war should exist between the United States and France, or any other nation, as, according to the law of nations, or special authority, would justify the recapture of friendly vessels, it might, on that event, with similar propriety, apply to them; which furnishes, I think, the true construction of the act. The opinion which I delivered at New York, in *Talbot* v. *Seeman*, was, that although an American vessel could not justify the taking of a neutral vessel from the French, because neither the sort of war that subsisted, nor the special commission under which the American acted, authorized the proceeding; yet that the 7th section of the act of 1799, applied to recaptures from France, as an enemy, in all cases authorized by Congress. And on both points, my opinion remains unshaken; or, rather, has been confirmed by the very able discussion which the subject has lately undergone in this court, on the appeal from my decree."[1]

Similar sentiments were also expressed by Judge Chase and Judge Paterson, in the same case. From these opinions, it seems clearly to result, that the act of March 2, 1799, can not be the rule of salvage in this case.

On the part of the *libellant,* it was stated, in reply, as to the admissibility of the dispatches from the American envoys, and the French *arrêt* of 18th January, 1798, that courts of admiralty will always take notice of such laws of foreign countries as go to modify or change the law of nations, and are not bound by the same rules of evidence, as courts of common law. 1 Dall. 463; Lofft, 631; Doug.

[1] This case of *Talbot* v. *Seeman* was argued once before, in this court, at Philadelphia. [*Ante,* p. 102.]

619, 622, 649, 650, 554. The opposite counsel have cited and relied on Robinson's Reports, to show what was the ancient law of France, and surely, we have as good a right to cite the same book, to show what is the present law of France. In *The Maria,* 1 Rob. 288, this *arrêt* of France is cited and argued upon by the judge.

The cases cited by the opposite counsel to show that foreign laws must be proved as facts, are all cases at common law, or relate to the mere municipal laws of a foreign country; and are not such as go to modify or explain the law of nations, as that country has adopted it. The case in P. Williams refers to a municipal law, which had no connection with the law of nations. The same observation applies to the cases from 6 Mod., and 2 Salk. No case can be produced, where a law of a foreign country, authenticated as this is by an act of the legislature of our country, has been refused to be considered by a court.

As to the objection, that the cargo does not appear to be the production of England, or her possessions, because there is no evidence that the whole of the province of Bengal has been subjected to the dominion of England; it may be sufficient to observe, that the libel and answer admit Calcutta to be an English port, and the case stated says, the vessel sailed from Calcutta, in Bengal, loaded with a cargo of the product and manufacture of that country. It being admitted, that Calcutta is an English port, and that the cargo was the production of that country, it follows, unless the contrary is clearly shown in evidence, that the cargo was the product of an English possession.

It is said, that there is no evidence that France carried her unjust decrees into execution, and that they might only be enacted *in terrorem.* But the fact is notorious to all the world: Congress have expressly declared it in the preambles of their acts: the whole system of hostility is founded upon it, and can be justified on no other ground. They have further declared it, by ordering the dispatches to be published and distributed among the citizens of the United States, for their information. It would be strange, if this court, sitting here as a court of the law of nations, to try a cause in which all the world are parties, should be the only persons in the world ignorant of the fact.

The general principle is admitted, that salvage is not due for the recapture of a neutral from a belligerent, and for this reason, that by the law of nations, the neutral would be restored by the captor, with damages and costs. But *cessante ratione, cessat lex.* And it follows,

by powerful inference, that if the captor would not have restored the neutral, with damages and costs, salvage ought to be allowed. To bring the *Amelia* within this inference, it is only necessary to show, that she would not have been restored with damages and costs. If the court should take into consideration the *arrêt* of the 18th of January, 1798, and the fact, that the cargo was the production of an English possession, there is no doubt but, instead of being restored with damages and costs, she would have been condemned and totally lost to her owners. Is no salvage due, for so certain and so signal a benefit?

It is said, that unless salvage is expressly given by the act of Congress, it can only be claimed upon a contract, either express or implied. This is not the case. The claim of salvage upon recapture never is supposed to arise *ex contractu.* It is given as a reward for the benefit received, and where there is no express statute upon the subject, the amount is to be regulated, not by the labor or hazard of the recaptor, nor by his intention to concur a benefit, but by the supposed amount which the owner would have been willing to give for the rescue of his property. Woodeson, 423. In *The Two Friends,* 1 Rob. 234–5, the rule of salvage on rescue is said to be *quantum meruit.* And in the same case, p. 232, Sir W. Scott says, "it has been slightly questioned in the act of court (which contains the exposition of facts given by both parties), whether there was such a state of hostilities between America and France as to raise a title of salvage for American goods retaken from the French. But this point has not been pursued in argument; and indeed, I should wonder if it had, after the determinations of this court, which have, in various instances, decreed salvage in similar cases. It is not for me to say, whether America is at war with France, or not; but the conduct of France towards America has been such *de facto,* as to induce American owners to acknowledge the services by which they have recovered their ships and cargoes out of the hands of French cruisers, by force of arms."

In the case of *Bas* v. *Tingy,* the question was not argued, whether salvage could be claimed upon the recapture of a neutral, on the ground of benefit rendered; and, therefore, the opinion of the court in that case does not militate with our claim.

August 11, 1801. Marshall, C. J., delivered the opinion of the court: This is a writ of error to a decree of the circuit court for the

district of New York, by which the decree of the district court of that State, restoring the ship *Amelia* to her owner on the payment of one-half for salvage, was reversed, and a decree rendered, directing the restoration of the vessel without salvage.

The facts agreed by the parties, and the pleadings in the cause, present the following case: The ship *Amelia* sailed from Calcutta, in Bengal, in April, 1799, loaded with a cargo of the product and manufacture of that country, and was bound to Hamburg. On the 6th September, she was captured by the French national corvette *La Diligente,* commanded by L. J. Dubois, who took out the master, part of the crew and most of the papers of the *Amelia,* and putting a prize-master and French sailors on board her, ordered her to St. Domingo, to be judged according to the laws of war. On the 15th of September, she was recaptured by Captain Talbot, commander of the *Constitution,* who ordered her into New York for adjudication. At the time of the recapture, the *Amelia* had eight iron cannon, and eight wooden guns, with which she left Calcutta. From the ship's papers, and other testimony, it appeared, that she was the property of Chapeau Rouge, a citizen and merchant of Hamburg; and it was conceded by the counsel below, that France and Hamburg were not in a state of hostility with each other, and that Hamburg was to be considered as neutral between the present belligerent powers.

The district court of New York, before whom the cause first came, decreed one-half of the gross amount of the ship and cargo as salvage to the recaptors. The circuit court of New York reversed this decree, from which reversal, the recaptors appealed to this court. The *Amelia* was libelled as a French vessel, and the libellant prays that she may be condemned as prize; or, if restored to any person entitled to her as the former owner, that such restoration should be made on paying salvage. The claim and answer of Hans Frederic Seeman discloses the neutral character of the vessel, and claims her on behalf of the owners.

The questions growing out of the facts, and to be decided by the court. are: Is Captain Talbot, the plaintiff in error, entitled to any, and if to any, to what salvage, in the case which has been stated?

Salvage is a compensation for actual service rendered to the property charged with it. It is demandable of right for vessels saved from pirates, or from the enemy. In order, however, to support the demand, two circumstances must concur. 1. The taking must be lawful. 2. There must be a meritorious service rendered to the recaptured.

1. The taking must be lawful; for no claim can be maintained in a court of justice, founded on an act in itself tortious. On a recapture, therefore, made by a neutral power, no claim for salvage can arise, because the act of retaking is a hostile act, not justified by the situation of the nation to which the vessel making the recapture belongs, in relation to that from the possession of which such recaptured vessel was taken. The degree of service rendered the rescued vessel is precisely the same as if it had been rendered by a belligerent; yet the rights accruing to the recaptor are not the same, because no right can accrue from an act in itself unlawful.

In order, then, to decide on the right of Captain Talbot, it becomes necessary to examine the relative situation of the United States and France at the date of the recapture. The whole powers of war being, by the Constitution of the United States, vested in Congress, the acts of that body can alone be resorted to as our guides in this inquiry. It is not denied, nor, in the course of the argument, has it been denied, that Congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed. To determine the real situation of America in regard to France, the acts of Congress are to be inspected.

The first act on this subject passed on the 28th of May, 1798, and is entitled "An act more effectually to protect the commerce and coasts of the United States." This act authorizes any armed vessel of the United States to capture any armed vessel sailing under the authority, or pretense of authority, of the Republic of France, which shall have committed depredations on vessels belonging to the citizens of the United States, or which shall be found hovering on the coasts, for the purpose of committing such depredations. It also authorizes the recapture of vessels belonging to the citizens of the United States.

On the 25th of June, 1798, an act was passed "to authorize the defense of the merchant vessels of the United States against French depredations." This act empowers merchant vessels, owned wholly by citizens of the United States, to defend themselves against any attack which may be made on them by the commander or crew of any armed vessel sailing under French colors, or acting, or pretending to act, by or under the authority of the French Republic; and to capture any such vessel. This act also authorizes the recapture of merchant vessels belonging to the citizens of the United States. By the 2d

section, such armed vessel is to be brought in and condemned for the use of the owners and captors. By the same section, recaptured vessels belonging to the citizens of the United States, are to be restored, they paying for salvage not less than one-eighth nor more than one-half of the true value of such vessel and cargo.

On the 28th of June, an act passed "in addition to the act more effectually to protect the commerce and coasts of the United States." This authorizes the condemnation of vessels brought in under the first act, with their cargoes, excepting only from such condemnation, the goods of any citizen or person resident within the United States, which shall have been before taken by the crew of such captured vessel. The second section provides that whenever any vessel or goods, the property of any citizen of the United States, or person resident therein, shall be recaptured, the same shall be restored, he paying for salvage one-eighth part of the value, free from all deductions.

On the 9th of July, another law was enacted, "further to protect the commerce of the United States." This act authorizes the public armed vessels of the United States to take any armed French vessel, found on the high seas. It also directs such armed vessel, with her apparel, guns, etc., and the goods and effects found on board, being French property, to be condemned as forfeited. The same power of capture is extended to private armed vessels. The sixth section provides, that the vessel or goods of any citizen of the United States, or person residing therein, shall be restored, on paying for salvage not less than one-eighth, nor more than one-half, of the value of such recapture, without any deduction.

The seventh section of the act for the government of the navy, passed the 2d of March, 1799, enacts, "That for the ships or goods belonging to the citizens of the United States, or to the citizens or subjects of any nation in amity with the United States, if retaken within twenty-four hours, the owners are to allow one-eighth part of the whole value for salvage," and if they have remained above ninety-six hours in possession of the enemy, one-half is to be allowed.

On the 3d of March, 1800, Congress passed "an act providing for salvage in cases of recapture." This law regulates the salvage to be paid "when any vessels or goods, which shall be taken as prize as aforesaid, shall appear to have before belonged to any person or persons permanently resident within the territory, and under the protection, of any foreign prince, government or state, in amity with the

United States, and to have been taken by an enemy of the United States, or by authority, or pretense of authority, from any prince, government or state, against which the United States have authorized, or shall authorize, defense or reprisals."

These are the laws of the United States which define their situation in regard to France, and which regulate salvage to accrue on recaptures made in consequence of that situation.

A neutral armed vessel which has been captured, and which is commanded and manned by Frenchmen, whether found cruising on the high seas, or sailing directly for a French port, does not come within the description of those which the law authorizes an American ship of war to capture, unless she be considered *quoad hoc* as a French vessel.

Very little doubt can be entertained, but that a vessel thus circumstanced, encountering an American unarmed merchantman, or one which should be armed, but of inferior force, would as readily capture such merchantman, as if she had sailed immediately from the ports of France. One direct and declared object of the war, then, which was the protection of the American commerce, would as certainly require the capture of such a vessel, as of others more determinately specified. But the rights of a neutral vessel, which the Government of the United States can not be considered as having disregarded, here intervene; and the vessel certainly is not, correctly speaking, a French vessel.

If the *Amelia* was not, on the 15th of September, 1799, a French vessel, within the description of the act of Congress, could her capture be lawful? It is, I believe, a universal principle, which applies to those engaged in a partial, as well as those engaged in a general war, that where there is probable cause to believe the vessel met with at sea, is in the condition of one liable to capture, it is lawful to take her, and subject her to the examination and adjudication of the courts. The *Amelia* was an armed vessel, commanded and manned by Frenchmen. It does not appear, that there was evidence on board to ascertain her character. It is not then to be questioned, but that there was probable cause to bring her in for adjudication. The recapture, then, was lawful.

But it has been insisted, that this recapture was only lawful in consequence of the doubtful character of the *Amelia*, and that no right of salvage can accrue from an act which was founded in mistake, and

which is only justified by the difficulty of avoiding error, arising from the doubtful circumstances of the case. The opinion of the court is, that had the character of the *Amelia* been completely ascertained by Captain Talbot, yet, as she was an armed vessel, under French authority, and in a condition to annoy the American commerce, it was his duty to render her incapable of mischief. To have taken out the arms, or the crew, was as little authorized by the construction of the act of Congress contended for by the claimants, as to have taken possession of the vessel herself.

It has, I believe, been practised in the course of the present war, and if not, is certainly very practicable, to man a prize and cruise with her for a considerable time, without sending her in for condemnation. The property of such vessel would not, strictly speaking, be changed, so as to become a French vessel, and yet it would probably have been a great departure from the real intent of Congress, to have permitted such vessel to cruise unmolested. An armed ship, under these circumstances, might have attacked one of the public vessels of the United States. The acts which have been recited expressly authorize the capture of such vessel, so commencing hostilities, by a private armed ship, but not by one belonging to the public. To suppose, that a capture would in one case be lawful, and in the other unlawful; or to suppose, that even in the limited state of hostilities in which we were placed two vessels armed and manned by the enemy, and equally cruising on American commerce, might the one be lawfully captured, while the other, though an actual assailant, could not; or if captured, that the act could only be justified from the probable cause of capture furnished by appearances, would be to attribute a capriciousness to our legislation on the subject of war, which can only be proper when inevitable.

There must, then, be incidents growing out of those acts of hostility specifically authorized, which a fair construction of the acts will authorize likewise. This was obviously the sense of Congress. If by the laws of Congress on this subject, that body shall appear to have legislated upon a perfect conviction that the state of war in which this country was placed, was such as to authorize recaptures, generally, from the enemy; if one part of the system shall be manifestly founded on this construction of the other part, it would have considerable weight in rendering certain, what might before have been doubtful.

Upon a critical investigation of the acts of Congress, it will appear,

that the right of recapture is expressly given, in no single instance, but that of a vessel or goods belonging to a citizen of the United States. It will also appear, that the *quantum* of salvage is regulated, as if the right to it existed previous to the regulation.

Although no right of recapture is given, in terms, for the vessels and goods belonging to persons residing within the United States, not being citizens, yet an act, passed so early as the 28th of June, 1798, declares, that vessels and goods of this description, when recaptured, shall be restored on paying salvage; thereby plainly indicating, that such recapture was sufficiently warranted by law, to be the foundation of a claim for salvage. If the recapture of vessels of one description, not expressly authorized by the very terms of the act of Congress, be yet a rightful act, recognized by Congress as the foundation for a claim to salvage, which claim Congress proceeds to regulate, then it would seem, that other recaptures from the same enemy are equally rightful; and where the claim they afford for salvage has not been regulated by Congress, such claim must be determined by the principles of general law.

In this situation remained the recaptured vessels of any other power, also at war with France, until the act of the 2d of March, 1799, which regulates the salvage demandable from them. Neither by that act, nor by any previous act, was a power given, in terms, to recapture such vessels. But their recapture was an incident which unavoidably grew out of the state of the war. On the capture of a French vessel, having with her as a prize the vessel of such a power, the prize was inevitably recaptured. On the idea, that the recapture was lawful, and that it was a foundation on which the right to salvage could stand, the legislature, in March, 1799, declared what the amount of that salvage should be. The expression of this act is by no means explicit. If it extends to neutrals, then it governs in this case; if otherwise, the law respecting them continued still longer, on the same ground with the law respecting a belligerent, prior to the passage of the act of the 2d of March, 1799. Thus it continued until the 3d of March, 1800, when the legislature regulated the salvage to be paid by neutrals, recaptured from a power against which the United States have authorized defense or reprisals.

This act having passed subsequently to the recapture of the *Amelia*, can certainly not affect that case as to the quantity of salvage, or give a right to salvage which did not exist before. But it manifests, in like

manner with the laws already commented on, the system which Congress considered itself as having established. This act was passed at a time when no additional hostility against France could have been contemplated. It was only designed to keep up the defensive system which had before been formed, and which it was deemed necessary to continue, until the negotiation then pending should have a pacific termination. Accordingly, there is no expression in the act extending the power of recapture, or giving it, in the case of neutrals. This power is supposed to exist, as an incident growing out of the state of war, and the right to salvage produced by that power is regulated in the act.

In case of a recapture, subsequently to the act, no doubt could be entertained, but that salvage, according to its terms, would be demandable. Yet there is not a syllable in it which would warrant an idea, that the right of recapture was extended by it, or did not exist before. It must then have existed, from the passage of the laws, which commenced a general resistance to the aggressions we had so long experienced and submitted to.

It is not unworthy of notice, that the first regulation of the right of salvage in the case of a recapture, not expressly enumerated among the specified acts of hostility warranted by the law, is to be found in one of those acts which constitute a part of the very system of defense determined on by Congress, and is the first which subjects to condemnation the prizes made by our public ships of war.

It has not escaped the consideration of the court, that a legislative act, founded on a mistaken opinion of what was law, does not change the actual state of the law as to preexisting cases. This principle is not shaken by the opinion now given. The court goes no further than to use the provisions in one of several acts forming a general system, as explanatory of other parts of the same system; and this appears to be in obedience to the best established rules of exposition, and to be necessary to a sound construction of the law.

An objection was made to the claim of salvage, by one of the counsel for the defendant in error, unconnected with the acts of Congress, and which it is proper here to notice. He states, that to give title to salvage, the means used must not only have produced the benefit, but must have been used with that sole view. For this he cites Beawes' *Lex Mer.* 158. The principle is applied by Beawes to the single case of a vessel saved at sea, by throwing overboard a part of her cargo.

In that case, the principle is unquestionably correct, and in the case of a recapture, it is as unquestionably incorrect. The recaptor is seldom actuated by the sole view of saving the vessel, and in no case of the sort, has the inquiry ever been made. It is, then, the opinion of the court, on a consideration of the acts of Congress, and of the circumstances of the case, that the recapture of the *Amelia* was lawful; and that, if the claim to salvage be in other respects well founded, there is nothing to defeat it in the character of the original taking.

2. It becomes then necessary to inquire, whether there has been such a meritorious service rendered to the recaptured, as entitles the recaptor to salvage?

The *Amelia* was a neutral ship, captured by a French cruiser, and recaptured while on her way to a French port, to be adjudged according to the laws of war. It is stated to be the settled doctrine of the law of nations, that a neutral vessel, captured by a belligerent, is to be discharged without paying salvage: and for this several authorities have been quoted, and many more might certainly be cited. That such has been a general rule, is not to be questioned. As little is it to be questioned, that this rule is founded exclusively on the supposed safety of the neutral. It is expressly stated in the case of *The War Onskan,* cited from Robinson's Reports, to be founded on this plain principle, "that the liberation of a clear neutral from the hand of the enemy, is no essential service rendered to him, inasmuch as that the same enemy would be compelled, by the tribunals of his own country, after he had carried the neutral into port, to release him, with costs and damages for the injurious seizure and detention." It is not unfrequent, to consider and speak of a regular practice under a rule, as itself forming a rule. A regular course of decisions on the text of the law, constitutes a rule of construction, by which that text is to be applied to all similar cases: but alter the text, and the rule no longer governs. So, in the case of salvage. The general principle is, that salvage is only payable, where a meritorious service has been rendered. In the application of this principle, it has been decided, that neutrals carried in by a belligerent for examination, being in no danger, receive no benefit from recapture; and ought not, therefore, to pay salvage.

The principle is, that without benefit, salvage is not payable: and it is merely a consequence from this principle, which exempts recaptured neutrals from its payment. But let a nation change its laws and its practice on this subject; let its legislation be such as to subject to

condemnation all neutrals captured by its cruisers, and who will say, that no benefit is conferred by a recapture? In such a course of things, the state of the neutral is completely changed. So far from being safe, he is in as much danger of condemnation, as if captured by his own declared enemy. A series of decisions, then, and of rules founded on his supposed safety, no longer apply: only those rules are applicable, which regulate a situation of actual danger. This is not, as it has been termed, a change of principle; but a preservation of principle, by a practical application of it, according to the original substantial good sense of the rule.

It becomes, then, necessary to inquire, whether the laws of France were such as to have rendered the condemnation of the *Amelia* so extremely probable, as to create a case of such real danger, that her recapture by Captain Talbot must be considered as a meritorious service entitling him to salvage. To prove this, the counsel for the plaintiff in error has offered several decrees of the French Government, and especially, one of the 18th of January, 1798.

Objections have been made to the reading of these decrees, as being the laws of a foreign nation, and therefore, facts, which, like other facts, ought to have been proved, and to have formed a part of the case stated for the consideration of the court. That the laws of a foreign nation, designed only for the direction of its own affairs, are not to be noticed by the courts of other countries, unless proved as facts, and that this court, with respect to facts, is limited to the statement made in the court below, can not be questioned. The real and only question is, whether the public laws of a foreign nation, on a subject of common concern to all nations, promulgated by the governing powers of a country, can be noticed as law, by a court of admiralty of that country, or must be still further proved as a fact.

The negative of this proposition has not been maintained in any of the authorities which have been adduced. On the contrary, several have been quoted (and such seems to have been the general practice) in which the marine ordinances of a foreign nation are read as law, without being proved as facts. It has been said, that this is done by consent: that it is a matter of general convenience, not to put parties to the trouble and expense of proving permanent and well-known laws which it is in their power to prove; and this opinion is countenanced by the case cited from Douglas. If it be correct, yet, this decree having been promulgated in the United States as the law of France,

by the joint act of that department which is entrusted with foreign intercourse, and of that which is invested with the powers of war, seems to assume a character of notoriety which renders it admissible in our courts. It is, therefore, the opinion of the court, that the decree should be read as an authenticated copy of a public law of France, interesting to all nations.

The decree ordains, that "the character of vessels, relative to their quality of neuter or enemy, shall be determined by their cargo; in consequence, every vessel found at sea, loaded, in whole or in part, with merchandise, the production of England or her possessions, shall be declared good prize, whoever the owner of these goods or merchandise may be." This decree subjects to condemnation in the courts of France, a neutral vessel, laden, in whole or in part, with articles the growth of England or any of its possessions. A neutral thus circumstanced can not be considered as in a state of safety: his recaptor can not be said to have rendered him no service. It can not reasonably be contended, that he would have been discharged in the ports of the belligerent, with costs and damages.

Let us, then, inquire, whether this was the situation of the *Amelia*. The first fact states her to have sailed from Calcutta, in Bengal, in April, 1799, laden with a cargo of the product and manufacture of that country. Here it is contended, that the whole of Bengal may possibly not be in the possession of the English, and, therefore, it does not appear that the cargo was within the description of the decree. But to this, it has been answered, that in inquiring whether the *Amelia* was in danger or not, this court must put itself in the place of a French court of admiralty, and determine as such court would have determined. Doing this, there seems to be no reason to doubt, that the cargo, without inquiring into the precise situation of the British power in every part of Bengal, being *prima facie* of the product and manufacture of a possession of England, would have been so considered, unless the contrary could have been plainly shown.

The next fact relied on by the defendant in error is, that the *Amelia* was sent to be adjudged according to the laws of war, and from thence it is inferred, that she could not have been judged according to the decree of the 18th of January. It is to be remembered, that these are the orders of the captor, and without a question, in the language of a French cruiser, a law of his own country furnishing a rule of conduct in time of war, will be spoken of as one of the laws of war.

But the third and fourth facts in the statement admit the *Amelia,* with her cargo, to have belonged to a citizen of Hamburg, which city was not in a state of hostility with the Republic of France, but was to be considered as neutral between the then belligerent powers. It has been contended, that these facts not only do not show the recaptured vessel to have been one on which the decree could operate, but positively show that the decree could not have affected her. The whole statement, taken together, amounts to nothing more than that Hamburg was a neutral city; and it is precisely against neutrals, that the decree is in terms directed. To prove, therefore, that the *Amelia* was a neutral vessel, is to prove her within the very words of the decree, and consequently, to establish the reality of her danger.

Among the very elaborate arguments which have been used in this case, there are some which the court deem it proper more particularly to notice. It has been contended, that this decree might have been merely *in terrorem;* that it might never have been executed; and that, being in opposition to the law of nations, the court ought to presume it never would have been executed. But the court can not presume the laws of any country to have been enacted *in terrorem;* nor that they will be disregarded by its judicial authority. Their obligation on their own courts must be considered as complete; and without resorting either to public notoriety, or the declarations of our own laws on the subject, the decisions of the French courts must be admitted to have conformed to the rules prescribed by their government.

It has been contended, that France is an independent nation, entitled to the benefits of the law of nations; and further, that if she has violated them, we ought not to violate them also, but ought to remonstrate against such misconduct. These positions have never been controverted; but they lead to a very different result from that which they have been relied on as producing.

The respect due to France is totally unconnected with the danger in which her laws had placed the *Amelia;* nor is France in any manner to be affected by the decree this court may pronounce. Her interest in the vessel was terminated by the recapture, which was authorized by the state of hostility then subsisting between the two nations. From that time, it has been a question only between the *Amelia* and the recaptor, with which France has nothing to do.

It is true, that a violation of the law of nations by one power does

not justify its violation by another; but that remonstrance is the proper course to be pursued, and this is the course which has been pursued. America did remonstrate, most earnestly remonstrate, to France, against the injuries committed on her; but remonstrance having failed, she appealed to a higher tribunal, and authorized limited hostilities: this was not violating the law of nations, but conforming to it. In the course of these limited hostilities, the *Amelia* has been recaptured, and the inquiry now is, not whether the conduct of France would justify a departure from the law of nations, but what is the real law in the case? This depends on the danger from which she has been saved.

Much has been said about the general conduct of France and England on the seas, and it has been urged, that the course of the latter has been still more injurious than that of the former. That is a consideration not to be taken up in this cause: animadversions on either, in the present case, would be considered as extremely unbecoming the judges of this court, who have only to inquire what was the real danger in which the laws of one of the countries placed the *Amelia*, and from which she has been freed by her recapture.

It has been contended, that an illegal commission to take, given by France, can not authorize our vessels to retake; that we have no right by legislation to grant salvage out of the property of a citizen of Hamburg, who might have objected to the condition of the service. But it is not the authority given by the French Government to capture neutrals, which is legalizing the recapture made by Captain Talbot; it is the state of hostility between the two nations which is considered as having authorized that act. The recapture having been made lawfully, then the right to salvage, on general principles, depends on the service rendered. We can not presume this service to have been unacceptable to the Hamburger, because it has bettered his condition; but a recapture must always be made without consulting the recaptured. The act is one of the incidents of war, and is, in itself, only offensive as against the enemy. The subsequent fate of the recaptured depends on the service he has received, and on other circumstances.

To give a right to salvage, it is said, there must be a contract, either express or implied. Had Hamburg been in a state of declared war with France, recaptured vessels of that city would be admitted to be liable to pay salvage. If a contract be necessary, from what circumstances would the law, in that state of things, imply it? Clearly,

from the benefit received, and the risk incurred. If, in the actual state of things, there was also benefit and risk, then the same circumstances concur, and they warrant the same result.

It is also urged, that to maintain this right, the danger ought not to be merely speculative, but must be imminent and the loss certain. That a mere speculative danger will not be sufficient to entitle a person to salvage, is unquestionably true. But that the danger must be such, that escape from it by other means was inevitable,[1] can not be admitted. In all the cases stated by the counsel for the defendant in error, safety by other means was possible, though not probable. The flames of a ship on fire might be extinguished by the crew, or by a sudden tempest. A ship on the rocks might possibly be gotten off, by the aid of wind and tides, without assistance from others. A vessel captured by an enemy might be separated from her captor, and if sailors had been placed on board the prize, a thousand accidents might possibly destroy them; or they might even be blown by a storm into a port of the country to which the prize vessel originally belonged. It can not, therefore, be necessary that the loss should be inevitably certain; but it is necessary that the danger should be real and imminent. It is believed to have been so, in this case. The captured vessel was of such description that the law by which she was to be tried, condemned her as good prize to the captor. Her danger, then, was real and imminent. The service rendered her was an essential service, and the court is, therefore, of opinion, that the recaptor is entitled to salvage.

3. The next object of inquiry is, what salvage ought to be allowed? The captors claim one-half the gross value of the ship and cargo. To support this claim they rely on the "act for the government of the navy of the United States," passed the 2d of March, 1799. This act regulates the salvage payable on the ships and goods belonging to the citizens of the United States, or to the citizens or subjects of any nation in amity with the United States, retaken from the enemy. It has been contended, that the case before the court is in the very words of the act. That the owner of the *Amelia* is a citizen of a state in amity with the United States, retaken from the enemy. That the description would have been more limited, had the intention of the act been to restrain its application to a recaptured vessel belonging to a nation engaged with the United States against the same enemy. The words of the act would certainly admit of this construction.

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[1] [impossible]

Against it, it has been urged, and we think with great force, that the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law. If the construction contended for be given to the act, it subjects to the same rate of salvage a recaptured neutral, and a recaptured belligerent vessel. Yet, according to the law of nations, a neutral is generally to be restored without salvage.

This argument, in the opinion of the court, derives great additional weight from the consideration that the act in question is not temporary, but permanent. It is not merely fitted to the then existing state of things, and calculated to expire with them, but is a regulation applying to present and future times. Whenever the danger resulting to captured neutrals from the laws of France should cease, then, according to the principles laid down in this decree, the liability of recaptured neutrals to the payment of salvage would, in conformity with the general law and usage of nations, cease also. This event might have happened, and probably did happen, before hostilities between the United States and France were terminated by treaty. Yet, if this law applies to the case, salvage from a recaptured neutral would still be demandable. This act, then, if the words admit it, since it provides a permanent rule for the payment of salvage, ought to be construed to apply only to cases in which salvage is permanently payable.

On inspecting the clause in question, the court is struck with the description of those from whom the vessel is to be retaken, in order to come within the provisions of the act. The expression used is, the enemy: a vessel retaken from the enemy. The enemy of whom? The court thinks it not unreasonable to answer, of both parties. By this construction, the act of Congress will never violate those principles which we believe, and which it is our duty to believe, the legislature of the United States will always hold sacred.

If this act does not comprehend the case, then the court is to decide, on a just estimate of the danger from which the recaptured was saved, and of the risk attending the retaking of the vessel, what is a reasonable salvage. Considering the circumstances, and considering also what rule has been adopted in other courts of admiralty, one-sixth appears to be a reasonable allowance.

It is, therefore, the opinion of the court, that the decree of the

circuit court, held for the district of New York, was correct, in reversing the decree of the district court, but not correct in decreeing the restoration of the *Amelia*, without paying salvage. This court, therefore, is of opinion, that the decree, so far as the restoration of the *Amelia*, without salvage, is ordered, ought to be reversed, and that the *Amelia* and her cargo ought to be restored to the claimant, on paying for salvage one-sixth part of the net value, after deducting therefrom the charges which have been incurred.

THE UNITED STATES v. THE SCHOONER *PEGGY*[1]

Definitive decree.—Judicial notice.—High seas

A final condemnation in an inferior court of admiralty, where a right of appeal exists, and has been claimed, is not a *definitive* condemnation, within the meaning of the 4th article of the convention with France, signed September 30, 1800.[2]

The court is as much bound, as the executive, to take notice of a treaty, and will reverse the original decree of condemnation (although it was correct when made), and decree restoration of the property, under the treaty made since the original condemnation.

Quaere, as to the extent of the term 'high seas'?

Error to the Circuit Court for the District of Connecticut, on a question of prize. The facts found and stated by Judge Law, the district judge, were as follows:

> That the ship *Trumbull,* duly commissioned by the President of the United States, with instructions to take any armed French vessel or vessels, sailing under authority, or pretense of authority, from the French Republic, which shall be found within the jurisdictional limits of the United States, or elsewhere on the high seas, etc., as set forth in said instructions; and said ship did, on the 24th day of April last (April, 1800), capture the schooner *Peggy,* after running her ashore, a few miles to the westward of Port au Prince, within the dominions and territory of General Toussaint, and has brought her into port, as set forth in the libel; and it further appears, that all the facts contained in the claim are true;[3] whereupon, this court are of opinion that as it

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[1] 1 Cranch, 103; December term, 1801.

[2] *Infra,* p. 487.

[3] The material facts stated in the claim are, that the schooner was the property of citizens of the French Republic; that she was permitted by Toussaint to receive on board the cargo, which was on board at the time of capture; that

> appears that the said schooner was solely upon a trading voyage, and sailed under the permission of Toussaint, with dispatches for the French Government, under a convoy furnished by Toussaint, with directions to touch at Leogane for supplies, and that the arms she had on board must be presumed to be only for self-defense; neither does it appear she had ever made, or attempted to make, any depredations, and that she was not such an armed vessel as was meant and intended by the laws of the United States should be subject to capture and condemnation; and that the situation she was in, at the time of capture, being aground within the territory and jurisdiction of Toussaint, she was not on the high seas, so as to be intended to be within the instructions given to the commanders of American ships of war: therefore, adjudge said schooner is not a lawful prize, and decree that said schooner with her cargo be restored to the claimant.

From this decree, the attorney for the United States, in behalf of the United States and the commander, officers and crew of the *Trumbull*, appealed to the circuit court, in which Judge Cushing sat alone, as the district judge declined sitting in the cause, on account of the interest of his son, who was one of the officers on board the *Trumbull*, at the time of capture, and who, if the schooner should be condemned, would be entitled to a share of the prize-money. The circuit court, on the appeal, found the following facts, and gave the following opinion and decree:

> That David Jewett, commander of the said public armed vessel, called the *Trumbull*, being duly commissioned, and instructed by the President of the United States, as set forth in the said libel, did, on or about the 23d of April last, capture the said schooner *Peggy*, after running her aground, about pistol-shot from the shore, a few miles to the westward of Port au Prince, called also Port Republican, on the coast of the island of St. Domingo, and

she had dispatches from Toussaint to France; that she sailed by his authority, on the 23d of April, for France, navigated by ten men, including Buisson, the claimant, and Gillibert, the commander, and having on board four small three-pound carriage-guns, solely for defense against piratical assaults, and being under convoy of a tender, furnished by Toussaint. That on the 23d of April, she was run ashore, a few miles to the westward of Port au Prince, *within the dominion, jurisdiction and territory of General Toussaint, so that she was fast and tight aground;* at which time, and in which situation, the boats and crew of the *Trumbull* attacked and took possession of her, and got her off. That Toussaint then was, and still is, on terms of amity, commerce and friendship with the United States, duly entered into and ratified by treaty. That the schooner was on a lawful voyage, for the sole purpose of trade; and not commissioned, or in a condition to annoy or injure the trade or commerce of the United States.

afterwards bring her into port, as set forth in the libel. That at the time of the capture of the said schooner, there were ten persons aboard her. That she was then armed with four carriage-guns, being four-pounders, with four swivel-guns, six muskets, four pistols, four cutlasses, two axes, some boarding-hatchets, tomahawks and handcuffs. That she was a trading French vessel of about a hundred tons, then laden with coffee, sugar and other merchandise. That she had come from Bordeaux to Port au Prince, where the claimant had taken in said cargo, and from whence he sailed, on or about the said 23d day of April, with said schooner and cargo, having dispatches from General Toussaint for the French Government. That the said Buisson sailed from Port au Prince as aforesaid, with the permission and direction of General Toussaint, to proceed to Bordeaux; that said schooner so sailed from Port au Prince, under convoy of an armed vessel, by order of said Toussaint, without a passport from Mr. Stevens, consul-general of the United States at St. Domingo, but that Buisson had been promised by Toussaint's brother, that one should be obtained and sent him, which, however, was not done; that said schooner had sailed from Bordeaux for Port au Prince, with fifteen men, besides eight passengers (according to the roll of equipage), armed with some guns, swivels and muskets; that said Captain Buisson was without any commission as for a vessel of war, and alleges that he was armed only for self-defense. That at the time of said capture, the guns of said schooner were loaded with canister-shot, one of which being fired, the shot fell near the bow of the *Trumbull;* but the said Buisson declares that said gun was fired only as a signal to his convoy. That the said Captain Buisson appeared to be in a disposition, and was prepared with force, to resist the boats which were sent from the *Trumbull* to board him, a little previous to the capture, in case of their attempting it; and that the said schooner and cargo are French property.

Upon these facts, the court is of opinion as follows, viz.: However compassion may be moved in favor of the claimant by some circumstances; such as that he was charged with dispatches from General Toussaint, between whom and the United States there were some friendly arrangements respecting commerce; that he was not in a capacity of greatly annoying trade, from the fewness of his men; and his allegation that he was armed only in defense; yet as the court is bound by law, which makes no such distinctions; as armed French vessels are not protected by any treaty or convention; particularly, not by the regulations between General Toussaint and the American consul; and as the said schooner *Peggy* was in a condition capable of annoying, and even of capturing single unarmed trading vessels, unattended with convoy; the court can not avoid being of opinion, that she falls within the

description and general design of the expression of the law, an armed French vessel.

2d. That she was captured on the high seas: the argument taken by the claimant's counsel, from the extent of national jurisdiction on seacoasts bordering on the country, not applying to this case, so as to acquit the said schooner; the seacoast of St. Domingo not being neutral; not made so by any treaty or convention; but to be considered as hostile, upon our present plan of laws of defense with respect to France; as much so as any part of the coast of France, as far as regards French armed vessels; the court is, therefore, of opinion that the said schooner *Peggy* and cargo are lawful prize:

It is, therefore, considered, decreed and adjudged by this court, that the decree of the district court respecting the same, so far as regards their acquittal, be, and the same is hereby reversed; and that the said schooner, with her apparel, guns and appurtenances, and the goods and effects which were found on board of her at the time of capture, and brought into port as aforesaid, be, and the same are hereby condemned as forfeited to the use of the United States, and of the officers and men of the said armed vessel called the *Trumbull,* one-half thereof to the United States, the other half to the officers and men, to be divided according to law; the said schooner *Peggy* being of inferior force to the said armed vessel called the *Trumbull.*

This sentence and decree were pronounced on the 23d day of September, 1800.

During the present term, and before the court gave judgment upon this writ of error, viz., on the 21st of December, 1801, the convention with France was finally ratified by the President; the fourth article of which convention has these words: "Property captured, and not yet *definitively* condemned, or which may be captured before the exchange of ratifications (contraband goods destined to an enemy's port excepted), shall be mutually restored." "This article shall take effect from the date of the signature of the present convention. And if, from the date of the said signature, any property shall be condemned, contrary to the intent of the said convention, before the knowledge of this stipulation shall be obtained, the property so condemned shall, without delay, be restored or paid for."

On the 30th of September, 1800, this convention was signed by the respective plenipotentiaries of the two nations, at Paris. On the 18th of February, 1801, it was ratified by the President of the United States, with the advice and consent of the Senate, excepting the 2d

article, and with a limitation of the duration of the convention to the term of eight years. On the 31st of July, 1801, the ratifications were exchanged at Paris, with a proviso that the expunging of the 2d article should be considered as a renunciation of the respective pretensions which were the object of that article.

This proviso being considered by the President as requiring a renewal of the assent of the Senate, he sent it to them for their advice. They returned it, with a resolve that they considered the convention as fully ratified. Whereupon, on the 21st of December, 1801, it was promulged by a proclamation of the President.

The controversy turned principally upon two points: 1st. Whether the capture could be considered as made on the high seas, according to the import of that term, as used in the Act of Congress of July 9th, 1798 (1 U. S. Stat. 578). 2d. Whether, by the sentence of condemnation, by the circuit court, on the 23d of September, 1800, the schooner *Peggy* could be considered as *definitively* condemned, within the meaning of the 4th article of the convention with France, signed at Paris, on the 30th of September, 1800. The writ of error was dated on the 2d of October, 1800.

Griswold and *Bayard,* for the captors.

Mason, for the claimant.[1]

The Chief Justice delivered the opinion of the court.—In this case, the court is of opinion that the schooner *Peggy* is within the provisions of the treaty entered into with France, and ought to be restored. This vessel is not considered as being *definitively* condemned. The argument at the bar which contends that because the sentence of the circuit court is denominated a final sentence, therefore, its condemnation is definitive, in the sense in which that term is used in the treaty, is not deemed a correct argument. A decree or sentence may be interlocutory or final, in the court which pronounces it, and receives its appellation from its determining the power of that particular court over the subject to which it applies, or being only an intermediate order, subject to the future control of the same court. The last decree of an inferior court is final, in relation to the power of that court, but not in relation to the property itself, unless it be acquiesced under. The terms used in the treaty seem to apply to the actual con-

[1] I regret that not having the notes of this case, I am unable to report the very ingenious arguments of the learned counsel.

dition of the property, and to direct a restoration of that which is still in controversy between the parties. On any other construction, the word *definitive* would be rendered useless and inoperative. Vessels are seldom, if ever, condemned, but by a final sentence: an interlocutory order for a sale is not a condemnation. A stipulation, then, for the restoration of vessels, not yet condemned, would, on this construction, comprehend as many cases as a stipulation for the restoration of such as are not yet definitively condemned. Every condemnation is final as to the court which pronounces it, and no other difference is perceived between a condemnation and a final condemnation, than that the one terminates definitively the controversy between the parties, and the other leaves that controversy still depending. In this case, the sentence of condemnation was appealed from; it might have been reversed, and therefore, was not such a sentence as, in the contemplation of the contracting parties, on a fair and honest construction of the contract, was designated as a definitive condemnation.

It has been urged, that the court can take no notice of the stipulation for the restoration of property not yet definitely condemned; that the judges can only inquire whether the sentence was erroneous, when delivered, and that if the judgment was correct, it can not be made otherwise, by anything subsequent to its rendition. The Constitution of the United States declares a treaty to be the supreme law of the land. Of consequence, its obligation on the courts of the United States must be admitted. It is certainly true, that the execution of a contract between nations is to be demanded from, and in the general, superintended by, the executive of each nation; and therefore, whatever the decision of this court may be, relative to the rights of parties litigating before it, the claim upon the nation, if unsatisfied, may still be asserted. But yet, where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights, and is as much to be regarded by the court, as an act of Congress; and although restoration may be an executive, when viewed as a substantive act, independent of, and unconnected with, other circumstances, yet to condemn a vessel, the restoration of which is directed by a law of the land, would be a direct infraction of that law, and of consequence, improper.

It is, in the general, true, that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not. But if, subsequent to the judgment, and before the decision

of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt, in the present case, has been expressed, I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns, where individual rights, acquired by war, are sacrificed for national purposes, the contract making the sacrifice ought always to receive a construction conforming to its manifest import; and if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation. In such a case, the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which can not be affirmed, but in violation of law, the judgment must be set aside.

ALEXANDER MURRAY, Esq., v. Schooner *CHARMING BETSY*[1]

Marine trespass.—Probable cause.—Damages.—Expatriation.—Armed vessel

An American vessel, sold in a Danish island, to a person who was born in the United States, but who had *bona fide* become a burgher of that island, and sailing from thence to a French island, in June, 1800, with a new cargo purchased by her new owner, and under the Danish flag, was not liable to seizure, under the non-intercourse law of February 27, 1800.[2]

If there was no reasonable ground of suspicion that she was a vessel trading contrary to that law, the commander of a United States ship of war, who seizes and sends her in, is liable for damages.

The report of assessors appointed by the court of admiralty to assess the damages, ought to state the principles on which it is founded, and not a gross sum, without explanation.

An American citizen, residing in a foreign country, may acquire the commercial privileges attached to his domicil; and by making himself the subject of a foreign power, he places himself out of the protection of the United States, while within the territory of the sovereign to whom he has sworn allegiance.

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[1] 2 Cranch, 64; February term, 1804.

[2] *Supra*, p. 84.

Quaere? Whether a citizen of the United States can divest himself absolutely of that character otherwise than in such manner as may be prescribed by law?

Whether, by becoming the subject of a foreign power, he is freed from punishment for a crime against the United States?

What degree of arming constitutes an armed vessel?

The facts of this case are thus stated by the District Judge in his decree.

> The libel in this cause is founded on the act entitled "an act further to suspend the commercial intercourse between the United States and France, and the dependencies thereof" (27th February, 1800, 2 U. S. Stat. 7); and states that the schooner (*The Charming Betsy*) sailed from Baltimore, after the passing of that act, owned, hired or employed by persons resident within the United States, or by citizens thereof, resident elsewhere, bound to Guadeloupe, and was taken on the high seas, on the 1st of June, 1800, by the libellant, then commander of the public armed ship the *Constellation,* in pursuance of instructions given to the libellant, by the President of the United States, there being reason to suspect her to be engaged in a traffic or commerce contrary to the said act, etc. The claim and answer, replication and rejoinder, are referred to for a further statement of the proceedings in this case, on all which I ground my decree. On a careful attention to the exhibits and testimony in this cause, and after hearing of counsel, I am of opinion that the following facts are either acknowledged in the proceedings, or satisfactorily proved.
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> That on or about the 10th of April, 1800, the schooner, now called *The Charming Betsy,* but then called the *Jane,* sailed from Baltimore, in the district of Maryland, an American bottom, duly registered according to law, belonging to citizens of, and resident in, the United States, and regularly documented with American papers; that she was laden with a cargo belonging to citizens of the United States; that her destination was first to St. Bartholomew, where the master had orders to effect a sale of both vessel and cargo; but if a sale of the schooner could not be effected at St. Bartholomew, which was to be considered the "primary object" of the voyage, the master was to proceed to St. Thomas, with the vessel and such part of the flour as should be unsold, where he was to accomplish the sale. That although a sale of the cargo, consisting chiefly of flour, was effected at St. Bartholomew, yet the vessel could not there be advantageously disposed of, and the master proceeded, according to his instructions, to St. Thomas, where a *bona fide* sale was accomplished, by Captain James Phillips, on behalf of the American owners, for a valuable considera-

tion, to a certain Jared Shattuck, a resident merchant in the island of St. Thomas.

That although it is granted that Jared Shattuck was born in Connecticut, before the American revolution, yet he had removed, long before any differences with France in his early youth, to the island of St. Thomas, where he served his apprenticeship, intermarried, opened a house of trade, owned sundry vessels, and, as it is said, lands; which none but Danish subjects were competent to hold and possess. About the year 1796, he became a Danish burgher, invested with the privileges of a Danish subject, and owing allegiance to his Danish majesty. The evidence on this head is sufficient to satisfy me of these facts; though some of them might be more fully proved. It does not appear, that Jared Shattuck ever returned to the United States to resume citizenship, but constantly resided, and had his domicil, both before and at the time of the purchase of the schooner *Jane,* at St. Thomas. That although the schooner was armed and furnished with ammunition, on her sailing from Baltimore, and the cannon, arms and stores were sold to Jared Shattuck by a contract separate from that of the vessel, she was chiefly dismantled of these articles at St. Thomas, a small part of the ammunition, and a trifling part of the small arms excepted. That the name of the said schooner was at St. Thomas changed to that of *The Charming Betsy,* and she was documented with Danish papers, as the property of Jared Shattuck. That so being the *bona fide* property of Jared Shattuck, she took in a cargo belonging to him, and no other, as appears by the papers found on board, and delivered to this court.

That she sailed, with the said cargo, from St. Thomas, on or about the 25th day of June, 1800, commanded by a certain Thomas Wright, a Danish burgher, and navigated according to the laws of Denmark, for aught that appears to the contrary, bound to the island of Guadeloupe.

That on or about the first of July last, 1800, she was captured, on her passage to Guadeloupe, by a French privateer, and a prize-master and seven or eight hands put on board; the Danish crew (except Captain Wright, an old man and two boys) being taken off by the French privateer. That on the 3d of the same July, she was boarded and taken possession of by some of the officers and crew of the *Constellation,* under the orders of Captain Murray, and sent into the port of St. Pierre, in Martinique, where she arrived on the 5th of the same month of July. I do not state the contents of a paper called a *procès verbal,* which, however, will appear among the exhibits, because, in my opinion, it contains statements, either contrary to the real facts, or illusory, and calculated to serve the purposes of the French captors. Nor do I detail the number of cutlasses, a musket and a small quantity of ammunition found on board, when the schooner was boarded by

Captain Murray's orders. The Danish papers were on board, and, except the *procès verbal,* formed by the French captors, no other ship's papers. The instructions of Captain Murray from the President of the United States comprehend the case of a vessel found in the possession of French captors, but then it should seem, that it must be a vessel belonging to citizens of the United States. It does not appear that Captain Murray had any knowledge of Jared Shattuck being a native of Connecticut, or of any of the United States, until he was informed by Captain Wright, at Martinique.

It is unnecessary to go into any disquisition about the instructions to the commanders of public armed ships, whether they were directory to Captain Murray in the case in question; and if so, whether they were, or not, strictly conformable to law, does not finally justify an act which, on investigation, turns out to be illegal, either as it respects the municipal laws of our country or the laws of nations. Captain Murray's respectable character, both as an officer and a citizen forbids any idea of his intention to do a wanton act of violence towards either a citizen of the United States, or a subject of another nation. He, no doubt, thought it his duty to send the vessel in question to the United States for adjudication. He had also reasons prevailing with him, to sell Jared Shattuck's cargo in Martinique. His sending the schooner to Martinique was evidently proper, and serviceable to the owner, as she had not a sufficient number of the crew on board to navigate her. But the further proceeding turns out, in my opinion, wrong. Whatever probable cause might appear to Captain Murray to justify his conduct, or excite suspicion at the time, he ran the risk of, and is amenable for, consequences.

On a full consideration of the facts and circumstances of this case, I am of opinion that the schooner *Jane,* being the same in the libel mentioned, did not sail from the United States with an intent to violate the act, for a breach whereof the libel is filed. That she did not belong when she sailed from St. Thomas for Guadeloupe, to a citizen of the United States, but to a Danish subject. Jared Shattuck either never was a citizen of the United States, under our present national arrangement, or, if he should at any time have been so considered, he had lawfully expatriated himself, and became a subject of a friendly nation. No fraudulent intent appears in his case, either of eluding the laws of the United States, in carrying on a covered trade, by such expatriation, or that he became a Danish burgher for any purposes which are considered as exceptions to the general rule which seems established on the subject of the right of expatriation. That, being a Danish burgher and subject, he had a lawful right to trade to the island of Guadeloupe, any law of the United States notwithstanding, in a vessel *bona fide* purchased, either from citizens of the United States, or any other vessel documented and adopted

by the Danish laws. I do not rely more than it deserves, on the circumstance of Jared Shattuck's burghership of which the best evidence, to-wit, the brief, or an authenticated copy, has not been produced. I know well, that this brief alone, unaccompanied by the strong ingredients in his case, might be fallacious. I take the whole combination to satisfy me of his being *bona fide* a Danish adopted subject; and altogether it amounts, in my mind, to proof of expatriation.

The master (Wright) produces his Danish burgher's brief. He is a native of Scotland. But even the British case of *Pollard* v. *Bell,* 8 T. R. 435, to which I have been referred, shows that, with all the inflexibility evidenced in the British code, on the point of expatriation, a vessel was held to be Danish property, if documented according to the Danish laws, though the master, who had obtained a Danish burgher's brief, was a Scotchman. It shows, too, that in the opinion of the British judges (who agree, on this point, with the general current of opinions of civilians and writers on general law), the municipal laws or ordinances of a country do not control the laws of nations. The British courts have gone great lengths to modify their ancient feudal law of allegiance, so as to moderate its rigor, and adapt it to the state of the modern world, which has become most generally commercial. They hold it to be clearly settled, that although a natural-born subject can not throw off his allegiance to the king, but is always amenable for criminal acts against it, yet for commercial purposes he may acquire the rights of a citizen of another country. (Com. Rep. 677, 689.) I cite British authorities because they have been peculiarly tenacious on this subject. Naturalization in this country may sometimes be a mere cover; so may, and, no doubt, frequently are, burghers' briefs. But the case of Shattuck is accompanied with so many corroborating circumstances, added to his brief, as to render it, if not incontrovertibly certain, at least, an unfortunate case on which to rest a dispute as to the general subject of expatriation. I am not disposed to treat lightly the attachment a citizen of the United States ought to bear to his country. There are circumstances in which a citizen ought not to expatriate himself. He never should be considered as having changed his allegiance, if mere temporary objects, fraudulent designs, or incomplete change of domicil, appear in proof. If there are any such in Shattuck's case, they do not appear, and therefore, I must take it for granted that they do not exist. That, therefore, the ultimate destruction of his voyage, and sale of his cargo, are illegal.

The vessel must be restored, and the amount of sales of the cargo paid to the claimant, or his lawful agent, together with costs, and such damages as shall be assessed by the clerk of this court, who is hereby directed to inquire into and report the amount thereof. And for this purpose, the clerk is directed to associate

with himself two intelligent merchants of this district, and duly inquire what damage Jared Shattuck, the owner of the schooner *Charming Betsy* and her cargo, hath sustained, by reason of the premises. Should it be the opinion of the clerk, and the assessors associated with him that the officers and crew of the *Constellation* benefited the owner of *The Charming Betsy,* by the rescue from the French captors, they should allow in the adjustment, reasonable compensation for this service.

(Signed) RICHARD PETERS.

28th April, 1801.

On the 15th of May following, upon the report of the clerk and assessors, a final decree was entered for $20,594.16 damages, with costs. From this decree, the libellant appealed to the circuit court, who adjudged, "that the decree of the district court be affirmed, so far as it directs restitution of the vessel, and payment to the claimant of the net proceeds of the sale of the cargo in Martinique, deducting the costs and charges there, according to the account exhibited by Captain Murray's agent, being one of the exhibits in this cause: and that the said decree be reversed for the residue, each party to pay his own costs, and one moiety of the custody and wharfage bills for keeping the vessel until restitution to the claimant." From this decree, both parties appealed to the supreme court.

The cause was argued, at last term, by *Martin, Key* and *Mason,* for the claimant. No counsel was present for the libellant.

For the *claimant* it was contended that the sale of the schooner to Shattuck was *bona fide,* and that he was a Danish subject. That although she was in possession of French mariners, she was not an armed French vessel, within the acts of congress, which authorized the capture of such vessels. That neutrals are not bound to take notice of hostilities between two nations, unless war has been declared: that the right of search and seizure is incident only to a state of war. That neutrals are not bound to take notice of our municipal regulations: that the non-intercourse act was simply a municipal regulation, binding only upon our own citizens, and had nothing to do with the law of nations; it could give no right to search a neutral. That in all cases where a seizure is made under a municipal law, probable cause is no justification, unless it is made so by the municipal law under which the seizure is made.

As to the position that the sale was *bona fide,* the counsel for the claimant relied on the evidence, which came up with the transcript of

the record, which was very strong and satisfactory. Upon the question whether Shattuck was a Danish subject, or a citizen of the United States, it was said that although he was born in Connecticut, yet there was no evidence that he had ever resided in the United States, since their separation from Great Britain. But it appears by the testimony that he resided in St. Thomas, during his minority, and served his apprenticeship there. That he had married into a family in that island; had resided there ever since the year 1789; had complied with the laws which enabled him to become a burgher, and had carried on business as such, and had for some years, been the owner of vessels and lands. Even if, by birth, he had been a citizen of the United States, he had a right to expatriate himself. He had, at least, the whole time of his minority in which to make his election of what country he would become a citizen. Every citizen of the United States has a right to expatriate himself and become a citizen of any other country which he may prefer, if it be done with a *bona fide* and honest intention, at a proper time, and in a public manner. While we are inviting all the people of the earth to become citizens of the United States, it surely does not become us to hold a contrary doctrine, and deny a similar choice to our own citizens. Circumstances may, indeed, show the intention to be fraudulent and collusive, and merely for the purpose of illicit trade, etc. But such circumstances do not appear in the present case. Shattuck was fairly and *bona fide* domiciliated at St. Thomas before our disputes arose with France. The act of Congress, "further to suspend," etc., can not, therefore, be considered as operating upon such a person. The first act to suspend the intercourse was passed on the 13th of June, 1798 (1 U. S. Stat. 565), and expired with the end of the next session of Congress. The next act, "further to suspend," etc., was passed on the 9th of February, 1799 (*ibid.* 613), and expired on the 3d of March, 1800. The act upon which the present libel is founded, and which has the same title with the last, was passed on the 27th of February, 1800 (2 *ibid.* 7). All the acts are confined in their operations to persons resident within the United States, or under their protection.

She was not such an armed French vessel as comes within the description of those acts of Congress, which authorized the hostilities with France. She had only one musket, twelve ounces of powder, and twelve ounces of lead. The only evidence of other arms arises from the deposition of one McFarlan. But he did not go on board of her

until some days after the capture, and his deposition is inadmissible testimony, because he was entitled to a share of the prize-money, if the vessel should be condemned; and although a release from him to Captain Murray appears among the papers, yet that release was not made, until after the deposition was taken; and the fact is expressly contradicted by other testimony. The mere possession, by nine Frenchmen, did not constitute her an armed vessel. She was unable to annoy the commerce of the United States, which was the reason of the adjudication of this court, in the case of *The Amelia.* (See *Talbot* v. *Seeman,* 1 Cr. 1.) The *procès verbal* is no evidence of any fact but its own existence. If she had arms, they ought to have been brought in, as the only competent evidence of that fact. No arms are libelled, and none appear, by the account of sales, to have been sold in Martinique.

It being, then, a neutral unarmed vessel, Captain Murray had no right to seize and send her in. A right to search a neutral arises only from a state of public known war, and not from a municipal regulation. In time of peace, the flag is to be respected. Until war is declared, neutrals are not bound to take notice of it.

The decrees of both the courts below have decided that the vessel was not liable to capture. The only question is, whether the claimant is entitled to damages? Captain Murray has libelled her upon the non-intercourse act. He does not state that he seized her, because she was a French armed vessel, although he states her to be armed, at the time of capture. It has also been decided by both the courts that she is Danish property. If an American vessel had been illegally captured by Captain Murray, he would have been liable for damages; *a fortiori* in the case of a foreign vessel where, from motives of public policy, our conduct ought not only to be just but liberal.

In cases of personal arrest, if no crime has in fact been committed, probable cause is not a justification, unless it be made so by municipal law. As in the case of hue and cry, he who raises it is liable, if it be false. If the sheriff has a writ against A, and B is shown to him as the person, and he arrests B instead of A, he is liable to an action of trespass at the suit of B. (*Wale* v. *Hill,* 1 Bulst. 149.) So, if he replevies wrong goods, or takes the goods of one, upon a *fi. fa.* against another. In these cases, it is no justification to the officer, that he was informed, or believed, he was right. He must in all cases seize at his peril. So it is with all other officers, such as those of the revenue,

etc., probable cause is not sufficient to justify, unless the law makes it a justification. If the information is at common law, for the thing seized, and the seizure is found to have been illegally made, the injured party must bring his action of trespass; but by the course of the admiralty, the captor, being in court, is liable to a decree against him for damages. *The Fabius,* 2 Rob., 202. The case of *Wale* v. *Hill,* in 1 Bulst. 149, shows that where a crime has not been committed, there, probable cause can be no justification. But where a crime has been committed, the party arresting can not justify by the suspicion of others; it must be upon his own suspicion.

In the case of *Papillon* v. *Buckner,* Hardr. 478, although the goods seized had been condemned by the commissioners of excise, yet it was not held to be a good justification. In *Purviance* v. *Angus,* 1 Dall. 182, it was held that an error in judgment would not excuse an illegal capture; and in *Leglise* v. *Champante,* 2 Str. 820, it is adjudged that probable cause of seizure will not justify the officer.[1]

In 3 Anstr. 896, is a case of seizure of hides, where no provision was made in the law that probable cause should be a justification. This case cites *Pickering* v. *Truste,* 7 T. R. 53. For what reason do the revenue laws provide that probable cause shall be a justification, if it would be so, without such a provision? In these cases, the injury by improper seizures can be but small compared with those which might arise under the non-intercourse law. Great Britain has never made probable cause an excuse for seizing a neutral vessel for violating her municipal laws. A neutral vessel is only liable to your municipal regulations, while in your territorial jurisdiction; but as soon as she gets to sea, you have lost your remedy: you can not seize her on the high seas. Even in Great Britain, if a vessel gets out of the jurisdiction of one court of admiralty, she can not be seized in another. It is admitted that a law may be passed authorizing such a seizure, but

[1] The Ch. J. observed, that this case was overruled two years afterwards, in a case cited in a note to Gwillim's edition of Bac. Abr.[2] The case cited in the note is from 12 Vin. 173, tit. evidence, P. b. 6, in which it is said "that Lord Ch. Baron Bury, *Montague and Page,* against *Price,* held that where an officer had made a seizure, and there was an information upon it, etc., which went in favour of the party who afterwards brings trespass; the shewing these proceedings was sufficient to excuse the officer: It was competent to make out a probable cause for his doing the act. Mich. 6. Geo."

[2] The case of *Leglise* v. *Champante* was in 2 Geo. II. That cited in the note to Bac. ab. referred to by the Ch. J. was in 6 Geo. I. The mistake arises from the note in Gwillim's edition not mentioning the date of the case cited from *Viner.*

then it becomes a question between the two nations. If the present circumstances are sufficient to raise a probable cause for the seizure, and if such probable cause is a justification, it will destroy the trade of the Danish islands. The inhabitants speak our language, they buy our ships, etc. It will be highly injurious to the interests of the United States; and this court will consider what cause of complaint it would furnish to the Danish nation. If a private armed vessel had made this seizure, the captain and owners would have been clearly liable on their bond, which the law obliges them to give. The object of this act of Congress was more to prevent our vessels falling into the hands of the French than to make it a war measure, by starving the French islands.

Even if a Danish vessel should carry American papers and American colors, it would be no justification. In a state of peace, we have no right to say they shall not use them, if they please. In time of war, double papers, or throwing over papers, are probable causes of seizure, but this does not alter the property; it is no cause of condemnation. The vessel is to be restored, but without damages.

The mode of ascertaining the damages adopted by the district court, is conformable to the usual practice in courts of admiralty. See Marriott's Rep., and in the same book, p. 184, in the case of *The Vanderlee,* liberal damages were given.

In the revenue laws of the United States, vol. 4, p. 391, probable cause is made an excuse for the seizure; but no such provision is, or ought to have been, made in the non-intercourse law. The powers given were so liable to abuse that the commander ought to act at his peril.

The Chief Justice mentioned the case of *The Sally,* Captain Joy, in 2 Rob. 185 (Amer. edit.), where a court of vice-admiralty had decreed, in a revenue case, that there was no probable cause of seizure.

This cause came on again to be argued, at this term, by *Dallas,* for the libellant, and *Martin* and *Key,* for the claimant.

Dallas, as a preliminary remark, observed, that the judge of the district court had referred to the clerk and his associates to ascertain whether any and what salvage should be allowed. This was an improper delegation of his authority, not warranted by the practice of courts of admiralty, nor by the nature of his office. Although they had not reported upon this point, yet he submitted it to the court for their consideration.

After stating the facts which appeared upon the record, and such as were either admitted or proved, he divided his argument into three general points.

1. That Jared Shattuck was a citizen of the United States at the time of capture and recapture; and therefore, the vessel was subject to seizure and condemnation, under the act of Congress usually called the non-intercourse act.

2. That she was in danger of condemnation by the French, and therefore, if not liable to condemnation under the act of Congress, Captain Murray was at least entitled to salvage.

3. That if neither of the two former positions can be maintained, yet Captain Murray had probable cause to seize and bring her in, and therefore, he ought not to be decreed to pay damages.

I. The vessel was liable to seizure and condemnation under the non-intercourse act; Shattuck being a citizen of the United States at the time of recapture. Captain Murray's authority to capture *The Charming Betsy* depends upon the municipal laws of the United States, expounded by his instructions, and the law of nations. Before the non-intercourse act, measures had been taken by Congress to prevent and repel the injuries to our commerce which were daily perpetrated by French cruisers. By the act of 28th May, 1798 (1 U. S. Stat. 561), authority was given to capture "armed vessels sailing under authority, or pretense of authority, from the republic of France," etc., and to retake any captured American vessel. The act of 28th June, 1798 (*ibid.* 574), regulates the proceedings against such vessels, when captured, ascertains the rate of salvage for vessels recaptured, and provides for the confinement of prisoners, etc. The act of July 9th, 1798 (*ibid.* 578), authorizes the capture of armed French vessels anywhere upon the high seas, and provides for the granting commissions to private armed vessels, etc.

The right to retake an armed or unarmed neutral vessel, in the hands of the French, is nowhere expressly given; but is an incident growing out of the state of war; and is implied in several acts of Congress. This was decided in the case of *Talbot* v. *Seeman,* in this court, at August term, 1801 (1 Cr. 33). The right of recapture, carrying with it the right of salvage, gave the right of bringing into port; and that port must be a port of the captor.

The first non-intercourse act was passed June 13th, 1798 (1 U. S. Stat. 565); a similar act was passed February 9th, 1799 (*ibid.* 613).

The act upon which the present libel is founded was passed February 27th, 1800 (2 *ibid.* 7). These are not to be considered as mere municipal laws for the regulation of our own commerce, but as a part of the war measures which it was found necessary at that time to adopt. It was, *quoad hoc,* tantamount to a declaration of war.

Happily, there is not, and has not been, in the practice of our government, an established form of declaring war. Congress have the power, and may, by one general act, or by a variety of acts, place the nation in a state of war. So far as Congress have thought proper to legislate us into a state of war, the law of nations in war is to apply. By the general laws of war, a belligerent has a right not only to search for her enemy, but for her citizens trading with her enemy. If authorities for this position were necessary, a variety of cases decided by Sir William Scott might be cited.

As to the present case, France was to be considered as our enemy. The non-intercourse act of 1800 prohibits all commercial intercourse "between any person or persons resident within the United States, or under their protection, and any person or persons resident within the territories of the French Republic, or any of the dependencies thereof." And declares that "any ship or vessel, owned, hired or employed, in whole or in part, by any person or persons resident within the United States, or any citizen or citizens thereof, resident elsewhere," etc., "shall be forfeited, and may be seized and condemned." A citizen of the United States, resident "elsewhere," must mean a citizen resident in a neutral country. If Shattuck was such a citizen, the case is clearly within the statute. It is not necessary that the vessel should be registered as an American vessel; it is sufficient, if owned by a citizen of the United States: registering is only necessary to give the vessel the privileges of an American bottom. Nor is it necessary that she should have been built in the United States.

By the 8th section of the act of 27th February, 1800 (2 U. S. Stat. 10), reasonable suspicion is made a justification of seizure, and sending in for adjudication. The officer is bound to act upon suspicion, and that suspicion applies both to the character of the vessel, and to the nature of the voyage. Although the act of Congress mentions only vessels of the United States, still, from the nature of the case, the right to seize and send in must extend to apparent as well as real American vessels.

Such is the contemporaneous exposition given by the instructions

of the executive.[1] The words of these instructions are: "You are not only to do all that in you lies, to prevent all intercourse, whether direct or circuitous, between the ports of the United States and those of France and her dependencies, in cases where the vessels or cargoes are apparently, as well as really American, and protected by American papers only, but you are to be vigilant that vessels or cargoes, really American, but covered by Danish or other foreign papers, and bound to or from French ports, do not escape you." The law and the instructions having thus made it his duty to act on reasonable suspicion, he must be safe, though the ground of suspicion should eventually be removed.

Under our municipal law, therefore, the following propositions are maintainable: 1. That a vessel captured by the French, sails under French authority; and if armed, is, *quoad hoc,* a French armed vessel. The degree of arming is to be tested by the capacity to annoy the unarmed commerce of the United States. 2. The right to recapture an unarmed neutral is an incident of the war, and implied in the regulations of Congress. 3. The non-intercourse law justifies the seizure of apparent, as well as of real American vessels.

Nor does this doctrine militate with the law of nations. A war, in fact, existed between the United States and France. An army was raised, a navy equipped, treaties were annulled, the intercourse was prohibited, and commissions were granted to private armed vessels. Every instrument of war was employed; but its operation was confined to the vessels of war of France upon the high seas. So far as the war was allowed, the laws of war attached.

That it was a public war, was decided in the case of *Bas* v. *Tingy,* in this court, February term, 1800 (4 Dall. 37). No authorities are necessary to show that a state of war may exist without a public declaration. And the right to search follows the state of war. Vattel, lib. 3, c. 7, § 114; *The Maria,* 1 Rob. 304; *Garrels* v. *Kensington,* 8 T. R. 234. Whether the vessel was American or Danish, she was taken out of the hands of our enemy.

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[1] Upon Mr. Dallas's offering to read the instructions,

CHASE, J., said he was always against reading the instructions of the executive; because if they go no further than the law, they are unnecessary; if they exceed it, they are not warranted.

MARSHALL, Ch. J. I understand it to be admitted by both parties, that the instructions are part of the record. The construction, or the effect they are to have, will be the subject of further consideration. *They may be read.*

CHASE, J. I can only say, I am against it, and I wish it to be generally known. I think it a bad practice, and shall always give my voice against it.

The law of nations in war gives not only the right to search a neutral, but a right to recapture from the enemy. On this point, the case of *Talbot* v. *Seeman* is decisive, both as to the law of nations, and as to the acts of Congress, and that the rule applies as well to a partial as to a general war. Captain Murray's authority, then, was derived, not only from our municipal law, and his instructions, but from the law of nations. If he has pursued his authority in an honest and reasonable manner, although he may not be entitled to reward, yet he can not deserve punishment.

It remains to consider whether the vessel was, in fact, liable to seizure and condemnation. What were the general facts to create suspicion at the time? 1. The vessel was originally American. The transfer was recent, and since the non-intercourse law. The voyage was to a dependency of the French Republic, and therefore prohibited, if she was really an American vessel. 2. The owner was an American by birth. The master was a Scotchman. The crew were not Danes, but chiefly Americans, who came from Baltimore. 3. The *procès verbal* calls her an American vessel; which was corroborated by the declarations of some of the crew. 4. The practice of the inhabitants of the Danish islands to cover American property in such voyages.

What was there, then, to dispel the cloud of suspicion, raised by these circumstances? 1. The declarations of Wright, the master, whose testimony was interested, inconsistent with itself, and contradicted by others. 2. The documents found on board.

These were no other than would have been found, if fraud had been intended. These were, 1. The sea-letter or pass from the governor-general of the Danish islands, who did not reside at St. Thomas, but at St. Croix. It states only by way of recital that the vessel was the property of Jared Shattuck, a burgher and inhabitant of St. Thomas. It does not state that he was naturalized or a subject of Denmark. 2. The muster-roll, which states the names and number of the master and crew, who were ten besides the captain, viz., William Wright, master; David Weems, John Robinson, Jacob Davidson, John Lampey, John Nicholas, Frederick Jansey, George Williamson, William George, Prudentio, a Corsican, and Davy Johnson, a Norwegian. There is but one foreign name in the whole. Wright, in his deposition, says that three were Americans, one a Norwegian, and the rest were Danes, Dutch and Spaniards. The muster-roll was not on oath, but was the mere declaration of the owner. 3. The invoice, which only says that

Shattuck was the owner of the cargo. 4. The bill of lading, which says that he was the shipper. 5. The certificate of the oath of property of the cargo, states only by way of recital, that Shattuck, a burgher, inhabitant and subject, etc., was the owner of the cargo, but says nothing of the property in the vessel. By comparing this certificate with the oath itself, it appears that the word "subject" has been inserted by the officer, and was not in the original oath. 6. Shattuck's instructions to Captain Wright. 7. The bill of sale by Phillips, the agent of the American owners, to Shattuck; but his authority to make the sale was not on board.

To show what little credit such documents are entitled to, he cited the opinion of Sir W. Scott, in the case of *The Vigilantia,* 1 Rob. 6–8 (Amer. ed.), and in the case of *The Odin, (ibid.* 208–211). The whole evidence on board was a mere custom-house affair, all depending upon his own oath of property. His burgher's brief was not on board, nor did it appear, even by his own oath, that Shattuck was a burgher. And no document is yet produced in which he undertakes to swear that he is a Danish subject. Such documents could not remove a reasonable suspicion founded upon such strong facts. There could never be a seizure upon suspicion, if this was not warrantable at the time.

What has appeared since, to remove the suspicion, and to prove Shattuck to be a Danish subject? All the original facts remain, and the case rests on Shattuck's expatriation, whence arise two inquiries: 1. As to the right, in point of law, to expatriate. 2. As to the exercise of the right, in fact.

1. As to the right of expatriation. He was a native of Connecticut, and for aught that appears in the record, remained here until the year 1789, when we first hear of him in the island of St. Thomas. This was after the revolution, and therefore, there can be no question as to election, at least, there is no proof of his election to become a subject of Denmark.

If the account of the case of *Isaac Williams,* 1 Tuck. Bl., part 1, App. p. 436,[1] is correct, it was the opinion of Ch. J. Ellsworth, that a

[1] The state of the case and the opinion of Ch. J. Ellsworth, as extracted by Judge Tucker from *"The National Magazine,"* No. 3, p. 254, are as follows:

On the trial of Isaac Williams in the *District* (*qu. Circuit?*) Court of Connecticut, Feb. 27, 1797, for accepting a commission under the French Republic, and under the authority thereof committing acts of hostility against Great Britain, the defendant alleged, and offered to prove, that he had expatriated himself from the United States and become a French citizen before the com-

citizen of the United States could not expatriate himself. That learned judge is reported to have said in that case, that the common law of this country remains the same as it was before the revolution. But in the case of *Talbot* v. *Jansen,* 3 Dall. 133, this court inclined to the opinion that the right exists, but the difficulty was, that the law had not pointed out the mode of election and of proof.

It must be admitted, that the right does exist, but its exercise must be accompanied by three circumstances: 1. Fitness in point of time. 2. Fairness of intent. 3. Publicity of the act.

But the right of expatriation has certain characteristics, which distinguish it from a locomotive right, or a right to change the domicil. By expatriation, the party ceases to be a citizen and becomes an alien. If he would again become a citizen, he must comply with the terms of the law of naturalization of the country, although he was a native.

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mencement of the war between France and England. This produced a question as to the right of expatriation, when Judge ELLSWORTH, then Chief Justice of the United States, is said to have delivered an opinion to the following effect.

"The common law of this country remains the same as it was before the revolution. The present question is to be decided by two great principles; one is, that all the members of a civil community are bound to each other by compact; the other is, that one of the parties to this compact can not dissolve it by his own act. The compact between our community and its members is, that the community shall protect its members; and on the part of the members, that they will at all times be obedient to the laws of the community and faithful to its defense. It necessarily results that the member can not dissolve the compact without the consent, or default of the community. There has been no consent, no default. Express consent is not claimed; but it is argued that the consent of the community is implied, by its policy, its condition, and its acts. In countries so crowded with inhabitants that the means of subsistence are difficult to be obtained, it is reason and policy to permit emigration; but our policy is different, for our country is but scarcely settled, and we have no inhabitants to spare. Consent has been argued from the condition of the country, because we are in a state of peace. But though we were in peace, the war had commenced in Europe; we wished to have nothing to do with the war—but the war would have something to do with us. It has been difficult for us to keep out of the war—the progress of it has threatened to involve us. It has been necessary for our government to be vigilant in restraining our own citizens from those acts which would involve us in hostilities.

The most visionary writers on this subject do not contend for the principle in the unlimited extent, that a citizen may at any, and at all times, renounce his own, and join himself to a foreign country.

Consent has been argued from the acts of our government permitting the naturalization of foreigners. When a foreigner presents himself here, we do not inquire what his relation is to his own country; we have not the means of knowing, and the inquiry would be indelicate; we leave him to judge of that. If he embarrasses himself by contracting contradictory obligations, the fault and folly are his own: but this implies no consent of the government that our own citizens should also expatriate themselves. It is therefore my opinion, that these facts which the prisoner offers to prove in his defense, are totally irrelevant," etc. The prisoner was accordingly found guilty, fined and imprisoned.

But by a mere removal to another country, for purposes of trade, whatever privileges he may acquire in that country, he does not cease to be a citizen of this.

With respect to other parties at war, the place of domicil determines his character, enemy or neutral, as to trade. But with respect to his own country, the change of place alone does not justify his trading with her enemy; and he is still subject to such of her laws as apply to citizens residing abroad. *The Hoop,* 1 Rob. 165; *Gist* v. *Mason,* 1 T. R. 84; and particularly *Potts* v. *Bell,* 8 *ibid.* 548, where this principle is advanced by Doct. Nicholl, the king's advocate, in p. 555, admitted by Doct. Swabey, in p. 561, and decided by the court.

This principle of general law is fortified by the positive prohibition of the act of Congress. In France, the character of French citizen remains, until a naturalization in a foreign country. In the United States, we require an oath of abjuration, before we admit a person to be naturalized. If he was naturalized, he has done an act disclaiming the protection of the United States, and is no longer bound to his allegiance. But if he has acquired only a special privilege to trade, it must be subject to the laws of his country.

2. But has he, in fact, exercised the right of expatriation? And is it proved by legal evidence? His birth is *prima facie* evidence that he is a citizen of the United States, and throws the burden of proof upon him. No law has been shown, by which he could be a naturalized subject of Denmark, nor has he himself ever pretended to be more than a burgher of St. Thomas. What is the character of a burgher, and what is the nature of a burgher's brief? It is said that to entitle a person to own ships, there must have been a previous residence; but no residence is necessary to enable a man to be a master of a Danish vessel. It is a mere license to trade; a permit to bear the flag of Denmark; like the freedom of a corporation. It implies neither expatriation, an oath of allegiance, nor residence. *The Argo,* 1 Rob. 133; *Pollard* v. *Bell,* 8 T. R. 434. These cases show with what facility a man may become a burgher; that it is a mere matter of purchase, and that it is a character which may be taken up and laid aside at pleasure, to answer the purposes of trade.

But there is no evidence that he ever obtained even this burgher's brief. He went from Connecticut, a lad, an apprentice or clerk, in 1788 or 1789: he was not seen in business there until 1795 or 1796. In going, in 1789, he had no motive to expatriate himself, as there

was then no war. We find him first trading in 1796, after the war, and the law of Denmark forbids a naturalization in time of war. At what time, then, did he become a burgher? If he ever did become such, in fact, and it was in time, he can prove it by the record. Wright's burgher's brief is produced, and shows that they are matters of record. The brief itself, then, or a copy from the record, duly authenticated, is the best evidence of the fact, and is in the power of the party to produce. Why is it withheld, and other *ex parte* evidence picked up there, and witnesses examined here? All the evidence they have produced is merely matter of inference. They have examined witnesses to prove that he carried on trade in St. Thomas, owned ships and land, married, and resided there. By the depositions, they prove that a man is not by law permitted to do these things, without being a burgher; and hence, they infer his burghership.

These facts are equivocal in themselves, and not well proved. Certificates of citizenship are easily obtained, but are not always true. This is noticed by Sir W. Scott, in the cases before cited. A case happened in this country, *United States* v. *Villato,* 2 Dall. 370; where a person having taken the oath of allegiance to Pennsylvania, agreeable to the naturalization act of that State, obtained a certificate from a magistrate, confirmed by the attestation of the supreme executive of the State, that he was a citizen of the United States. But upon a trial in the circuit court of Pennsylvania, it was adjudged that he was not a citizen. *Captain Barney* also went to France, became a citizen, took command of a French ship of war, returned to this country, and is now certified to be a citizen of the United States. So, in the case of the information against the ship *John and Alice,* Captain Whitesides, he was generally supposed to be a citizen of the United States. On the trial, evidence of his citizenship was called for, when it appeared that his father brought him into this country in the year 1784, and remained here until 1792, when the father died. Neither he nor his father were naturalized, and the vessel was condemned. These instances show the danger of crediting such custom-house certificates.

All these certificates, in the present case, do not form the best evidence, because better is still in the possession of the party, and he ought to produce it. The general and fundamental rules of evidence are the same in courts of admiralty, as in courts of common law. If they appear to relax, it is only in that stage of the business where they are obliged to act upon suspicion. In the present case, the opinion of

merchants only is taken as to the laws of Denmark. No judicial character, not even a lawyer, was applied to. Certificates of merchants are no evidence of the law. *The Santa Cruz,* 1 Rob. 58. The evidence offered is both *ex parte* and *ex post facto.* Fraud is not to be presumed, but why was not the burgher's brief produced, as well as the other papers, such as the oath of property, etc., when it was certainly the most important paper in the case? The only reason which can be given is that it did not exist. It was a case like that of Captain Whitesides, where people were led into a mistake from the length of his residence, and from having seen him there from the time of his youth.

Upon the whole, then, we have a right to conclude that Jared Shattuck was not a Danish subject; or that if he was, the fact is not proved, and therefore he remains a citizen of the United States, in the words of the act of Congress, "residing elsewhere." The consequence must be a condemnation of the vessel.

II. She was in danger of condemnation in the French courts of admiralty, and therefore Captain Murray is entitled to salvage. This depends: 1. On the right to retake; 2. On the degree of danger; and 3. The service rendered.

1. He had a right to retake, on the ground of suspicion of illicit trade, in violation of the non-intercourse law, as well as on the ground of her being a vessel sailing under French authority, and so armed as to be able to annoy unarmed American vessels. He had also a right to bring her in for salvage, if a service was rendered. If his right to retake depends upon the suspicion of illicit trade, or upon her being a French armed vessel, he could take her only into a port of the United States.

The point of illicit trade has already been discussed. That the vessel was sailing under French authority is certain; the only question is, whether she was capable of annoying our commerce. She had portholes, a musket, powder and balls, and eight Frenchmen, who, probably, as is usual, had each a cutlass. Vessels have been captured, without a single musket; three or four cutlasses are often found sufficient. The vessel was sufficiently armed to justify Captain Murray, under his instructions, in bringing her in.

If, then, the taking was lawful, has she been saved from such danger as to entitle Captain Murray to salvage? There is evidence that Captain Wright requested Captain Murray to take the vessel, to prevent her falling into the hands of the English. He consented to be carried

into Martinique. He protested only against the privateer, not against Captain Murray. His letter to Captain Murray does not complain of the recapture, but of the detention. The taking was an act of humanity, for if Captain Murray had taken out the Frenchmen, and left the vessel with only Captain Wright and the boy, they could not have navigated her into port, and she must have been lost at sea, or fallen a prey to the brigands of the islands. This alone was a service which ought to be rewarded with salvage.

But she was in danger of condemnation in the French courts of admiralty. The case of *Talbot* v. *Seeman* has confirmed the principle adopted by Sir W. Scott, in the case of *The War Onskan,* 2 Rob. 246, that the departure of France from the general principles of the law of nations, varied the rule that salvage is not due for the recapture of a neutral out of the hands of her friend; and that the general conduct of France was such as to render the recapture of a neutral out of her hands, an essential service, which would entitle the recaptors to salvage. If she had been carried into a French port, how unequal would have been the conflict? Who would have been believed, the privateer or the claimant? The Danish papers would have been considered only as a cover for American property. The danger is shown by the apprehensions of Captain Wright and his crew; by the declarations of the privateer; by the *procès verbal;* and by the actual imprisonment of the crew.

But, independent of the general misconduct of France, there are several French ordinances under which she might have been condemned. The case of *Pollard* v. *Bell,* 8 T. R. 444, shows that such ordinances may justify the condemnation. The case of *Bernardi* v. *Motteux,* 2 Doug. 575, shows that the French courts actually do proceed to condemnation upon them, as in the case of throwing over papers, etc. So, in the case of *Mayne* v. *Walter,* Park on Insurance, 414 (363), the condemnation was because the vessel had an English supercargo on board.

By the ordinances of France, *Code des Prises,* vol. 1, p. 306, § 9, "all foreign vessels shall be good prize in which there shall be a supercargo, commissary or chief officer of an enemy's country; or the crew of which shall be composed of one-third sailors of an enemy's state; or which shall not have on board the *rôles d'équipage* certified by the public officers of the neutral places from whence the vessels shall have sailed." And by another ordinance, 1 *Code des Prises,* 303, §

6, "No regard is to be paid to the passports granted by neutral or allied powers, to the owners or masters of vessels, subjects of the enemy, if they have not been naturalized, or if they shall have not transferred their domicil to the states of the said powers, three months before the 1st of September, in the present year; nor shall the said owners or masters of vessels, subjects of the enemy, who shall have obtained such letters of naturalization, enjoy their effect, if, after they shall have obtained them, they shall return to the states of the enemy, for the purpose of their continuing their commerce;" and by the next article, "vessels, enemy built, or which shall have been owned by an enemy, shall not be reputed neutral or allied, if there are not found on board authentic documents, executed before public officers, who can certify their date, and prove that the sale or transfer thereof had been made to some of the subjects of an allied or neutral power, before the commencement of hostilities; and if the said deed or transfer of the property of an enemy to the subject of the neutral or ally, shall not have been duly enregistered before the principal officer of the place of departure, and signed by the owner, or the person by him authorized."

In violation of these ordinances, the chief officer, Captain Wright, was a Scot, an enemy to France: for although he had a burgher's brief, yet it did not appear, that he had resided three months before he obtained it; and we have before seen, that a previous residence was not necessary, by the laws of Denmark, to entitle him to a burgher's brief, for the purpose of being master of a vessel. In the next place, the whole number of the crew, with the master, being eleven, and three of the crew being Americans and the master a Scot, more than one-third of the crew were enemies of France. The muster-roll did not describe the place of nativity of the crew. The vessel was purchased after the commencement of hostilities between France and the United States. And there was no authority on board from the American owners to Phillips, the agent who made the sale, in violation of the regulation of 17th February, 1794, art. 4 (*2 Code des Prises,* p. 14), which declares "the vessel to be good prize, if being enemy built, or belonging originally to the enemy, the neutral, the allied, or the French proprietor, shall not be able to show, by authentic documents, found on board, that he had acquired his right to her before the declaration of war." See also 2 Valin, 249, § 9; 251, § 12, and 244.

What chance of escape had this vessel, under all these ordinances, which the French courts were bound to enforce? The case of *Pollard*

v. *Bell,* 8 T. R. 434, is precisely in point. The vessel in that case was Danish, and had all the papers usually carried by Danish vessels. But she was condemned in the highest court of appeal in France, because the master was a Scot, who had obtained a Danish burgher's brief, subsequent to the hostilities. Has there, then, been no service rendered?

It is no objection to the claim of salvage, that it is not made in the libel. Salvage is a condemnation of part of the thing saved. The prayer for condemnation of the whole includes the part: it may be made by petition, or even *ore tenus.*

The means used for saving need not be used with that sole view. *Talbot* v. *Seeman.* As to the *quantum* of salvage, he referred to the opinion of Sir W. Scott, in the case of *The Sarah,* 1 Rob. 263.

III. But if *The Charming Betsy* is not liable to condemnation, under the non-intercourse law, and if Captain Murray is not entitled to salvage, yet the restitution ought to be made of the net proceeds of the sale only, and not with damages and costs.

In maritime cases, probable cause is always a justification. The grounds of suspicion, in the present instance, have been already mentioned; and when to these are added the circumstances, that it was at Captain Wright's request that Captain Murray took possession of the vessel; that he consented to be carried into Martinique; that if he had taken out the Frenchmen, and left the vessel in the midst of the ocean, with only Captain Wright and his boy, they would have been left to destruction; that part of the cargo was damaged, part rifled, and all perishable; and that Captain Murray offered to release the vessel and cargo, on security, there can hardly be a stronger case to save him from a decree for damages.

In the case of the *Two Susannahs,* 2 Rob. 110, it is, by Sir W. Scott, taken as a principle, that a seizure is justified by an order for further proof, and he decreed a restitution of the proceeds only, it not being shown that the captors conducted themselves otherwise than with fair intentions. In the present case, there is no pretense that Captain Murray did not act from the purest motives, and from a wish faithfully to execute his instructions.

Key, contra.—1. The schooner *Charming Betsy* and her cargo were neutral property, and not liable to capture under the non-intercourse law. 2. When recaptured, she was not an armed French ves-

sel capable of annoying our commerce, and therefore not liable under the acts of Congress authorizing the capture of such vessels. 3. She was not in imminent danger when recaptured, and therefore Captain Murray is not entitled to salvage. 4. Under all the circumstances of the case, he acted illegally, and is liable for damages which have been properly assessed.

I. As to the neutral character of the vessel and cargo, he contended: 1. That Jared Shattuck never was an American citizen. 2. That if he was, he had expatriated himself, and had become a Danish subject. 3. That if not a Danish subject, yet he was not a citizen of the United States.

1. The evidence is that he was born in Connecticut, but before the Declaration of Independence, and was, therefore, a natural-born subject of Great Britain. He was in trade for himself, in St. Thomas, in 1794. This he could not do until he was twenty-one years of age, which will carry back the date of his birth to the year 1773. He was an apprentice at St. Thomas in the year 1788 or 1789. There is no evidence of his being in the United States since the Declaration of Independence. But if he had been, yet he went away while a minor, and he could not make his election during his minority. There is no evidence that his parents were citizens of the United States. Being a natural-born subject of Great Britain, he could not become a citizen of the United States, unless he was here at the time of the revolution, or his parents were citizens, or unless he became naturalized according to law. It is incumbent upon Captain Murray to prove him to be a citizen of the United States. It is sufficient for us to show that he was born a subject of Great Britain. They must show how he became a citizen. This is a highly penal law, and everything must be proved which is necessary to bring the case within the penalty.

2. But if he ever was a citizen of the United States, he had expatriated himself. That every man has a right to expatriate himself, is admitted by all the writers upon general law; and it is a principle peculiarly congenial to those upon which our constitutions are founded. Some of the States of the Union have expressly recognized the right, and even prescribed the form of expatriation. But where the form is not prescribed, nothing more is necessary than that it be accompanied with fairness of intention, fitness of time, and publicity of election.

In the present instance, all these circumstances concur. No time could have been more fit than the year 1788 or 1789, when all Europe

and America were in a state of profound peace. His country had then no claim to his service. The fairness of intention is evidenced by its having been carried into effect by an actual *bona fide* residence of ten or eleven years; by serving an apprenticeship; by actual domiciliation; by marriage; by becoming a burgher; by acquiring lands, and by owning ships. The publicity of election is witnessed by the same acts, and by taking the oath of allegiance to Denmark. The United States have prescribed no form of expatriation. All that he could do to render the act public and notorious has been done.

It is said a man can not cease to be a citizen of one state, until he has become a citizen or subject of another. But a man may become a citizen of the world; an alien to all the governments on earth.[1] It is in evidence that by the laws of Denmark a man can not become a subject and carry on trade without being naturalized; that an oath of allegiance and an actual domicil are necessary to naturalization; but that a domicil is not necessary to become a burgher, for the purpose of navigating a Danish vessel.

In the two cases cited from 1 Rob. 133 (*The Argo*), and 8 T. R. 434 (*Pollard* v. *Bell*), the question was only as to the national character of the master of the vessel, not of the owner; and therefore, they do not apply to the present case.

The burgher's brief of Captain Wright is dated 19th May, 1794, and certifies that he had taken the oath of fidelity to his Danish majesty, and was entitled to all the privileges of a subject.

3. But if the facts stated in the record are not sufficient to prove Shattuck to be a Danish subject, yet they do not prove him to be a citizen of the United States, and if he is not a citizen of the United States, it is immaterial of what country he is a subject. By the law of nature and nations, a man may, by a *bona fide* domicil, and long continued residence in a country, acquire the character of a neutral, or even of an enemy. In the case of *Scot* v. *Schawrtz*, Comyns, 677, it was decided that residence in and sailing from Russia gave the mariners of a Russian ship the character of Russian mariners, within the meaning of the British navigation act: and in the case of *The Harmony*, 2 Rob. 264, Sir W. Scott condemned the goods of an American citizen, because, by a residence in France, for four years, he had

[1] Ch. J.—There can be no doubt of that.
Dallas said he had been misunderstood. He only said that the act of becoming a citizen of another state was the most public act of expatriation and the best evidence of the fact.

acquired a domicil in that country which had given his property the character of the goods of an enemy. In the case of *Wilson* v. *Marryat,* 8 T. R. 31, it was adjudged that a natural-born British subject might acquire the character of a citizen of the United States for commercial purposes.

II. *The Charming Betsy* was not a French armed vessel, capable of annoying our commerce, and therefore not liable to capture or condemnation, by virtue of the limited war which existed between the United States and France. In supporting this proposition, it is not intended to interfere with the decision of this court in the case of *Talbot* v. *Seeman.* There is a great difference between the force of the *Amelia* in that case, and that of *The Charming Betsy.* The *Amelia* had eight cannon, was manned by twelve Frenchmen, and had been in possession of the French ten days, and must be admitted to have been such an armed French vessel as came within the meaning of the acts of Congress.

But in the present case, the vessel was built at Baltimore, and owned by citizens of the United States. When she sailed from Baltimore, she had four cannon, a number of muskets, etc., which Shattuck was obliged to purchase with the vessel, and which he afterwards sold at a considerable loss. The master swears, that at the time of recapture, she had only one musket, a few balls and twelve ounces of powder; and although McFarlan deposes to a greater quantity of arms, yet it appears that he did not go on board of her until eight days after the recapture. If arms were on board, they ought to have been brought in with the vessel: this is particularly required by the act of Congress. No arms are mentioned in the account of sales; it is to be presumed, as none were brought in, that none were on board. The master expressly swears that the French put no force or arms on board, when they took her. She could not, therefore, be such an armed vessel as was intended by the acts of Congress.

III. She was not in imminent danger when recaptured, and therefore the recaptors are not entitled to salvage. It is a general principle that the recapture of a neutral does not entitle to salvage.

It is not intended to question the correctness of the decision of this court in the case of *Talbot* v. *Seeman,* nor that of Sir W. Scott, in the case of *The War Onskan.* Those cases were exceptions to the general rule, because the conduct of France was in violation of the law of nations, and because neutral vessels had no chance of escaping the rapacity of the French prize courts. This system of depredation upon

neutral commerce continued during the years 1798 and 1799. The *Amelia* was recaptured by Captain Talbot, in September, 1799, while the *arrêt* of 18th January, 1798, so injurious to neutral commerce, and the violences of the prize courts, were in full operation.

The Charming Betsy was recaptured by Captain Murray, on the 3d of July, 1800. During this interval, great events had occurred in France. On the 9th of November, 1799, Bonaparte was placed at the head of the government, and a new order of things commenced. On the 24th of December, 1799, the *arrêt* of the council of five hundred, of the 18th January, 1798, which made the character of neutral vessels dependent upon the quality of the cargo, and declared good prize all those laden in whole or in part with the productions of England or her possessions, was repealed, and by a new decree, the ordinance of 1778 was reestablished. The government adopted a more enlightened and liberal policy towards neutrals. On the 26th of March, 1800, a new tribunal of prizes was erected, at the head of which was placed the celebrated Portalis, author of the Civil Code. On the 29th of May, 1800, their principles were tested in the case of *The Pegou,* an American ship belonging to Philadelphia. This case was a public declaration to all the world, that they began to entertain a proper respect for the law of nations, and from this time the rule of salvage, as established in the case of *The War Onskan,* ceased.

The Pegou had been condemned in an inferior tribunal. On an appeal to the council of prizes, Portalis, with a degree of liberality and correctness which would confer honor upon any court in the world, declared that "excepting the case when a prize is evidently and actually enemy's property, all questions about the validity or invalidity of prizes, come to the examination of a fact of neutrality." And in discussing the question as to the necessity of a *rôle d'équipage,* he says, "I will begin with the principle, that all questions about neutrality are what are called in law, questions *bona fide,* in which due regard is to be had to facts which are to be properly weighed, without adhering to trifling appearances." "But it would be a gross error, in believing that the want of, or the least irregularity in, one of these papers, could operate so far as to cause the vessel to be adjudged good prize. Sometimes regular papers cover an enemy's property, which other circumstances unmask. In other circumstances, the stamps of neutrality break through omissions and irregularities in the forms, proceeding from mere negligence, or grounded on motives free from fraud.

"We must speak to the point; and in these matters, as well as in

those which are to be determined, we must decide not by mere strict forms, but by the principles of good faith; we must say, with the law, that mere omissions or mere irregularities in the forms, can not prejudice the truth, if it is stated by any other ways: and *si aliquid ex solemnibus deficiat, cum equitas poscit, subveniendum est.*" "The main point in every case is that the judge may be satisfied that the property is neutral or not." He then cited a case decided upon the 6th article of the regulation of the 21st of October, 1744, by which article the act of throwing over papers is made a substantive ground of condemnation. But it was decided that the papers ought to be of such a nature as to prove the property to be enemy's.

The two grounds upon which *The Pegou* was condemned in the inferior tribunal were that she was armed for war, without any commission or authority from the United States, and that there was on board no *rôle d'équipage,* attested by the public officers of the port of departure. She mounted ten guns, and was provided with muskets and other warlike stores. Upon the first point, it was decided in the council of prizes that she was not armed for war, but for lawful defense; and on the second, that a *rôle d'équipage* was not absolutely necessary, if the property appeared otherwise clearly to be neutral.[1]

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[1] There is so much reason, justice and good sense appearing through a bad translation of probably, not a very accurate account of this case, that it is with pleasure transcribed as it has been published in this country from the London public prints.

Opinion of PORTALIS.—After having read the opinion of commissioners of the government, left in writing on the table, which is as follows:

It appears that a judgment of the tribunal of commerce at l'Orient, had granted Captain *Green* the replevy of his vessel and part of the goods and specie which composed the cargo; and that on the appeal entered by the comptroller of marine at l'Orient against that judgment, the tribunal of the department of Morbihan declared the vessel and cargo a good prize.

The grounds on which rested the decision of the tribunal of Morbihan were, that the vessel was armed for war without any commission or authorization from the American Government; and that there was on board no *rôle d'équipage* attested by the public officers of the port of his departure.

The captured claim the nullity of the prize, and that the vessel be reinstated in the situation she was in when captured, and that she be delivered up as well as her cargo, and the dollars which were on board, and also the papers, with damages and interest adequate to the losses they had sustained.

To be able to determine on the respective demands, we must first fix upon the validity or invalidity of the prize, excepting the case when a prize is evidently and actually enemy's property, all questions about the validity or invalidity of prizes come to the examination of a fact of neutrality.

In this case, was the tribunal of Morbihan authorized to determine that the ship *Pegou* was in such circumstances as to be prevented from being acknowledged and respected as neutral?

It is said the vessel was armed for war, and without any authorization from

In another case (*The Statira*), which was decided very shortly after that of *The Pegou,* by the same council of prizes, two questions arose: 1. Whether *The Statira,* being an American vessel captured by a British ship, and recaptured by a French privateer, was liable to confiscation on the ground of her being in the hands of an enemy; and, 2. Whether her cargo was ground of condemnation?

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her government; that she mounted 10 guns of different rates, and that muskets and warlike stores have been found in her.

The captured reply, that the vessel being bound to India, was armed for her own defense, and that the warlike ammunition, the muskets and guns, did not exceed what is usual to have on board for long voyages; for my part, I think it is not for having arms on board only, that a vessel can be said to be armed for war. The warlike armament is merely of an offensive nature; it is deemed so when there is no other end than attacking, or at least when every thing shows that attack is the main point of the armament: then a vessel is reputed inimical, or pirate if she has no commission or papers which may remove the suspicion. But defense is of natural right, and every means of defense is lawful in voyages at sea, as in every other dangerous occurrence of life.

A vessel consisting of but a small crew, and whose cargo in goods amounted to a considerable sum, was evidently intended for trade, and not for war. The arms found on board were not to commit plunder and hostility, but to avoid them; not for attack, but for defense. The pretense of armament for war, in my opinion, can not be founded.

I am now to discuss the second argument against the captors on the want of a *rôle d'équipage,* attested by the public officers of the place of her departure.

To support the validity of the prize, they allege the regulation of the 21st October, 1774, of the 26th of July, 1778, and the decree of the directory of the 12th Ventose, 5th year, which require a *rôle d'équipage.*

The captured, on their part, claim the execution of the treaty of commerce, between France and the United States of America, of the 6th February, 1778; they contend that general regulations could not derogate from a special treaty, and that the directory could not infringe the treaty by an arbitrary decree.

It is a fact that the regulations of 1774 and 1778, and the decree of the directory require a *rôle d'équipage* asserted by the public officers of the place of departure. It is also a fact, that the *rôle d'équipage* is not mentioned in the treaty of the 6th February, as one of the papers requisite to establish neutrality, but I believe I am not under the necessity of discussing whether the treaty is superior to the regulations, or whether the regulations are superior to the treaty.

I will begin with the principle that all questions about neutrality, are what are called in law, questions *bona fide,* in which due regard is to be had to facts which are to be properly weighed, without adhering to trifling appearances.

Neutrality is to be proved; for this reason, the regulation of marine of 1681, article 9, on prizes, states, that vessels with their cargoes, which shall not have on board charter parties, bills of lading, nor invoices, shall be considered as good prize.

From the same motives, the regulations of 1774 and 1778, put the commanders of neutral vessels under obligation of proving at sea their property being neutral, by passports, bills of lading, invoices and vessels' papers.

The regulation of 1774, whose enacting parts have been renewed by the directory, literally expresses, among the papers requisite to prove neutral property, that there must be a *rôle d'équipage* in due form.

But it would be a gross error to suppose that the want of, or the least irregularity in, one of these papers, could operate so far as to cause the vessel to be adjudged good prize.

On the first point, it was held that the mere capture does not, before condemnation, vest the property in the captor, so as to make it transferable to the recaptor, and therefore no ground of confiscation. On the 2d, there were two inquiries: 1. Whether, in point of law, the character of the vessel, neutral or not, should be determined by the nature of the cargo? 2. Whether the cargo consisted of contraband?

Sometimes regular papers cover an enemy's property, which other circumstances unmask. In other circumstances the stamps of neutrality break through omissions and irregularities in the forms, proceeding from mere negligence, or grounded on motives free from fraud.

We must speak to the point. and in these matters as well as in those which are to be determined, we must decide not by mere strict forms, but by the principles of good faith; we must say with the law, that mere omissions, or mere irregularities in the forms, can not prejudice the truth, if it is stated by any other ways: and *si aliquid ex solemnibus deficiat, cum equitas poscit, subveniendum est.*

Therefore, the regulation of the 26th July, 1778, art. 2, after having stated that the masters of neutral vessels shall prove at sea their property being neutral, by passports, bills of lading, invoices and other vessel papers, adds, one of which at least shall establish the property being neutral, or shall contain an exact description of it.

It is not then necessary in every case to prove the property neutral by the simultaneous concurrence of all the papers enumerated in the regulations. But it is sufficient according to the circumstances, that one of these papers establish the property, if it is not opposed or destroyed by more peremptory circumstances.

The main point in every case is, that the judge may be satisfied that the property is neutral or not.

We have a precedent of what I assert in art. 6, of the regulation of the 21st October, 1774; by that article every vessel belonging to what nation soever, neutral, enemy or ally, from which papers shall be proved to have been thrown overboard, shall be adjudged good prize, on the proof only of the papers having been thrown overboard; nothing can be more explicit.

Some difficulties arose on the execution of that severe clause of the law, which has been renewed by the regulation of 1778.

On the 13th November, 1779, the king wrote to the admiral, that he left entirely to him and to the commissioners of the council of prizes to apply the rigidity of the decree, and of the regulation of the 26th July, or to moderate their clauses as peculiar circumstances would require it in their opinion.

A judgment of the council of the 27th December, in the said year, rendered between Pierre Brandebourg, master of the Swedish ship *Fortune*, and M. de la Rogredourden, captain of the king's xebec the *Fox*, liberated the said vessel notwithstanding some papers had been thrown overboard. It was determined that to ground an adjudication of the vessel on the papers being thrown overboard, they ought to be of such nature as to prove the property enemy's, and that the captain ought to have had a concern in throwing his papers overboard; which was not the case with the Swedish captain.

In this case without discussing whether American captains are obliged or not to exhibit a *rôle d'équipage*, attested by the public officers of the place of their departure, I observe that this *rôle* is supplied by the passport, and that the captured allege the impossibility for them to have their *rôle d'équipage* attested by public officers in Philadelphia, since the intercourse was forbidden, under pain of death, with Philadelphia, where a most tremendous epidemic was raging: I must add, that the passport, the invoice, and all the vessel's papers, establish

As to the first, the commissary (Portalis) reviews the laws upon this subject, prior to the *arrêt* of the council of 500, of the 29th Nivose, year 6 (January 18th, 1798), the severity of which he condemns; but as *The Statira* was captured while it was in force, the captor was entitled to have the capture tried by it. He observes that such regulations are improperly styled laws, and they are essentially variable *pro temporibus et causis;* that they should always be tempered by wisdom and equity. He adverts to the words *in whole or in part,* by which, he says, ought to be understood, a great part, according to the judicial

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evidently the property of the vessel and cargo being neutral; none of these papers have ever been disputed. Thus the invalidity of the capture is obvious; whence it follows that every thing which has been taken from them, ought to be restored in kind or by a just indemnification.

As to their claim for damages and interest, I must observe, that such a claim is not in every case the sequel of the invalidity of the capture.

Suspicious proceedings of the captured, may occasion the mistake of the captors. But when the injustice on the part of the captors can not be excused, the captured have a right to damages and interest.

Let us apply these principles to the cause. Could the captors entertain any grounded suspicions against the captain of the ship *Pegou?* was not the neutrality of the ship proved by her being an American built ship, by her flag, by her destination, by the crew being composed of Americans, by her cargo consisting of American goods, without any contraband articles, by the name and the character of Captain Green, very well known by services he rendered to the French nation, by the register, the passport, the invoice, by the papers on board, finally, by the place where she was captured, which was far from any suspicious destination? It was then impossible for the captors to make any mistake; the vessel struck her colors at the first summons, the officers and crew made faithful declarations, they answered plainly in their examination; no pretense whatever was left to the captors; they don't appear to have observed the forms prescribed by the regulation. Some very heavy charges are uttered against them; but I think it is not time yet to take notice of them; they will be discussed when the articles captured are restored.

In these circumstances I am of opinion, that a more absolute and full replevy be granted to Captain Green of the American ship *Pegou,* and her cargo, as well as the papers found on board; as to the claim of damages and interest, made by Captain Green, that the former be granted to him, and they shall be settled by arbitrators in the usual form.

(Signed) PORTALIS.

Paris, 6 Prairial, 8th year.

The council declare that the capture of the ship *Pegou* and her cargo, is null and of no effect; therefore, grant a full and absolute replevy of the vessel, rigging and apparel, together with the papers and cargo, to Captain John Green; as to the damages and interest claimed by Captain Green, the council grant them to him, and they shall be settled by arbitrators in the usual forms.

Done at Paris on the 9th Prairial, 8th year of the Republic.

Present,

Citizen	REDON,	BARENNES,
Presidents	NIOU CANTE,	DUSAUR,
	MOREAU.	PAREVAL.
	MONTIGNY,	GRANDMAISON,
	MONPLACID.	TOURNACHER.

maxim *parum pro nihilo habetur*. Upon this principle he is of opinion that a ship ought not to be subject to confiscation, even under the law of the 29th Nivose, unless such a part of the cargo comes under the description of what is there made contraband, as ought to excite a presumption of fraud against all the rest.

The question of contraband related to forty barrels of pitch, part of the cargo of *The Statira*. He observed that pitch was not made contraband by the treaty of 1778, but as France was, by that treaty, entitled to all the advantages of the most favored nation, and as by a subsequent treaty between the United States and Great Britain, pitch was among the enumerated articles of contraband, it necessarily became such in regard to France. He, however, decides the quantity to be too small to justify condemnation, even upon the principle of the law of 24th (*quaere?* 29th) Nivose. And the ship was restored.[1]

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[1] The following account of the case of the *Statira* is extracted from London papers of June 1800.

We stated to our readers some time ago the principles upon which the new council of prizes at Paris proceeded with respect to neutral vessels, and we gave the decision at length upon the American ship *Pegou*, which was ordered to be restored with costs. That decision showed, that a greater degree of system had been established, and that the loose and frequently unjust principles upon which the directory acted with respect to captures of neutral ships, were meant to be abandoned. The following is the decision of the council on another case, that of the *Statira:*

The *Statira*, Captain Seaward, an American ship, had been captured by an English vessel, and recaptured by the French privateer the *Hazard*.

The first point which the commissary considers is, the effect which the *Statira* having been in the possession of the English ought to have.

He observes, that if the vessel captured and recovered had been French, and recaptured by a national vessel, there would have been nothing due to the recaptor, because this is only the exercise of that protection which the state owes to all its subjects in all circumstances. If it had been recaptured by a privateer, the French regulation gives the property of the vessel to the recaptor, on account of the risk and danger of privateering. It might be an act of generosity to restore the vessel to the original owner, but it is not of right that it should.

In the next place, he considers the case of a neutral recaptured from the enemy. If really neutral, he says the vessel must be released. The ground of this higher degree of favor for a neutral he states to be, that the French vessel must have been lost in the country. But it is not certain that the neutral captured by an enemy may not be released by the admiralty courts of the enemy. The mere capture does not vest the property immediately in the captor, so as to make it transferable to the recaptor. The commissary considers the property not vested in the captor till sentence of condemnation.

We believe this is much milder, and more favorable for neutrals than our practice. The being a certain time in the enemy's custody, or *intra maenia*, transfers the property to the captor. This was held in the late well-known case of the Spanish prize, captured by the French, and recaptured by the English. It is to be observed, however, that a principle of reciprocity is pursued, and that we give the same indulgence to the neutral which they would have given us in a similar case.

These cases are read to show that France had abstained from those violations of the law of nations which had caused the rule in the case of *The War Onskan;* and to bring the present case within the principles established by the court in the case of *Talbot* v. *Seeman.*

The general conduct of France having been changed, it is to be presumed she would have been released, with damages and costs; if not upon the principles of justice, good faith, and the law of nations, yet upon those of policy. France was at war with Great Britain; partial hostilities existed with the United States. The non-intercourse law prevented our vessels from trading with France or her dependencies; and the French West Indies could only be supplied from the Danish islands. It is not to be believed, therefore, that they would, by condemning this vessel (coming to them with those very supplies which they wanted), embarrass a trade so necessary to their very existence.

But independently of the general misconduct of France towards neu-

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Having proved that the *Statira* was not liable to confiscation, on the ground of her being in the hands of an enemy, the commissary considers whether her cargo was ground of confiscation.

Upon this point he considers two questions, 1st, whether in point of law, the character of the vessel, neutral or not, should be determined by the nature of the cargo? 2d, whether the cargo consisted of contraband?

He then reviews all the laws upon this head. He shows that till the decree of the 29th Nivose, (year 6) January 18, 1798, the regulation states, "His majesty prohibits all privateers to stop and bring into the ports of the kingdom the ships of neutral powers, even though coming from or bound to the ports of the enemy, with the exception of those carrying supplies to places blockaded, invested or besieged. With regard to the ships of neutral states laden with contraband commodities for the enemy, they may be stopped and the said commodities shall be seized and confiscated, but the vessels and the residue of their cargo shall be restored, unless the said contraband commodities constituted three-fourths of the value of the cargo, in which case the ship and cargo shall be wholly confiscated. His majesty however reserves the right of revoking the privileges above granted, if the enemy do not grant a reciprocal indulgence in the course of six months from the date hereof.

The law of the 29th Nivose (year 6), overturned all this system, and enacted, "That the state of ships in regard to their being neutral or hostile, should be determined by their cargo; that accordingly every vessel found at sea, laden in whole or in part with commodities coming from England or its possessions, should be declared good prize, whoever might be owners of their articles and commodities."

The severity of this regulation the commissary condemns, but as the *Statira* was captured while it was in force, the captor was entitled to have the capture tried by it.

He examines next how the regulation applies, premising his opinion that such regulations are improperly styled laws, and they are essentially variable *pro temporibus et causis;* that they should always be tempered by wisdom and equity. He adverts to the words in whole or in part. By the whole, he says, ought to be understood a great part, according to the judicial maxim *parum pro nihilo habetur.* Upon this principle then, he is of opinion that a ship ought not to be subject to confiscation even under the law of the 29th Nivose, unless such

trals, the captors rely upon three points arising under French ordinances.

1. That the *rôle d'équipage* wants the place of nativity of the crew. But, according to the opinion of Portalis, this is not a fatal defect, nor is it, of itself, a sufficient ground for condemnation.

2. That more than one-third of the crew were enemies of France. The word *matelot,* in the ordinance of 1778, means a sailor, in contradistinction to the captain or master. Exclude the master, and there were only ten persons on board, and only three of those are pretended to be enemies; so that one-third were not enemies, within the meaning of the ordinance.

But these three pretended enemies were Americans. The hostilities which existed between France and the United States amounted at most to a partial, limited war, according to the decision of this court in the case of *Bas* v. *Tingy*. It was only a war against French armed force found on the high seas. It did not authorize private hostilities between the citizens of the two countries. Individuals are only enemies to each

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a part of the cargo comes under the description of what is there made contraband, as ought to excite a presumption of fraud against all the rest. What that part should be is not capable of definition, but should be left to the enlightened equity and sound discretion of the judge.

The *Statira* had on board sixty barrels of turpentine and forty barrels of pitch. The captor contended that these were contraband; the captured said, that by the treaty of 1778 with the Americans, they were not enumerated as contraband.

But the commissary shows, that the Americans by the treaty were bound to admit the French to all the advantages of the most favorite nations; that having, in a subsequent treaty with England, made pitch contraband, with respect to the latter, necessarily it became contraband with regard to France.

The learned commissary, however, thinks that even upon the principle of the law of the 24th Nivose, the quantity of pitch was too small to justify confiscation.

In the next place the captor alleged, that 2911 pieces of Campeachy wood, part cargo of the *Statira,* was the produce of English possessions.

This point, however, had not been regularly ascertained, as the report on the subject was made without the captured being called as a party.

The commissary states, however, strong circumstances of suspicion on this head. The captured had not appealed against the confiscation of the cargo. The point came under the consideration of the court on the appeal of the captor, who wanted to get both ship and cargo.

The commissary therefore saw no reason for condemning the ship, which was clearly neutral; but on account of the suspicions against the character of the cargo, he thought no indemnification whatever was due to the captured.

Judgment was pronounced accordingly.

The piratical decree of the 29th Nivose (year 6), mentioned above with so much severity by Portalis, has been repealed, and things have been placed upon the footing of the regulation of 1778; that is, the French are to treat neutrals in regard to contraband in the same way in which they are treated by us; they will not allow the Americans to carry into England a commodity which the English would seize as contraband going into the ports of France.

other, in a general war. The war extended only to those objects pointed out in the acts of Congress; as to everything else, the state of the two nations was to be considered as a state of peace. It was a war only *quoad hoc*. The individuals of the two nations were always neutral to each other. A citizen of the United States could only be considered as an enemy of France, while in arms against her; the neutrality was the counterpart, or (to use a mathematical expression), the complement of the war. A citizen of the United States, peaceably navigating a neutral vessel, could not be burdened with the character of enemy.

3. The master was a Scot by birth. The ordinance cited from 1 *Code des Prises,* 303, § 6, in support of this objection, is in the alternative. The master of the vessel must be naturalized in a neutral country, or must have transferred his domicil to the neutral country, three months before the first of September in that year. Naturalization is not necessary, if there be such a transfer of the domicil; and the domicil is not necessary, if the party be naturalized. But the authority of Portalis shows that these decrees are not to be considered as laws, but *sub modo*. They are only regulations made at particular times, for particular purposes.

If the same evidence had been produced at Guadeloupe, which has been brought here (and the same would have been more easily obtained there), there can be no doubt the vessel would have been restored. It is in evidence that other vessels of Mr. Shattuck had been released. No salvage can be allowed, unless the danger was imminent, not problematical.

IV. Under all the circumstances of the case, Captain Murray acted illegally, and is liable for damages; which have been properly assessed. His subsequent conduct rendered the transaction tortious, *ab initio*. If he was justified in rescuing the vessel from the hands of the French, his subsequent detention of the vessel, and the sale of the cargo at Martinique by his own agent, without condemnation, were unauthorized acts, in violation of the rights of neutrality. The libel says nothing of the cargo; it is first mentioned in the replication. The libel only prays condemnation of the vessel, on the ground of violation of the non-intercourse law.

By law, he was bound to bring the vessel and cargo into a port of the United States for adjudication, and had no authority to sell the cargo, before condemnation. As to the pretense of her being an armed

French vessel, he ought to have sent the arms into port with the vessel, as the only evidence of their existence.

The commander of the French privateer, in his commission to the prize-master, calls her the Danish schooner *Charming Betsy,* William Wright, master. There was no evidence to impeach the credence due to the papers found on board of her, which at that time had every appearance of fairness, and which have since been incontestably proved to be genuine.

The facts stated in the *procès verbal* are, that she had no log-book; that the mate declared himself to be an American; that the flag and pendant were American; that the Danish flag had been made, during the chase, which was confirmed by the two boys, and that she had no pass from the French consul. Whatever weight might be given to these facts, if true, yet the outrageous and disorderly conduct of the crew of the privateer entirely destroys the credit of the *procès verbal,* and at best it would be only the declaration of interested plunderers.

But it is said that, by the law of nations, probable cause is a sufficient excuse; and that this law operates as the law of nations. In revenue laws, probable cause is no justification, unless it is made so by the laws themselves. This is not a war measure. If the United States were at war, it was unnecessary, because the act of trading with an enemy is itself a ground of condemnation. This law was passed because the United States were not at war, and wished to avoid it, by showing their power over the French colonies in the West Indies. It is a municipal regulation, as well suited to a state of peace as of war. It affects our own citizens only. It is no part of the law of nations. What would other nations call it, were they bound to notice it? It can give no right to search and seize neutrals. It could not affect their rights.

He who takes must take at his peril. The law only gives authority to seize vessels of the United States. If he takes the vessel of another nation, he must answer it.

As to the damages. Nothing can justify Captain Murray; but it was a mistake of the head, not of the heart. His intentions were honest and correct, but he suffered his suspicions to carry him too far. If it was an error in judgment, shall he have salvage? If an injury has been done to the innocent and unfortunate owner, shall he have no redress? The consequences to him were the same, whatever might have been the motive. The damages have been properly assessed in the district court. If damages are to be given, they ought not to be less

than the original cost of vessel and cargo, with the outfit, insurance, interest and expenses; and upon calculation, it will be found that the damages assessed do not exceed the amount of these.[1]

Dallas.—It is said that Mr. Shattuck never was a citizen of the United States. What is averred and admitted need not be proved. Mr. Soderstrom, in his rejoinder, expressly admits that he was once a citizen of the United States by alleging that he had transferred his allegiance from the Government of the United States to his Danish majesty. Mr. Shattuck's burgher's brief is, at length, for the first time, produced and admitted to be made a part of the record. It bears date on the 10th of April, 1797. It may here be remarked that some of the witnesses have testified that he became a burgher in 1795. This shows how little reliance ought to be placed upon their testimony. If, then, Mr. Shattuck did expatriate himself, it was not until April, 1797. It has been conceded that a man can not expatriate himself unless it be done in a fit time, with fairness of intention, and publicity of act.

As to the fitness of the time. What was the situation of this country and France in the year 1797? In 1795, the British treaty had excited the jealousy of France. In 1796, she passed several edicts highly injurious to our commerce. Mr. Pinckney had been sent as an envoy extraordinary, and was refused. France had gone on in a long course of injury and insult, which at length roused the spirit of the nation. On the 14th of June, 1797, the act of Congress was passed, prohibiting the exportation of arms; on the 23d, the act for the defense of the ports and harbors of the United States; on the 24th, the act for raising 80,000 militia; on the 1st July, the act providing a naval armament; on the 13th of June, 1798, the first non-intercourse bill was passed, and on the 7th of July, the treaties with France were annulled. These facts show that the time when Mr. Shattuck chose to expatriate himself, was a time of approaching hostilities, and when everything indicated war.

As to the fairness of his intention. The same facts show what that intention was. It was to carry on that trade which everything tended to show would soon become criminal by the laws of war, and from the exercise of which the other citizens of the United States were about to

[1] MARSHALL, Ch. J. What would have been the law as to probable cause, if there had been a public general war between France and the United States, and the vessel had been taken on suspicion of being a vessel of the United States, trading with the enemy, contrary to the laws of war? Would probable cause excuse, in such a case, if it should turn out that she was a neutral?

be interdicted. The act of Congress points to this very case. It was to prevent transactions of this nature, that the word "elsewhere" was inserted.

But why was not this burgher's brief, or a copy of it, put on board the vessel? The answer is obvious, because it would have discovered the time of expatriation, which would have increased the suspicions excited by the origin of the vessel, by the recent transfer, by the nature of the cargo, and by the character of the crew. Domicil in a neutral country gives a man only the rights of trade; it will not justify him in a violation of the laws of his country.

If, then, Mr. Shattuck could not expatriate himself, or if he has not expatriated himself, he is bound to obey the laws of the United States. A nation has a right to bind, by her laws, her own citizens residing in a foreign country; as the United States have done in the act of Congress respecting the slave-trade and in the non-intercourse law.

The question, whether the vessel was capable of annoying our commerce, depends upon matter of fact, of which the court will judge. The number of men was sufficient; the testimony respecting the cutlasses is supported by the nature of the transaction, and by the usage in such cases. Some arms were necessary to prevent Captain Wright and his boys from rising and rescuing the vessel. Circumstances are as strong as oaths, and are generally more satisfactory. The vessel, having port-holes, was constructed for war, and in an hour after her arrival at Guadeloupe, might have been completely equipped. Upon the principles of the case of *Talbot* v. *Seeman,* Captain Murray was bound to guard against this, and he would have been culpable, if he had suffered her to escape.

But it is said that she was not in danger of condemnation by the French, because France had ceased from her violation of the laws of nations, because she had repealed the obnoxious *arrêt* of 18th January, 1798, and because one-third of the crew were not her enemies. Admitting all this, yet if one ground of condemnation remained, she would have been condemned. The vessel was transferred from an enemy to a neutral, during the heat of hostilities. This alone was a sufficient ground of condemnation, under the ordinance already cited from 1 *Code des Prises,* 304, art 7. In the case of *Talbot* v. *Seeman,* the ground of salvage was that the vessel was liable to condemnation under a French *arrêt.* And that the courts of France were bound to carry the *arrêt* into effect.

The conduct of Captain Murray was not illegal. He was bound, by law, as well as by his instructions, to take the vessel out of the hands of the French. It was with the consent, if not at the request, of Captain Wright; and it was in itself an act of humanity. His conduct was fair, upright and honorable in the whole transaction. He offered to take security for the vessel and cargo. The cargo was perishable: if it had been brought to the United States, it would not have been in a merchantable condition; or if it had been, it would not have sold so high here (being chiefly articles of American produce) as at Martinique. The sale was fair, and the proceeds brought to the United States to wait the event of the trial.

Probable cause is a thing of maritime jurisdiction; and authorities in point may be found, even at common law. If it is a municipal regulation, it is one which affects the whole world. It is engrafted upon the law of nations. It is municipal only as it emanates from the municipal authority of the nation. But the whole world is bound to notice a law which affects the interests of all nations in the world.

As to the damages. The principles upon which they are assessed do not appear from the report of the assessors, but the probability is that they were founded upon the estimates of the probable profits of the voyage, as stated in the testimony of some of the witnesses. In a case of this kind, where the purity of intention is admitted, it can never be proper to give speculative or vindictive damages.[1]

Martin, in reply.—1. As to the national character of Shattuck. He was born before the revolution; probably, in 1773 or 1774; at least twenty-one years before April 10th, 1797, which will bring it before the Declaration of Independence. In *Duane's Case,* it was decided that even if it had been proved, that he was born in New York, yet his birth being before the revolution, and having been carried to Ireland during his minority, he was an alien.

The rejoinder of Mr. Soderstrom does not admit the fact that Shattuck was a citizen of the United States; but if it did, it is coupled with an express allegation that he had duly expatriated himself; and if part is taken, the whole must be taken. The words of the rejoinder are, "and this party expressly alleges and avers that the said Jared Shattuck, at the several times and periods above mentioned, and long before, and in the intermediate times which elapsed between the said several times

[1] In answer to an inquiry by the Chief Justice for authorities to support the position that probable cause is always a justification in maritime cases, Mr. DALLAS referred generally to Browne's Civil and Admiralty Law, and to the decisions of Sir Wm. Scott.

or periods, had been, then was, ever since hath been, and now is, a subject of his majesty the king of Denmark, owing allegiance to his said majesty, and to no other prince, potentate, state or sovereignty whatever; and that he, the said Jared Shattuck, had, long before his said purchase of the said schooner, duly expatriated himself from the dominions of the United States, to those of his said majesty; and transferred his allegiance and subjection from the said United States and their government to his said majesty and his government." The whole purport of which is, that if he was ever a citizen of the United States, he had expatriated himself.

Even if it was an admission of the fact, yet it could not prejudice Mr. Shattuck, as the rejoinder is by Mr. Soderstrom, in character of consul of Denmark, and as the representative of the nation. If he was born before the revolution, he never owed natural allegiance to the United States; and if he remained here, after the revolution, during part of his minority, he owed only a temporary and local allegiance; during the existence of which, if he had taken up arms against the United States, he would have been guilty of treason. But that allegiance continued only while he was a resident of the country; he had a right to transfer such temporary allegiance whenever he pleased. Foster's Cr. Law, 183, 185.

That he acted with a fair and honest intention is proved by his *bona fide* residence and domicil for ten or eleven years. 2 Browne's Civil and Admiralty Law, 328. The navigation act of Great Britain is a municipal law, and yet a *bona fide* domicil and residence of foreigners, were held sufficient to bring the persons within its provisions. *Scott qui tam,* v. *Schwartz,* Comyns, 677.[1]

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[1] The case of *Scott* v. *Schwartz*, was an information against the Russian ship *The Constant*, because the master and three-fourths of the mariners were not of that country or place, according to the Statute of 12. Car. 2, C. 18, § 8. The ship was built in Russia, and the cargo was the product of that country. The master was born out of the Russian dominions, but in 1733 was admitted, and ever since continued a burgher of Riga; and had been a resident there, when not engaged in foreign voyages, and traded from thence, nine years before the seizure. There were only eleven mariners on board, of whom four were born in Russia; Morgan a fifth was born in Ireland and there bound apprentice to the master, and as such went with him to Riga, and for three or four years before the seizure, served on board the same ship and sailed therein from Riga, on this and former voyages. The other six were born out of the dominions of Russia, but Stephen Hanson, one of them, had resided at Riga eight years next before the seizure—Hans Yasper five years—Rein Steingrave four years, and Derrick Andrews, the cook, seven years, and these four, during those years had sailed from Riga in that and other vessels.

It was adjudged that these people were of that country or place, within the meaning of the Statute, and the vessel properly manned and navigated.

But a stronger case than that is found in 1 Bos. & Pul. 430 (*Marryatt* v. *Wilson*), in the exchequer chamber, on a writ of error from the king's bench. In that case, a natural-born British subject, naturalized in the United States, since the peace, was adjudged to be a citizen of the United States, within the treaty and navigation acts of Great Britain, so as to carry on a direct trade from England to the British East Indies. The opinion of EYRE, Ch. J., beginning in p. 439, is very strong in our favor.

There is no probability that the vessel would have been condemned at Guadeloupe. Mr. Shattuck, and his course of trade, were well known there, and they had already released some of his vessels. Another reason is that Bonaparte was at that time negotiating with the northern powers of Europe, to form a coalition to support the principle that free ships should make free goods; and he would have succeeded but for the able negotiations of Lord Nelson at Copenhagen.

In Park on Insurance, 363, it is said, "If the ground of decision appear to be, not on the want of neutrality, but upon a foreign ordinance manifestly unjust, and contrary to the law of nations, and the insured has only infringed such a partial law; as the condemnation did not proceed on the point of neutrality, it can not apply to the warranty so as to discharge the insurer." And in support of this position he cites the case of *Mayne* v. *Walter*.

There is no ordinance of France which, upon the principles established in the case of *The Pegou,* would have been a sufficient ground of condemnation. The circumstances required by those ordinances are only evidence of neutrality, which is always a question of *bona fides*. A condemnation upon either of these ordinances alone would have been contrary to the law of nations; but if they are considered as only requiring certain circumstances, tending to establish the fact of neutrality, they are perfectly consistent with that law. This is the light in which they have been considered by Portalis. The French have never considered our vessels as the vessels of an enemy. Our vessels have not been condemned by them as enemy property; but their sentences have always been grounded upon a pretended violation of some particular ordinance of France. Hence, it appears that they would not have considered an American vessel, sold to a Dane, as an enemy's vessel transferred to a neutral during a state of war.

But the claim of salvage is an afterthought. It was not necessary to bring her to the United States to obtain salvage. Salvage is a ques-

tion of the law of nations, and may be decided by the courts of any civilized nation. Instead of rendering a service, he has done a tenfold injury. Captain Murray's intentions were undoubtedly correct and honorable, and we do not wish vindictive damages; but Mr. Shattuck will be a loser, even if he gains his cause, and recovers the damages already assessed. Probable cause can not justify the taking and bringing in a neutral; but it may prevent vindictive damages.

February 22d, 1804. MARSHALL, Ch. J., delivered the opinion of the court.—*The Charming Betsy* was an American-built vessel, belonging to citizens of the United States, and sailed from Baltimore, under the name of *The Jane,* on the 10th of April, 1800, with a cargo of flour for St. Bartholomew; she was sent out for the purpose of being sold. The cargo was disposed of at St. Bartholomew; but finding it impossible to sell the vessel at that place, the master proceeded with her to the island of St. Thomas, where she was disposed of to Jared Shattuck, who changed her name to that of *The Charming Betsy,* and having put on board her a cargo consisting of American produce, cleared her out, as a Danish vessel, for the island of Guadeloupe.

On her voyage she was captured by a French privateer, and eight hands were put on board her for the purpose of taking her into Guadeloupe as a prize. She was afterwards recaptured by Captain Murray, commander of the *Constellation* frigate, and carried into Martinique. It appears that the master of *The Charming Betsy* was willing to be taken into that island; but when there, he claimed to have his vessel and cargo restored, as being the property of Jared Shattuck, a Danish burgher.

Jared Shattuck was born in the United States, but had removed to the island of St. Thomas, while an infant, and was proved to have resided there ever since the year 1789 or 1790. He had been accustomed to carry on trade as a Danish subject; had married a wife and acquired real property in the island, and also taken the oath of allegiance to the crown of Denmark in 1797.

Considering him as an American citizen, who was violating the law prohibiting all intercourse between the United States and France, or its dependencies, or the sale of the vessel as a mere cover to evade that law, Captain Murray sold the cargo of *The Charming Betsy,* which consisted of American produce, in Martinique, and brought the vessel into the port of Philadelphia, where she was libelled under what is

termed the non-intercourse law. The vessel and cargo were claimed by the consul of Denmark as being the *bona fide* property of a Danish subject.

This cause came on to be heard before the judge for the district of Pennsylvania, who declared the seizure to be illegal, and that the vessel ought to be restored, and the proceeds of the cargo paid to the claimant, or his lawful agent, together with costs and such damages as should be assessed by the clerk of the court, who was directed to inquire into and report the amount thereof; for which purpose he was also directed to associate with himself two intelligent merchants of the district, and duly inquire what damage Jared Shattuck had sustained by reason of the premises. If they should be of opinion that the officers and crew of the *Constellation* had conferred any benefit on the owners of *The Charming Betsy,* by rescuing her out of the hands of the French captors, they were, in the adjustment, to allow reasonable compensation for the service.

In pursuance of this order, the clerk associated with himself two merchants, and reported that having examined the proofs and vouchers exhibited in the cause, they were of opinion that the owner of the vessel and cargo had sustained damage to the amount of $20,594.16, from which is to be deducted the sum of $4,363.86, the amount of moneys paid into court arising from the sales of the cargo, and the further sum of $1,300, being the residue of the proceeds of the said sales remaining, to be brought into court, $5,663.86. This estimate is exclusive of the value of the vessel, which was fixed at $3,000. To this report an account is annexed, in which the damages, without particularizing the items on which the estimate was formed, were stated at $14,930.30.

No exceptions having been taken to this report, it was confirmed, and, by the final sentence of the court, Captain Murray was ordered to pay the amount thereof. From this decree an appeal was prayed to the circuit court, where the decree was affirmed so far as it directed restitution of the vessel, and payment to the claimant of the net proceeds of the sale of the cargo in Martinique, and reversed for the residue. From this decree, each party has appealed to this court.

It is contended on the part of the captors, in substance, 1st. That the vessel *Charming Betsy* and cargo are confiscable under the laws of the United States. If not so, 2d. That the captors are entitled to salvage. If this is against them, 3d. That they ought to be excused from damages, because there was probable cause for seizing the vessel and bringing her into port.

1. Is *The Charming Betsy* subject to seizure and condemnation for having violated a law of the United States? The libel claims this forfeiture, under the act passed in February, 1800, further to suspend the commercial intercourse between the United States and France, and the dependencies thereof. That act declares, "that all commercial intercourse," etc. It has been very properly observed, in argument, that the building of vessels in the United States for sale to neutrals, in the islands is, during war, a profitable business, which Congress can not be intended to have prohibited, unless that intent be manifested by express words, or a very plain and necessary implication. It has also been observed that an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country. These principles are believed to be correct, and they ought to be kept in view, in construing the act now under consideration.

The first sentence of the act which describes the persons whose commercial intercourse with France, or her dependencies, is to be prohibited, names any person or persons resident within the United States, or under their protection. Commerce carried on by persons within this description is declared to be illicit. From persons the act proceeds to things, and declares explicitly the cases in which the vessels employed in this illicit commerce shall be forfeited. Any vessel owned, hired or employed, wholly or in part, by any person residing within the United States, or by any citizen thereof, residing elsewhere, which shall perform certain acts recited in the law, becomes liable to forfeiture. It seems to the court to be a correct construction of these words to say that the vessel must be of this description, not at the time of the passage of the law, but at the time when the act of forfeiture shall be committed.

The cases of forfeiture are, first, a vessel of the description mentioned which shall be voluntarily carried, or shall be destined, or permitted to proceed to any port within the French Republic. She must, when carried, or destined, or permitted to proceed to such port, be a vessel within the description of the act. The second class of cases are those where vessels shall be sold, bartered, intrusted, or transferred, for the purpose that they may proceed to such port or place. This part of the section makes the crime of the sale dependent on the purpose

for which it was made. If it was intended that any American vessel, sold to a neutral, should, in the possession of that neutral, be liable to the commercial disabilities imposed on her while she belonged to citizens of the United States, such extraordinary intent ought to have been plainly expressed; and if it was designed to prohibit the sale of American vessels to neutrals, the words placing the forfeiture on the intent with which the sale was made ought not to have been inserted. The third class of cases are those vessels which shall be employed in any traffic by or for any person resident within the territories of the French Republic, or any of its dependencies. In these cases, too, the vessels must be within the description of the act, at the time the fact producing the forfeiture was committed.

The Jane having been completely transferred, in the island of St. Thomas, by a *bona fide* sale, to Jared Shattuck, and the forfeiture alleged to have accrued on a fact subsequent to that transfer, the liability of the vessel to forfeiture must depend on the inquiry, whether the purchaser was within the description of the act.

Jared Shattuck having been born within the United States, and not being proved to have expatriated himself, according to any form prescribed by law, is said to remain a citizen, entitled to the benefit, and subject to the disabilities imposed upon American citizens; and therefore to come expressly within the description of the act which comprehends American citizens residing elsewhere.

Whether a person born within the United States, or becoming a citizen according to the established laws of the country, can divest himself absolutely of that character, otherwise than in such manner as may be prescribed by law, is a question which it is not necessary at present to decide. The cases cited at bar, and the arguments drawn from the general conduct of the United States on this interesting subject, seem completely to establish the principle, that an American citizen may acquire, in a foreign country, the commercial privileges attached to his domicil, and be exempted from the operation of an act expressed in such general terms as that now under consideration. Indeed, the very expressions of the act would seem to exclude a person under the circumstances of Jared Shattuck. He is not a person under the protection of the United States. The American citizen who goes into a foreign country, although he owes local and temporary allegiance to that country, is yet, if he performs no other act changing his condition, entitled to the protection of his own government; and if, without

the violation of any municipal law, he should be oppressed unjustly, he would have a right to claim that protection, and the interposition of the American Government in his favor, would be considered as a justifiable interposition. But his situation is completely changed, where, by his own act, he has made himself the subject of a foreign power. Although this act may not be sufficient to rescue him from punishment for any crime committed against the United States, a point not intended to be decided, yet it certainly places him out of the protection of the United States, while within the territory of the sovereign to whom he has sworn allegiance, and, consequently, takes him out of the description of the act.

It is, therefore, the opinion of the court that *The Charming Betsy,* with her cargo, being at the time of her recapture the *bona fide* property of a Danish burgher, is not forfeitable, in consequence of her being employed in carrying on trade and commerce with a French island.

2. The vessel not being liable to confiscation, the court is brought to the second question, which is—Are the recaptors entitled to salvage?

In the case of *The Amelia* (1 Cr. 1), it was decided, on mature consideration, that a neutral armed vessel, in possession of the French, might, in the then existing state of hostilities between the two nations, be lawfully captured; and if there were well-founded reasons for the opinion, that she was in imminent hazard of being condemned as a prize, the recaptors would be entitled to salvage. The court is well satisfied with the decision given in that case, and considers it as a precedent not to be departed from in other cases attended with circumstances substantially similar to those of *The Amelia.* One of these circumstances is, that the vessel should be in a condition to annoy American commerce.

The degree of arming which should bring a vessel within this description has not been ascertained, and perhaps it would be difficult precisely to mark the limits, the passing of which would bring a captured vessel within the description of the acts of Congress on this subject. But although there may be difficulty in some cases, there appears to be none in this. According to the testimony of the case, there was on board but one musket, a few ounces of powder and a few balls. The testimony respecting the cutlasses is not considered, as showing that they were in the vessel at the time of her recapture. The capacity of this vessel for offense appears not sufficient to warrant the capture of her as an armed vessel. Neither is it proved to the satisfaction of the

court, that *The Charming Betsy* was in such imminent hazard of being condemned, as to entitle the recaptors to salvage.

It remains to inquire whether there was in this case such probable cause for sending in *The Charming Betsy* for adjudication, as will justify Captain Murray for having broken up her voyage, and excuse him from the damages sustained thereby. To effect this, there must have been substantial reason for believing her to have been at the time, wholly or in part, an American vessel, within the description of the act; or hired or employed by Americans; or sold, bartered or trusted for the purpose of carrying on trade to some port or place belonging to the French Republic.

The circumstances relied upon are, principally, 1st. The *procès verbal* of the French captors. 2d. That she was an American-built vessel. 3d. That the sale was recent. 4th. That the master was a Scotchman, and the muster-roll showed that the crew were not Danes. 5th. The general practice in the Danish islands of covering neutral property.

The *procès verbal* contains an assertion that the mate declared that he was an American, and that their flag had been American, and had been changed, during the cruise, to Danish, which declaration was confirmed by several of the crew. If the mate had really been an American, the vessel would not, on that account, have been liable to forfeiture. nor would that fact have furnished any conclusive testimony of the character of the vessel. The *procès verbal,* however, ought for several reasons to have been suspected. The general conduct of the French West India cruisers, and the very circumstance of declaring that the Danish colors were made during the chase, were sufficient to destroy the credibility of the *procès verbal.* Captain Murray ought not to have believed that an American vessel, trading to a French port, in the assumed character of a Danish bottom, would have been without Danish colors.

That she was an American vessel, and that the sale was recent, can not be admitted to furnish just cause of suspicion, unless the sale of American-built vessels had been an illegal or an unusual act. That the master was a Scotchman, and that the names of the crew were not generally Danish, are circumstances of small import, when it is recollected that a very great proportion of the inhabitants of St. Thomas are British and Americans. The practice of covering American property in the islands might and would justify Captain Murray in giving to other causes of suspicion more weight than they would otherwise

be entitled to, but can not be itself a motive for seizure. If it was, no neutral vessel could escape, for this ground of suspicion would be applicable to them all.

These causes of suspicion, taken together, ought not to have been deemed sufficient to counterbalance the evidences of fairness with which they were opposed. The ship's papers appear to have been perfectly correct, and the information of the master, uncontradicted by those belonging to the vessel who were taken with him, corroborated their verity. No circumstance existed which ought to have discredited them. That a certified copy of Shattuck's oath, as a Danish subject, was not on board, is immaterial, because, being apparently on all the papers a burgher, and it being unknown that he was born in the United States, the question whether he had ceased to be a citizen of the United States could not present itself.

Nor was it material, that the power given by the owners of the vessel to their master to sell her in the West Indies, was not exhibited. It certainly was not necessary to exhibit the instructions under which the vessel was acquired, when the fact of acquisition was fully proved by the documents on board, and by other testimony.

Although there does not appear to have been such cause to suspect *The Charming Betsy* and her cargo to have been American, as would justify Captain Murray in bringing her in for adjudication, yet many other circumstances combine with the fairness of his character to produce a conviction that he acted upon correct motives from a sense of duty; for which reason this hard case ought not to be rendered still more so by a decision in any respect oppressive.

His orders were such as might well have induced him to consider this as an armed vessel within the law, sailing under authority from the French Republic; and such, too, as might well have induced him to trust to very light suspicions respecting the real character of a vessel appearing to belong to one of the neutral islands. A public officer, intrusted on the high seas to perform a duty deemed necessary by his country, and executing according to the best of his judgment the orders he has received, if he is a victim of any mistake he commits, ought certainly never to be assessed with vindictive or speculative damages. It is not only the duty of the court to relieve him from such, when they plainly appear to have been imposed on him, but no sentence against him ought to be affirmed, where, from the nature of the proceedings, the whole case appears upon the record, unless those pro-

ceedings are such as to show on what the decree has been founded, and to support that decree.

In the case at bar, damages are assessed as they would be by the verdict of the jury, without any specification of items, which can show how the account was made up, or on what principles the sum given as damages was assessed. This mode of proceeding would not be approved of if it was even probable, from the testimony contained in the record, that the sum reported by the commissioners of the district court was really the sum due. The district court ought not to have been satisfied with a report, giving a gross sum in damages, unaccompanied by any explanation of the principles on which that sum was given. It is true, Captain Murray ought to have excepted to this report. His not having done so, however, does not cure an error apparent upon it, and the omission to show how the damages which were given had accrued, so as to enable the judge to decide on the propriety of the assessment of his commissioners, is such an error.

Although the court would in any case disapprove of this mode of proceeding, yet, in order to save the parties the cost of further prosecuting this business in the circuit court, the error which has been stated might have been passed over, had it not appeared probable that the sum for which the decree of the district court was rendered is really greater than it ought to have been, according to the principles by which the claim should be adjusted.

This court, therefore, is not satisfied with either the decree of the district or circuit court, and has directed me to report the following decree:

Decree of the Court.—This cause came on to be heard, on the transcript of the record of the circuit court, and was argued by counsel; on consideration whereof, it is adjudged, ordered and decreed as follows, to wit: That the decree of the circuit court, so far as it affirms the decree of the district court, which directed restitution of the vessel, and payment to the claimant of the net proceeds of the sale of the cargo in Martinique, deducting the costs and charges there, according to amount exhibited by Captain Murray's agent, being one of the exhibits in the cause, and so far as it directs the parties to bear their own costs, be affirmed; and that the residue of the said decree, whereby the claim of the owner to damages for the seizure and detention of his vessel was rejected, be reversed.

And the court, proceeding to give such further decree as the circuit court ought to have given, doth further adjudge, order and decree, that so much of the decree of the district court as adjudges the libellant to pay costs and damages, be affirmed; but that the residue thereof, by which the said damages are estimated at $20,594.16, and by which the libellant was directed to pay that sum, be reversed and annulled. And this court does further order and decree, that the cause be remanded to the circuit court, with directions to refer it to commissioners, to ascertain the damages sustained by the claimants, in consequence of the refusal of the libellant to restore the vessel and cargo at Martinique, and in consequence of his sending her into a port of the United States for adjudication; and that the said commissioners be instructed to take the actual prime cost of the cargo and vessel, with interest thereon, including the insurance actually paid, and such expenses as were necessarily sustained in consequence of bringing the vessel into the United States, as the standard by which the damages ought to be measured. Each party to pay his own costs in this court, and in the circuit court. All which is ordered and decreed accordingly.[1]

LITTLE, ET AL. v. BARREME, ET AL. (*FLYING FISH*)[2]

Responsibility of naval officer for illegal seizure.—Probable cause.

The commander of a ship of war of the United States, in obeying his instructions from the President of the United States, acts at his peril: if those instructions are not strictly warranted by law, he is answerable in damages to any person injured by their execution.

The act of the 9th of February, 1799,[3] did not authorize the seizure upon the high seas of any vessels sailing from a French port; and the orders of the President of the United States could not justify such a seizure.

Quaere? Whether probable cause will excuse from damages?

Appeal from the Circuit Court for the District of Massachusetts.

On the 2d of December, 1799, the Danish brigantine *Flying Fish* was captured, near the island of Hispaniola, by the United States frigates *Boston* and *General Green,* upon suspicion of violating the Act of Congress, usually termed the non-intercourse law, passed on the 9th of February, 1799 (1 U. S. Stat. 613), by the 1st section of

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[1] Captain Murray was reimbursed his damages, interest and charges, out of the Treasury of the United States, by an act of Congress, January 31, 1805.

[2] 2 Cranch, 170; February term, 1804. [3] *Supra,* p. 68.

which it is enacted, "That from and after the first day of March next, no ship or vessel owned, hired or employed, wholly or in part, by any person resident within the United States, and which shall depart therefrom, shall be allowed to proceed directly, or from any intermediate port or place, to any port or place within the territory of the French Republic, or the dependencies thereof, or to any place in the West Indies, or elsewhere, under the acknowledged government of France, or shall be employed in any traffic or commerce with or for any person, resident within the jurisdiction or under the authority of the French Republic. And if any ship or vessel, in any voyage thereafter commencing, and before her return within the United States, shall be voluntarily carried or suffered to proceed to any French port or place as aforesaid, or shall be employed as aforesaid, contrary to the intent hereof, every such ship or vessel, together with her cargo, shall be forfeited; and shall accrue, the one-half to the use of the United States, and the other half to the use of any person or persons, citizens of the United States, who will inform and prosecute for the same; and shall be liable to be seized, and may be prosecuted and condemned, in any circuit or district court of the United States, which shall be holden within or for the district where the seizure shall be made."

And by the 5th section, it is enacted, "That it shall be lawful for the President of the United States to give instructions to the commanders of the public armed ships of the United States, to stop and examine any ship or vessel of the United States, on the high seas, which there may be reason to suspect to be engaged in any traffic or commerce contrary to the true tenor hereof; and if, upon examination, it shall appear that such ship or vessel is bound or sailing to any port or place within the territory of the French Republic, or her dependencies, contrary to the intent of this act, it shall be the duty of the commander of such public armed vessel, to seize every such ship or vessel engaged in such illicit commerce, and send the same to the nearest port in the United States; and every such ship or vessel, thus bound or sailing to any such port or place, shall, upon due proof thereof, be liable to the like penalties and forfeitures as are provided in and by the first section of this act."

The instructions given in consequence of this section, bear date the 12th of March, 1799, and are as follows:

> SIR:—Herewith you will receive an Act of Congress further to suspend the commercial intercourse between the United States

and France, and the dependencies thereof, the whole of which requires your attention. But it is the command of the President, that you consider particularly the fifth section as part of your instructions, and govern yourself accordingly. A proper discharge of the important duties enjoined on you, arising out of this act, will require the exercise of a sound and impartial judgment. You are not only to do all that in you lies, to prevent all intercourse, whether direct or circuitous, between the ports of the United States and those of France and her dependencies, in cases where the vessels or cargoes are apparently, as well as really, American, and protected by American papers only; but you are to be vigilant that vessels or cargoes really American, but covered by Danish or other foreign papers, and bound to or from French ports, do not escape you.

Whenever, on just suspicion, you send a vessel into port to be dealt with according to the afore-mentioned law, besides sending with her all her papers, send all the evidence you can obtain to support your suspicions, and effect her condemnation. At the same time that you are thus attentive to fulfill the objects of the law, you are to be extremely careful not to harass or injure the trade of foreign nations with whom we are at peace, nor the fair trade of our own citizens.

In the district court of Massachusetts, the vessel and cargo were ordered to be restored, without damages or costs. Upon the question of damages, the Honorable Judge Lowell delivered the following opinion:

This libel is founded on the statutes of the United States, made to suspend the commercial intercourse between the United States and France, and the dependencies thereof. The libellants not having produced sufficient proof to bring this vessel and cargo so far within the provisions of these statutes as to incur a forfeiture thereof, the same has been decreed to be delivered to the claimants. The question remaining to be decided is, whether the claimants are entitled to damages, which they suggest to have arisen to them, or those for whom they claim, by the capture and detention.

The facts which appear and are material to this question are, that the vessel was owned, and her cargo, by Samuel Goodman, a Prussian by birth, but now an inhabitant of the Danish island of St. Thomas; that the master was born in, and is now of, the same island, but for several years had been employed in vessels of citizens of the United States, and sailed out of our ports; that he speaks our language perfectly, in the accent of an American, and has the appearance of being one. The mate is a citizen of the

United States, born here, and having always continued such. The rest of the seamen are Englishmen, Portuguese and negroes: the supercargo, a Frenchman. The vessel had carried a cargo of provisions and dry goods from St. Thomas to Jeremie, and was returning thither, loaded with coffee, when captured. That during the chase by the American frigates, the master threw overboard the log-book, and certain other papers. That there was on board a protest signed by the master, supercargo and several seamen, in which they declared that the vessel had been bound from St. Thomas to Port au Prince, and was compelled by Rigaud's vessels to go into Jeremie, which was false and totally unfounded; and that, after the capture, the master inquired of his seamen whether they would stand by him respecting this pretense. That the statutes of the United States prohibiting intercourse with France and its dependencies had been long before known at St. Thomas, and that it had been since a common practice there, to cover American property for the purpose of eluding the law.

If a war of a common nature had existed between the United States and France, no question would be made but the false papers found on board, the destruction of the log-book and other papers, would be a sufficient excuse for the capture, detention and consequent damages. It is only to be considered whether the same principles, as they respect neutrals, are to be applied to this case?

My mind has found much difficulty in settling this question. It is one altogether new to me, and arises from the peculiar imperfect war existing at this time between the United States and France. I have embraced an opinion with much diffidence, and am happy that it may be revised in the superior courts of the United States.

On what principles is the right of belligerent powers to examine neutral vessels, and the duty of neutrals to furnish their ships with proper papers, and to avoid such conduct as may give cause to suspect they are other than they pretend to be, founded? Do they not necessarily result from a compromise of their respective rights in a state of war? Neither of the belligerent powers have an original and perfect right to capture the property of neutrals, but they have a right, unless restrained by treaty, however disguised or covered by the aid of neutrals.[1] It is a breach of neutrality to attempt to defeat this right. The practice of nations, therefore, for many ages, has been on the one hand to exercise and on the other to prevent this examination, and to establish a principle that neutral vessels shall be furnished with the usual

[1] It is believed that there has been an error in copying this passage. It is, however, printed *verbatim* from the transcript of the record. The words to be supplied probably are, "to search for and seize the property of their enemies," to be inserted after the word "treaty."

documents to prove their neutral state; shall destroy none of their papers, nor shall carry false papers, under the hazard of being exposed to every inconvenience resulting from capture, examination and detention, except the eventual condemnation of the property; and even this, by some writers, has been held to be lawful, and enforced by some great maritime powers. Every maritime nation must be involved in the war, on the side of one or the other of the belligerent powers, but from the establishment of these principles. It is not the edicts, statutes or regulations of any particular nation which confer these rights, or impose these duties. They are the result of common practice, long existing, often recognized, and founded on pacific principles. Whenever a state of war exists, these rights and duties exist.

It does not appear to me to be material, what is the nature of the war, general or limited. Nothing can be required of neutrals but to avoid duplicity. Sufficient notice to neutrals of the existing state of hostilities is all that is necessary, to attach to them the duties, and to belligerent nations, the rights, resulting from a state of war. This notice is given in different ways, by proclamations, heralds, statutes published, and even by the mere existence of hostilities for a length of time. As the island of St. Thomas, being a dependency of a neutral nation, situated near the dependencies of the belligerent power with whom the United States had prohibited intercourse, and having had long and full knowledge of the state of things, its inhabitants were, as I conceive, bound not to interfere or attempt to defeat the measures taken by our government, in their limited war. We find, however, that these attempts have been frequent; that American vessels have, in many instances, been covered in that island, and the trade which our government has interdicted has been thus carried on. It behooved, then, those of its inhabitants who would avoid the inconveniences of restraint to act with openness, and avoid fraud and its appearances.

This construction of the state in which the United States are (although I am of opinion that, abstractedly from other considerations, it would give them the rights of belligerent powers), places the neutral powers in no new predicament, nor imposes the necessity of any new documents, or other conduct than they were obliged to from the preexisting state of war between most of the great naval powers. On the whole, I am of opinion that no damages are to be paid the claimants for the capture and detention, and do so decree, and that each party bear their own costs.

From this decree, the claimants appealed to the circuit court, where it was reversed, and $8,504 damages were given. The following is the decree of the circuit court:

This court having fully heard the parties on the said appeal, finds the facts stated in the said decree to be true, and that the said Little had instructions from the President of the United States, on which the action in the said libel is founded, a copy of which instructions is on file. And it further appearing that the said brigantine and her cargo were Danish, and neutral property, and that the said George Little knew that the said brig, at the time of the said capture, was bound and sailing from Jeremie to St. Thomas, a Danish and neutral port, and not to any French port; this court is of opinion that although Captain Little had a right to stop and examine the said brig, in case of suspecting her to be engaged in any commerce contrary to the act of the 9th of February, 1799, yet that he was not warranted by law to capture and send her to a port of the United States. That it was at his risk and peril, if the property was neutral; and that a probable cause to suspect the vessel and cargo American, will not, in such case, excuse a capture and sending to port. It is, therefore, considered, adjudged and decreed by this court, that the said decree respecting damages and costs be, and it is hereby reversed, and that the said claimants recover their damages and costs.

The damages being assessed by assessors appointed by the court, a final sentence was pronounced, from which the captors appealed to this court.

The cause was argued at December term, 1801, by *Dexter,* for the appellants, and by *Martin* and *Mason,* for the claimants.

February 27th, MARSHALL, Ch. J., now delivered the opinion of the court.—The *Flying Fish,* a Danish vessel, having on board Danish and neutral property, was captured on the 2d of December, 1799, on a voyage from Jeremie to St. Thomas, by the United States frigate *Boston,* commanded by Captain Little, and brought into the port of Boston, where she was libelled as an American vessel that had violated the non-intercourse law. The judge before whom the cause was tried directed a restoration of the vessel and cargo, as neutral property, but refused to award damages for the capture and detention, because, in his opinion, there was probable cause to suspect the vessel to be American. On an appeal to the circuit court, this sentence was reversed, because the *Flying Fish* was on a voyage from, not to, a French port, and was, therefore, had she even been an American vessel, not liable to capture on the high seas.

During the hostilities between the United States and France, an act for the suspension of all intercourse between the two nations was

annually passed. That under which the *Flying Fish* was condemned, declared every vessel owned, hired or employed, wholly or in part, by an American, which should be employed in any traffic or commerce with or for any person resident within the jurisdiction, or under the authority of the French Republic, to be forfeited, together with her cargo; the one-half to accrue to the United States, and the other to any person or persons, citizens of the United States, who will inform and prosecute for the same. The 5th section of this act authorizes the President of the United States to instruct the commanders of armed vessels "to stop and examine any ship or vessel of the United States, on the high seas, which there may be reason to suspect to be engaged in any traffic or commerce contrary to the true tenor of the act, and if, upon examination, it should appear that such ship or vessel is bound or sailing *to* any port or place within the territory of the French Republic or her dependencies, it is rendered lawful to seize such vessel and send her into the United States for adjudication.

It is by no means clear that the President of the United States, whose high duty it is to "take care that the laws be faithfully executed," and who is commander-in-chief of the armies and navies of the United States, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited, by being engaged in this illicit commerce. But when it is observed that the general clause of the first section of the act which declares that "such vessels may be seized, and may be prosecuted in any district or circuit court, which shall be holden within or for the district where the seizure shall be made," obviously contemplates a seizure within the United States; and that the 5th section gives a special authority to seize on the high seas, and limits that authority to the seizure of vessels bound, or sailing *to* a French port, the legislature seem to have prescribed that the manner in which this law shall be carried into execution was to exclude a seizure of any vessel not bound *to* a French port. Of consequence, however strong the circumstances might be, which induced Captain Little to suspect the *Flying Fish* to be an American vessel, they could not excuse the detention of her, since he would not have been authorized to detain her, had she been really American.

It was so obvious, that if only vessels sailing to a French port could

be seized on the high seas, that the law would be very often evaded, that this Act of Congress appears to have received a different construction from the executive of the United States; a construction much better calculated to give it effect. A copy of this act was transmitted by the secretary of the navy, to the captains of the armed vessels, who were ordered to consider the 5th section as a part of their instructions. The same letter contained the following clause:

> A proper discharge of the important duties enjoined on you, arising out of this act, will require the exercise of a sound and an impartial judgment. You are not only to do all that in you lies to prevent all intercourse, whether direct or circuitous, between the ports of the United States and those of France or her dependencies, where the vessels are apparently as well as really American, and protected by American papers only, but you are to be vigilant that vessels or cargoes, really American, but covered by Danish or other foreign papers, and bound to or from French ports, do not escape you.

These orders, given by the executive, under the construction of the Act of Congress made by the department to which its execution was assigned, enjoin the seizure of American vessels sailing from a French port. Is the officer who obeys them liable for damages sustained by this misconstruction of the act, or will his orders excuse him? If his instructions afford him no protection, then the law must take its course, and he must pay such damages as are legally awarded against him; if they excuse an act, not otherwise excusable, it would then be necessary to inquire, whether this is a case in which the probable cause which existed to induce a suspicion that the vessel was American, would excuse the captor from damages when the vessel appeared in fact to be neutral?

I confess, the first bias of my mind was very strong in favor of the opinion, that though the instructions of the executive could not give a right, they might yet excuse from damages. I was much inclined to think that a distinction ought to be taken between acts of civil and those of military officers; and between proceedings within the body of the country and those on the high seas. That implicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system, appeared to me strongly to imply the principle, that those orders, if not to perform a prohibited act, ought to justify the person whose general duty

it is to obey them, and who is placed by the laws of his country in a situation which, in general, requires that he should obey them. I was strongly inclined to think that where, in consequence of orders from the legitimate authority, a vessel is seized with pure intention, the claim of the injured party for damages would be against that government from which the orders proceeded, and would be a proper subject for negotiation. But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is that the instructions can not change the nature of the transaction, nor legalize an act which, without those instructions, would have been a plain trespass.

It becomes, therefore, unnecessary to inquire whether the probable cause afforded by the conduct of the *Flying Fish* to suspect her of being an American, would excuse Captain Little from damages for having seized and sent her into port? since, had she been an American, the seizure would have been unlawful. Captain Little, then, must be answerable in damages to the owner of this neutral vessel, and as the account taken by order of the circuit court is not objectionable on its face, and has not been excepted to by counsel before the proper tribunal, this court can receive no objection to it.

There appears, then, to be no error in the judgment of the circuit court, and it must be affirmed with costs.

HALLET & BOWNE v. JENKS AND OTHERS[1]

Marine insurance.—Illegal voyage

A vessel belonging to citizens of the United States, in the year 1799, driven by distress into a French port, and obliged to land her cargo, in order to make repairs, and prevented by the officers of the French Government from reloading her original cargo, and from taking away anything in exchange but produce or bills, might purchase and take away such produce, without incurring the penalties of the non-intercourse act of June 13, 1798.[2] And such voyage was not illegal, so as to avoid the insurance.

Hallet *v.* Jenks, 1 Caines' Cas. 43; s. c. 1 Caines' Rep. 64, affirmed.

This was a writ of error to the "Court for the Trial of Impeachments, and the Correction of Errors, in the State of New York," under the act of Congress of the 24th September, 1789, § 25 (1 U. S.

[1] 3 Cranch, 210; February term, 1805. [2] *Supra*, p. 56.

Stat. 85), which gives the Supreme Court of the United States appellate jurisdiction upon a judgment in the highest court of a State, in which a decision in the suit could be had, where is drawn in question the construction of any clause of a statute of the United States, and the decision is against the right, privilege or exemption, specially set up or claimed by either party, under such statute.

The action was upon a policy of insurance, and the only question to be decided by this court was, whether the risk insured was illegal, under the act of Congress (commonly called the non-intercourse law) of the 13th June, 1798 (1 U. S. Stat. 565). For although another question appears to arise upon the record, viz., whether a condemnation in a foreign court, as enemy's property, be conclusive evidence of that fact, yet this court is prohibited by the same 25th section of the act of 1789, to consider any other question than that which respects the construction of the statute in dispute.

On the trial of the general issue, a special verdict was found, containing the following facts:

That on the 27th day of April, 1799, the defendants, for a premium of 25 per cent, insured for the plaintiffs against all risks, $1,000, upon 25,000 pounds weight of coffee, valued at 20 cents per pound, on board the sloop *Nancy,* from Hispaniola to St. Thomas. That in the margin of the policy was inserted a clause in the following words, "warranted the property of the plaintiffs, all Americans," but that the words "all Americans," were added, after the policy was subscribed; that the sloop *Nancy* was built at Rhode Island, and belonged to citizens of the United States, resident in Rhode Island, as well when she left that State, as at the time of her capture, and being chartered by the plaintiffs, sailed from Newport, in Rhode Island, on the 12th day of December, in the year 1798, on her first voyage to the Havana; that in the course of the said voyage, she was compelled, being in distress, to put into Cape François, in the island of Hispaniola, a country in the possession of France, where she arrived on the 5th day of January, 1799; that the master and supercargo of the sloop were part owners of the cargo, and two of the plaintiffs in this suit; that having so put into Cape François, the cargo was landed to repair the vessel; that the public officers acting under the French Government there, took from them nearly all the provisions on board the sloop, and the master and supercargo were permitted to sell, and did sell, the remainder, to different persons there; that the master and supercargo

made a contract with the public officers, by which they were to be paid for the provisions in thirty days, but the payment was not made; that, with the proceeds of the remaining parts of the cargo, they purchased the whole of the cargo which was on board, at the time of the capture, and also seventeen hogsheads of sugar, which they sent home to New York, on freight; that the said officers forbade the said master and supercargo of the sloop, from taking on board the cargo landed from the said vessel, or from conveying from the said island any specie, by reason whereof they were compelled to sell the same, and to take the produce of that country in payment. That the sloop, with 30,000 weight of coffee on board, 25,000 pounds weight of which was intended to be insured by the present policy, sailed from Cape François, on the 23d day of February, in the year last aforesaid, on the voyage mentioned in the policy of insurance, having on board the usual documents of an American vessel; that the sloop, in the course of her said voyage, was captured by a British frigate, and carried into the island of Tortola, and vessel and cargo libelled, as well for being the property of the enemies of Great Britain, as for being the property of American citizens, trading contrary to the laws of the United States; that, at the time of the capture of the sloop, besides the documents aforesaid, the following paper was found on board:

Liberty—Safe Conduct—Equality

At the Cape, 11th Termidor, sixth year of the French Republic, one and indivisible. The general of division and private agent of the executive directory at St. Domingo, requests the officers of the French navy and privateers of the republic, to let pass freely the American vessel called the ———, ——— master, property of Mr. E. Born Jenks, merchants at Providence, State of Rhode Island, in the United States, arrived from the said place to the Cape François, for trade and business. The citizen French consul, in the place where the said vessel shall be fitted out, is invited to fill with her name, and the captain's, the blank left on these presents; in attestation of which, he will please to set his hand hereupon.

(Signed) J. Hedouville.
Gauthier,
the general secretary of the agency.

Which paper was received on board the sloop, at Cape François, and was on board when she left that place; that the property insured

by the policy aforesaid was claimed by the said Zebedee Hunt, and was condemned by a sentence of the said court of vice-admiralty, in the following words: "That the said sloop *Nancy,* and cargo on board, claimed by the said Zebedee Hunt, as by the proceedings will show to be enemy's property, and as such, or otherwise, liable to confiscation, and condemned the same as good and lawful prize to the captors." That the plaintiffs are Americans, and were owners of the property insured, and that the same was duly abandoned to the underwriters.

That part of the act of Congress, which the underwriters contended had been violated by the defendants in error, is as follows:

> § 1. That no ship or vessel, owned, hired or employed, wholly or in part, by any person resident within the United States, and which shall depart therefrom, after the first day of July next, shall be allowed to proceed directly, or from any intermediate port or place, to any port or place within the territory of the French Republic, or the dependencies thereof, or to any place in the West Indies, or elsewhere, under the acknowledged government of France, or shall be employed in any traffic or commerce with or for any person, resident within the jurisdiction, or under the authority of the French Republic. And if any ship or vessel, in any voyage thereafter commencing, and before her return within the United States, shall be voluntarily carried, or suffered to proceed to any French port or place as aforesaid, or shall be employed as aforesaid, contrary to the intent hereof, every such ship or vessel, together with her cargo, shall be forfeited, and shall accrue, etc.

The second section enacts, that after the first of July, 1798, no clearance for a foreign voyage shall be granted to any ship or vessel owned, hired or employed, wholly or in part, by any person resident within the United States, until a bond shall be given, in a sum equal to the value of the vessel and cargo, "with condition, that the same shall not, during her intended voyage, or before her return within the United States, proceed or be carried, directly or indirectly, to any port or place within the territory of the French Republic, or the dependencies thereof, or any place in the West Indies, or elsewhere, under the acknowledged government of France, unless by distress of weather, or want of provisions, or by actual force or violence, to be fully proved and manifested before the acquittance of such bond; and that such vessel is not, and shall not, be employed, during her intended

voyage, or before her return, as aforesaid, in any traffic or commerce with or for any person resident within the territory of that republic, or in any of the dependencies thereof." June 13, 1798. (1 U. S. Stat. 565.)

Mason, for the plaintiffs in error.—If the insurance was upon an illegal transaction, the defendants in error have no right to recover. The only question for the consideration of this court is, whether it be a transaction prohibited by the act of Congress. If the purchase of this cargo in Cape François was lawful, the policy is good.

The first section of the act has two branches, and contemplates two separate offenses: 1st. That no vessel shall be allowed to go to a French port. But this prohibition must be subject to the general principle, that the act of God, or of the public enemy, shall be an excuse. 2d. That if driven into such port by distress, or involuntarily carried in, yet there shall be no trade or traffic. The words are, "if any vessel shall be voluntarily carried, or suffered to proceed to any French port or place as aforesaid, or shall be employed as aforesaid." The going in must be voluntary, but the legislature carefully omit the word voluntarily, when speaking of the offense of trading, for all trading must be voluntary; it can not be by compulsion. The object was to prevent intercourse, and the statute only makes the same saving of the forfeiture which a court would have made without such a saving clause.

The condition of the bond mentioned in the second section confirms this construction of the first. It is divided into two clauses, agreeable to the two offenses to be provided against. The proviso "unless by distress of weather," etc., is annexed only to the offense of going into the port, but there is no saving or exception as to the offense of trading. If she had not been driven in by distress of weather, she would have been liable to forfeiture, under the first offense. But having been employed in traffic with persons resident, etc., she is equally liable to forfeiture, under the second, and the condition of the bond has been substantially broken.

The special verdict states, "that the master and supercargo were permitted to sell, and did sell, the residue of the cargo, to different persons there." Here was no compulsion. This selling was a violation of the law; but it is not that which avoids this policy. The fault was, that with the proceeds of those sales, the plaintiffs below purchased the cargo insured. There was no compulsion to do this, except

what I shall presently notice, as stated in the verdict. It will probably be contended, that the following words of the verdict show a compulsion, viz., "that the said officers forbade the said master and supercargo from taking on board the cargo landed from the said vessel, or from conveying from the said island any specie, by reason whereof, they were compelled to sell the same, and to take the produce of that country in payment." But this is only the reasoning of the jury, and the words, by reason whereof, show what kind of compulsion it was, and that it was not that inevitable necessity which can excuse the express violation of the law. The owners ought to have said to them, if you forbid us to take away our property, we must leave it, and look to our Government for an indemnification; for they have forbidden us to sell it to you, or to purchase a new cargo. The forbidding them to relade their goods, and to take away specie, was no compulsion to purchase produce. The verdict does not state that the master or supercargo attempted to resist the force; it may be wholly a colorable transaction.

The act of the 27th February, 1800 (2 U. S. Stat. 7), shows what the construction of that of 1798 ought to be. The third section of the former provides, that in case the vessel shall be compelled, by distress or superior force, to go into a French port, and shall there necessarily unlade and deliver, or shall be deprived of any cargo then on board, the master may receive payment in bills of exchange, money or bullion, and not otherwise, "and shall not thereby be understood to contravene this law." This is a clear implication, that if there had not been such an express permission to receive payment in bills of exchange, money or bullion, it would have been a contravention of the law; and that law, excepting this provision, is substantially the same as the law of 1798.

Harper, contra.—I might safely agree to the first position taken by the opposite counsel, that the first section of the act of 1798 creates two distinct offenses. But this is not so. The whole constitutes but one offense. How is a ship to be employed in traffic? She must bring and carry. If she did not go voluntarily, she was not employed in trafficking. If the master sell the cargo, under such circumstances, the vessel is not employed in traffic. But if the act creates two separate offenses, how is the vessel employed in the traffic? She did not carry the cargo there voluntarily. But it being there, and landed, neces-

sarily landed, how is the vessel concerned in the sales and purchases made by the master? The necessity of repairing the vessel is as much an excuse for landing the cargo, as stress of weather was for going in. The master was forbidden to relade it. But a difference is taken between prohibition and prevention. It is said, that the forbidding is not preventing. But by whom was the prohibition? By the officers of the Government, having authority and power to carry the prohibition into effect. It was, therefore, actual prevention.

What was the mischief intended to be remedied by the act of Congress? Not such a sale as this. It was to prevent a voluntary intercourse, not to prevent citizens of the United States from rescuing their property from impending loss. What is traffic? A contract by consent of both parties. If one is under compulsion, it is no contract, no traffic. The transaction disclosed by the verdict, is only the means of saving property from a total loss. The owners were not obliged to abandon, as the gentleman contends, property thus put in jeopardy. The master and supercargo were not free agents. They were not obliged to take bills, which they knew would not be paid. If I could have had a doubt upon this case it would have been removed by the decisions of the circuit courts of the United States. In a case before one of your Honors,[1] in Baltimore, a vessel had brought home from the French West Indies, a cargo of the produce of those islands, after having been compelled to go in and sell her outward cargo; and it was decided, that the case was not within this act of Congress. A similar case is understood to have been decided by another of your Honors,[2] in New York. If those cases were not within the law I am warranted in saying, this is not.

Those decisions produced the third section of the act of 1800, which the gentleman has cited, and which was introduced, to shut the door that had been left open. It was perceived, that the law, as it stood before, would give an opportunity of fraud. The third section was enacted to take away the temptation; because, although there might be cases, clear of fraud, it was thought best to sacrifice these particular cases, that fraud might be prevented in others. This section, therefore, has given a sanction to the decisions of the circuit courts.

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[1] Judge WASHINGTON.

[2] Judge PATERSON, in September, 1799, in the case of Richardson and others, cited in 1 Caines' Rep., p. 63.

Key, in reply.—It is clear, that there are two distinct prohibitions in the act. The two parts of the section are connected by the disjunctive "or," and not by the copulative "and." This is rendered still more evident, by the form of the condition of the bond described in the second section.

Whenever you rely on the necessity of the case, to justify your acts, you must not go beyond the necessity. All beyond is voluntary. In this case, it might go to the landing, and to the seizure of part, but not to the sale of the residue. The probability of loss is not necessity. If they took produce, it was only to avoid a greater loss. It was not an inevitable necessity. Another fact shows that it was trading; not merely taking on board, to bring home, property which they were compelled to receive. She was not coming home with the property, when she was captured, but going on a trading voyage. And the French pass states that she came to Cape François for trade and business. The intention of the act was to prevent all trading and intercourse with France or her dependencies.

In the case at Baltimore, before his Honor Judge WASHINGTON, the vessel returned directly home to Baltimore, with produce, which she had been compelled to take or abandon.

Mason, on the same side.—It is said, there must be a preexisting intention to go to a French port. If the sloop had arrived safe at the Havana, and been there sold to an agent of the French Government, it is clear, she would have been liable to forfeiture. So, if the French agent, who signed the passport, had freighted the vessel. These cases show that a preexisting intention is not necessary. The construction contended for would, indeed, open a wide door to fraud, as the gentleman has contended. It would only be necessary to start a plank, in sight of the port, and then go in to stop the leak, and the whole law is evaded.

March 6, 1805. MARSHALL, Ch. J., delivered the opinion of the court, to the following effect:—The court is of opinion, according to the best consideration they have been able to give the subject, that this case is not within the act of Congress of 1798, usually called the non-intercourse law.

It is contended by the counsel for the defendant, that the circumstances stated in the special verdict, do not show an absolute necessity

for the trading therein described. And it is said, the plaintiff might have abandoned the property, and sought redress of his government; and that it was his duty to do so, rather than violate the laws of his country. But the court is of opinion, that the act of Congress did not impose such terms upon a person who was forced by stress of weather to enter a French port, and land his cargo, and was prevented by the public officers of that port to relade and carry it away. Even if an actual and general war had existed between this country and France, and the plaintiff had been driven into a French port, a part of his cargo seized, and he had been permitted by the officers of the port to sell the residue, and purchase a new cargo, I am of opinion, that it would not have been deemed such a traffic with the enemy, as would vitiate the policy upon such new cargo. The terms of the act of Congress seem to imply an intentional offense on the part of the owners.

The case put, of a French agent going to the Havana, and there purchasing the cargo for the use of the French Government, under a preconcert with the owners, would certainly be an offense against the law; but when there is no such intention; when the vessel has been absolutely forced, by stress of weather, to go into a French port, and land her cargo; when part has been seized for the use of the Government of France, and the master has been forbidden by the public officers of the port to relade the residue, and to sell it for any thing valuable, except the produce of the country; the mere taking away such produce, can not be deemed such a traffic as is contemplated by the act of Congress.

Judgment affirmed, with costs.[1]

SANDS v. KNOX[2]

Non-intercourse act

The non-intercourse act of June 13, 1798,[3] did not impose any disability upon vessels of the United States, sold *bona fide* to foreigners, residing out of the United States, during the existence of that act.

Error to the Court for the Trial of Impeachments and the Correction of Errors, in the State of New York.

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[1] See the opinion of the supreme court of New York, in this case, in 1 Caines' Rep. 64, and that of the High Court for the Trial of Impeachments and Correction of Errors, in the State of New York, delivered by Lansing, Chancellor, in 1 Caines' Cases in Error, p. 43.

[2] 3 Cranch, 499; February term, 1806.

[3] *Supra,* p. 56.

Thomas Knox, administrator, with the will annexed, of Raapzat Heyleger, a subject of the King of Denmark, brought an action of trespass *vi et armis,* in the supreme court of judicature of the State of New York, against Joshua Sands, collector of the customs for the port of New York, for seizing and detaining a schooner called the *Jennett,* with her cargo.

The defendant, Sands, pleaded in justification, that he was collector, etc., and that after the 1st day of July, 1798, viz., on the 16th of November, 1798, the said schooner, then being called the *Juno,* was owned by a person resident within the United States, at Middletown, in Connecticut, and cleared for a foreign voyage, viz., from Middletown to the island of St. Croix, a bond being given to the use of the United States, as directed by the statute, with condition that the vessel should not, during her intended voyage, or before her return within the United States, proceed, or be carried, directly or indirectly, to any port or place within the territory of the French Republic, or the dependencies thereof, or any place in the West Indies, or elsewhere, under the acknowledged government of France, unless by stress of weather, or want of provisions, or by actual force or violence, to be fully proved and manifested before the acquittance of such bond, and that such vessel was not, and should not be, employed, during her said intended voyage, or before her return as aforesaid, in any traffic or commerce with, or for, any person resident within the territory of that republic, or in any of the dependencies thereof. That afterwards, on the 8th of December, 1798, she did proceed, and was voluntarily carried from Middletown to the island of St. Croix, in the West Indies, and from thence, before her return within the United States, to Port de Paix in the island of St. Domingo, being then a place under the acknowledged government of France, without being obliged to do so by stress of weather, or want of provisions, or actual force and violence, whereby, and according to the form of the statute, the said schooner and her cargo became forfeited, the one-half to the use of the United States, and the other half to the informer; by reason whereof, the defendant, being collector, etc., on the 1st of July, 1799, arrested, entered and took possession of the said vessel and cargo, for the use of the United States, and detained them as mentioned in the declaration, and as it was lawful for him to do.

The plaintiff, in his replication, admitted that the defendant was collector, etc., that at the time she sailed from Middletown for St. Croix,

she was owned by a person then resident in the United States; and that a bond was given as stated in the plea; but alleged, that she sailed directly from Middletown to St. Croix, where she arrived on the 1st of February, 1799, the said island of St. Croix then and yet being under the government of the King of Denmark. That one Josiah Savage, then and there being the owner and possessor of the said vessel, sold her, for a valuable consideration, at St. Croix, to the said Raapzat Heyleger, who was then, and until his death continued to be, a subject of the King of Denmark, and resident at St. Croix, who, on the 1st of March following, sent the said vessel, on his own account, and for his own benefit, on a voyage from Port de Paix to St. Croix, without that, that she was at any other time carried, etc.

To this replication, there was a general demurrer and joinder, and judgment for the plaintiff, which, upon a writ of error to the court for the trial of impeachments and correction of errors, in the State of New York, was affirmed. The defendant now brought his writ of error to this court, under the 25th section of the judiciary act of the United States. (1 U. S. Stat. 85.)

The only question which could be made in this court, was upon the construction of the act of Congress, of June 13, 1798 (1 U. S. Stat. 565), commonly called the non-intercourse act; the first section of which is in these words: "That no ship or vessel, owned, hired or employed, wholly or in part, by any person resident within the United States, and which shall depart therefrom, after the 1st day of July next, shall be allowed to proceed, directly, or from any intermediate port or place, to any port or place within the territory of the French Republic, or the dependencies thereof, or to any place in the West Indies, or elsewhere, under the acknowledged government of France, or shall be employed in any traffic or commerce with or for any person, resident within the jurisdiction or under the authority of the French Republic. And if any ship or vessel, in any voyage thereafter commencing, and before her return within the United States, shall be voluntarily carried, or suffered to proceed, to any French port or place as aforesaid, or shall be employed as aforesaid, contrary to the intent hereof, every such ship or vessel, together with her cargo, shall be forfeited, and shall accrue, the one-half to the use of the United States, and the other half to the use of any person or persons, citizens of the United States, who will inform and prosecute for the same; and shall be liable to be seized, prosecuted and condemned, in any

circuit or district court of the United States, which shall be holden within and for the district where the seizure shall be made."

The condition of the bond stated in the plea, corresponded exactly with that required by the second section of the act. The seventieth section of the act of 2d of March, 1799 (1 U. S. Stat. 678), makes it the duty of the several officers of the customs, to seize any vessel liable to seizure, under that or any other act of Congress respecting the revenue.

C. Lee, for the plaintiff in error.—The question is, whether the act of Congress does not impose a disability upon the vessel itself?

This vessel was clearly within the literal prohibition of the act. She was "owned wholly by a person resident within the United States." She did "depart therefrom, after the 1st day of July (then) next." She did "proceed from an intermediate port or place, to a place in the West Indies, under the acknowledged government of France." She was also a vessel which, "in a voyage thereafter commencing, and before her return within the United States," was "voluntarily carried, or suffered to proceed, to a French port." She had, therefore, done and suffered every act which, according to the letter of the law, rendered her liable to forfeiture, seizure and condemnation.

It is true, that the decision of this court, in the case of the *Charming Betsy,* 2 Cr. 115, seems, at first view, to be against us. But the present question was not made, and could not arise, in that case, because that vessel had not been to a French port, nor had she returned from a French port to the United States. If such a trade as the present case presents were to be permitted, the whole object of the non-intercourse act would be frustrated. A vessel of the United States may, according to the judgment in the case of the *Charming Betsy,* be sold and transferred to a Dane, and he may trade with her as he pleases; but we say, it is with this proviso, that he does not send her from a French port to the United States. He takes the vessel with that restriction. If he trades to the United States, he is bound to know and respect their laws. The intention of the law was not only to prevent American citizens, but American vessels, from carrying on an intercourse with French ports.

The case of the *Charming Betsy* was under the act of February, 1800; but the present case arises under that of 1798, which is very

different in many respects. The opinion in that case, so far as it was not upon points necessarily before the court, is open to examination. Neither the words of the law, nor the form of the bond, make any exception of the case of the sale and transfer of the vessel, before her return. If, therefore, a sale is made, it must be subject to the terms of the law; and although the vessel may not be liable to seizure upon the high seas, yet upon her return to the United States, it became the duty of the custom-house officer to seize her. The law ought to be so construed as to carry into effect the object intended. That object was, to cut off all intercourse with France, and by that means compel her to do justice to the United States. But if this provision of the law is to be so easily eluded, France will be in a better situation than before, for she will receive her usual supplies, and we shall be weakened by the loss of the carrying trade.

Bayard, contra, was stopped by the court.

MARSHALL, Ch. J.—If the question is not involved, whether probable cause will justify the seizure and detention; if there are no facts in the pleadings which show a ground to suspect that there was no *bona fide* sale and transfer of the vessel, the court does not wish to hear any argument on the part of the defendant in error. It considers the point as settled by the opinion given in the case of the *Charming Betsy,* with which opinion the court is well satisfied. The law did not intend to affect the sale of vessels of the United States, or to impose any disability on the vessel, after a *bona fide* sale and transfer to a foreigner.

Judgment affirmed.

Judgments of the Court of Claims of the United States

WILLIAM GRAY, Administrator, v. THE UNITED STATES[1]

[No. 7, French Spoliations. Decided May 17, 1886]

On the Proofs

The treaties of 1778[2] bind America and France in reciprocal obligations looking to independent sovereignty for the one and certain exclusive privileges for the other. Subsequent to the peace of 1782 the French revolutionary government charges violations of the treaty in not according to France her exclusive privileges, and on the publication of the Jay treaty, 1795, breaks off diplomatic relations. Between 1791 and the treaty of 1800[3] France is guilty of depredations on American commerce in violation both of treaties and the law of nations. A state of partial, maritime war exists. In 1800, negotiations being renewed, the French Government demands restoration of the exclusive privileges and indemnity for their withdrawal. The American offers 8,000,000 francs to be released, but insists on indemnity for its citizens. Finally the treaty of 1800 is ratified with both pretensions stricken out, France renouncing her claim for the treaty privileges and America her claim for the wrongs done her citizens. In 1885 an act is passed authorizing American citizens having *"valid claims to indemnity upon the French Government arising out of illegal captures, detentions, seizures, condemnations, and confiscations,"* prior to the treaty of 1800, to bring suit, and directing this court to *"determine the validity and amount"* thereof.

I. The power of this court to grant redress in the French spoliation cases is necessarily limited by the terms of the *Act of January* 20, 1885[4] (23 Stat. L. 283), conferring jurisdiction.

II. The act casts upon the courts the duty of determining judicially both that the French seizures were *"illegal"* and the American claims are *"valid."*

III. The treaties of alliance and commerce with France 1778, having been concluded upon the same day and the result of the same negotiation and signed by the same plenipotentiaries, are in diplomatic effect one instrument.

IV. The treaty of commerce assured to France exclusive privileges; the treaty of alliance cast upon the American Government the obligation

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[1] Court of Claims Reports, vol. 21, page 340. [2] *Infra,* pp. 441, 466.
[3] *Infra,* p. 487. [4] *Supra,* p. 92.

of maintaining French possessions in America; the Jay treaty of 1795, granting the same commercial privileges to England, necessarily conflicted with the French treaties.

V. A judicial tribunal must treat the facts of a former international dispute only as they affect private rights. Its decision can not properly be regarded as a reflection upon the treaty-making power.

VI. A seizure upon the high seas of an American vessel bound for a neutral port on the alleged ground of her having violated French regulations *"concerning the navigation of neutrals,"* was an illegal seizure, and the claims resulting therefrom a valid claim, for which the American Government was morally bound to demand redress.

VII. Concerning the question whether war existed between America and France prior to the treaty of 1800 and the nature and extent thereof, the judicial department must follow the political.

VIII. The acts of 1798 and 1799, the declarations and actions of the Executive, and the conduct and assurances of the two Governments conclusively show that while there was a limited maritime war (in its nature a prolonged series of reprisals), nevertheless no state of public general war existed, such as would abrogate treaties, suspend private rights, or authorize indiscriminate seizures and condemnations.

IX. The claims which the French Government renounced by the treaty of 1800 were national; those which our Government renounced were individual; and the reciprocal renunciation constituted the bargain effected by the treaty of 1800.

X. All claims urged by one nation upon another are technically national; but there is a distinction between claims founded upon injury to the whole people and those founded upon injury to particular citizens.

XI. The bargain whereby this Government obtained the renunciation of the French claims against itself, and the relinquishment of its obligations under the treaty of 1778, brings these cases within the provision of the Constitution, that "private property shall not be taken for public use without just compensation."

XII. The claims renounced by the treaty of 1800 were unliquidated demands for wrong and injury; the debts provided for by the treaty of 1803 were obligations in the nature of contract, or for captures as to which restitution had been ordered by the council of prizes. Therefore the latter treaty does not extend to the former demands.

XIII. The attempt of the French Government to regulate by its own decrees the conduct of neutral merchantmen upon the high seas was contrary to the law of nations and void; and the seizure of an American vessel on the alleged ground that her *"rôle d'équipage"* was not in the form prescribed by French law was illegal.

XIV. A citizen must exhaust his remedy in the courts of a foreign power before he can call upon his own Government for diplomatic redress;

but the decision of the foreign tribunal is not final, being the very beginning of the international controversy; and the doctrine is applicable only where the courts are open and the citizen free to seek redress.

XV. The treaty of 1819 with Spain does not extend to the French spoliation cases.

XVI. The treaty of 1831 with France does not extend to the claims renounced and, from an international point of view, extinguished by the treaty of 1800.

XVII. Whether the *Act of May* 28, 1798[1] (Stat. L. 561), abrogated the treaty of 1778 is an immaterial question here, inasmuch as the claims rest on the violation of neutral rights under the law of nations.

XVIII. The *French Spoliation Claims Act,* 1885[2] (23 Stat. L., § 3, p. 283), while requiring this court to determine the *"present ownership"* of a claim, does not require it to act as a court of probate and settle estates of deceased owners. Hence an action may be maintained by an administrator.

The Reporters' statement of the case:

This is the leading French spoliation case, but at the time when it was brought before the court a number of cases were presented by the various counsel, whose names are given below, and the general question of the Government's liability, and the general principles more or less applicable to all of these cases, were discussed at great length.

The decision was understood to be final as to this case, but no order was entered at the time of its rendition.

Mr. William Gray for the claimant, William Gray, administrator.

Mr. William E. Earle (with whom was *Mr. Samuel Shellabarger*) for the claimant, F. K. Carey.

Mr. Fisher Ames for the claimant, Fisher Ames, administrator.

Mr. Leonard Myers for various claimants residing in Philadelphia.

Mr. Lawrence Lewis, Jr., for the same and other parties.

Mr. J. Hubley Ashton for the city of Philadelphia.

Mr. Benjamin Wilson for the defendants.

DAVIS, J., delivered the opinion of the court:

This claim, one of the class popularly called "French spoliations," springs from the policy of the French revolutionary government be-

[1] *Supra,* p. 56. [2] *Supra,* p. 92.

tween the execution of King Louis XVI and the year 1801, a policy which led to the detention, seizure, condemnation, and confiscation of our merchant vessels peacefully pursuing legitimate voyages upon the high seas. Over ninety years have these claims been the subject of discussion and agitation, first between the two nations, and then between the individuals injured and the Government of the United States. Prolonged and heated negotiation resulted in the treaty of 1800, by which, it is urged on behalf of the claimants, their rights were surrendered to France for a consideration valuable to this Government. The claims being valid obligations admitted by the French Government, they contend that the United States, through this agreement, in which demands of the one nation were set off against those of the other, assumed as against their citizens these obligations and should pay them. This position is denied by the Government, which in addition presents other defenses based upon subsequent transactions between the two countries, urging that thereby were destroyed any beneficial rights possibly vested in the claimants, if their contention as to the treaty of 1800 be correct.

The act sending the claims to this court, while the third that has passed both Houses of Congress, is the first that has received the approval of a President, as one was vetoed by President Polk, another by President Pierce, while this, the third, was signed by President Arthur.

Whatever the rights of the claimants, they are without remedy other than that which Congress may have seen fit to give them; and our power to grant redress, be our opinion as to the justice of their claims what it may, is limited by the terms of the remedial statute. The force and effect of the act, by virtue of which the claimants appear at this bar seeking relief, must then be examined at the threshold of the discussion. The act authorizes "citizens of the United States or their legal representatives," having "valid claims to indemnity upon the French Government arising out of illegal captures, detentions, seizures, condemnations, and confiscations," prior to the ratification of the convention of 1800 with France, to apply here within a time limited (§ 1), that (§ 3) this court may "examine and determine the validity and amount" of their claims, the present ownership, and, if owned by an assignee, certain details in regard thereto. The act excludes from its benefits claims embraced in certain conventions with France and Spain, concluded in 1803, 1819, and 1831, and with pro-

visions as to rules of court, defense of the United States, evidence and other matters not important for our immediate purpose, directs this court, as to the claims thus placed within our jurisdiction, to report to Congress the first Monday of each December the facts found by us and our conclusions, which are to be taken, both as to law and facts, as advisory and not conclusive upon either party, the claimants or the Government.

So peculiar a jurisdiction was probably never before conferred upon a strictly judicial tribunal. The rights of the claimants, if any exist, arise from the acts of the political branch of the Government done in the protection and aid of the nation. For such rights there can be no remedy other than that granted by the legislature; in this instance the legislature has elected to transmit to the judiciary, under certain restrictions, the examination of the claimants' demands, with the proviso that the conclusion reached in this forum shall not be finally binding upon either party, but that the defendants, as well as the claimants, have reserved to them an appeal, not in the regular line of judicial procedure to the Supreme Court of the United States, but back again to that body, from which alone any remedy can come to the citizen for wrongs done him by his Government.

The reason for this peculiar grant of remedy is found in the nature of the claims, which spring from international controversies of the gravest character intimately entwined with the history of our struggle for independence; also in the age of the claims; and, lastly, in the absolutely indeterminate amount of financial responsibility which will be thrown upon the Government should the claims be found to exist as valid obligations due from the United States to their citizens. Good or bad, not one of these claims is enforceable but by the consent of the Congress, and the Congress can affix to that consent such condition as in their wisdom seems just and for the best interests of the Republic. The remedy now granted is an examination and advisory report by the judiciary, to be followed by a decision by the legislative branch of the Government.

It has been said that the validity of the claims as a class is admitted by the act, and this court should confine the examination to each individual claim for the purpose only of determining whether it falls within the class. This is understood to be in effect the argument on behalf of some of the claimants. Our labor and responsibility would be greatly lightened could we agree with this proposition, but the act

of Congress seems clearly to negative the contention, and to throw upon us the duty of investigating the validity of these claims against France and the assumption of them by the United States. It requires us to examine, not claims in a specified category or known by a generic name, not even "claims" simply, but "valid" claims against France, and valid claims arising not merely from captures, detentions, seizures, condemnations, and confiscations, but from acts of this nature which were "illegal." The validity of the claims, as against France, is the very first condition imposed by the legislature upon the grant of remedy. The claims must have been "valid" obligations existing at the time and which this Government had the right to enforce diplomatically before they come within the purport of the statute. To grant as correct the contention that we are to examine in each case whether, and only whether, the seized or detained vessel had violated the law of nations or the treaties—as, for illustration, drawn from the argument, whether she carried contraband of war, or attempted to break an actual blockade, or failed to carry proper papers—if we are to examine only into this, then effect is perhaps given to the word "illegal," found in the statute defining the nature of the acts from which the claims arise, but the word "valid," of equal if not superior force, is entirely ignored.

Clearly Congress expects from us an opinion as to the validity of claims of this class as against France, and the third section of the act, which requires us to receive "historic and documentary evidence," "to decide upon the validity of said claims according to the rules of law, municipal and international, and the treaties of the United States applicable to the same," and to report "all such conclusions of fact and law as in [our] judgment may affect the liability of the United States therefor," is not only confirmatory of this conclusion, but obliges us to go further and to examine into the resultant liability claimed to exist in the Government of the United States to compensate the claimants for the injuries alleged to have been sustained at the hands of the French Republic. This involves an examination of the history of the relations between the two countries from 1777, when negotiations for the treaties of alliance and commerce began, as the whole contention starts with the treaties of 1778 with France, which came to us during the darkest hours of the struggle for independence, and when we were hoping against hope for the aid which there was no prospect of receiving.

Burgoyne had capitulated, Howe had been driven from New Jersey,

and, after the drawn battle of Germantown, was shut up in Philadelphia, where the ease and luxury of a city camp were but occasionally interrupted by an excursion against the enemy on land or an encounter upon the river. Curiously enough, at the end of a successful campaign, the American cause was, barring the indomitable spirit of the patriots, in the direst straits.

Gates, excited by his success at the north and become the president of the executive board of war, had broken with Washington and had used his influence successfully in securing the appointment as inspector-general, against Washington's earnest protest, of a man who had openly defied the commander-in-chief. Washington's army of less than nine thousand men, lying at Valley Forge, was violently assailed by the State of Pennsylvania for not prosecuting an active winter campaign, while even in Congress, to which the remonstrance of the State's council and assembly had been addressed, there was deep discontent as to the policy of the commander-in-chief and sharp criticism upon his conduct. In Philadelphia the British, lodged in comfortable houses, were surrounded by every luxury which a full purse and communication with the outer world could afford; while in the Continental camp, as Washington wrote to Congress, the army was so reduced by cold and starvation, that unless some capital change took place it must "starve, dissolve, or disperse." In Philadelphia there was every comfort and almost every means of dissipation; at Valley Forge nearly three thousand men were unfit for duty because they were barefooted "and otherwise naked" (Sparks's Washington, vol. 5, pp. 197–203), while many were in the hospitals and farm-houses wanting clothes and shoes (*ibid.*). So desperate was the situation that General Huntington preferred fighting to starving, his brigade being out of provisions, while General Varnum, quoting the saying of Solomon that "hunger will break through a stone wall," added, "three days successively we have been destitute of bread; two days we have been entirely without meat. The men must be supplied or they can not be commanded." (*Ibid.* 193.)

This condition of his severely-tried army Washington represented to Congress eloquently and repeatedly. Practically that body did nothing to remedy the evil, but on the other hand, suggested the propriety of attacking Philadelphia, while an expedition of 1,000 men was, against Washington's judgment, detached for an invasion of Canada; an expedition abundantly supplied with commanders in the

persons of three major-generals, but unfortunately lacking in such necessary military details as food, clothing, and transportation. (Bancroft, vol. 9, ch. 27.) The financial condition of the country was in harmony with the physical condition of the army, and the issue of eight and one-half millions of paper money caused an enormous depreciation in the value of the currency, increased the feeling of financial insecurity and necessarily impaired the credit of the Government. The army was small, insufficiently fed, paid, and clad; before them was a strong, rich, and prosperous enemy; the Government was weak, the currency suspected, while disaffection, discontent, and jealousy were prevalent among the highest officers.

Such was the close of the year 1777 at home. Hardy, determined, patriotic, self-sacrificing as the sturdy revolutionists were, probably some way would have been found out of these apparently overwhelming misfortunes; how, no one at that time could possibly foresee. Relief was, however, after weary waiting, to come from a quarter where it had long been expected with hope constantly deferred.

Franklin had early established indirect and secret relations with the court of France through his friend Dumas, a Swiss man of letters residing chiefly in Holland, who was a devoted adherent of the American cause, and who early advised an alliance with France and Spain, it being to their interest that the United States should be independent of England, "whose enormous maritime power [filled] them with apprehensions." In 1776 Silas Deane was sent out as a political agent, and he soon opened secret and informal relations with the French department of foreign affairs. He could not succeed in obtaining from France any open action, but his purchase of munitions of war and supplies, and his many other acts in direct violation of strict neutrality were permitted, winked at, and encouraged. He was told that it was for the interest of both countries "to have the most free and uninterrupted intercourse," but that, the understanding with Britain being good, there could not be recognition of the shipping of military supplies and stores.

Practically in this condition did matters remain after the arrival of the commissioners (Franklin and Lee), although they also constantly pressed the argument contained in the instructions to Deane, namely: France is the country it is fittest for us to obtain and cultivate; the commercial advantages Britain has enjoyed with the colonies have greatly contributed to her wealth and importance; a great part of that

commerce will fall to France, especially (and here is the key of the negotiation) if she favors us now, for our trade is rapidly increasing, our population is rapidly increasing, we are waxing strong and rich, with a great future before us; why not step in now, even at the cost of war with England, a war which under any circumstances you momentarily expect.

French popular sentiment was with us, but to the popular clamor, delicately excited by the astute diplomacy of Franklin and his colleagues, was opposed the clear and calm judgment of the King's advisers, men who conceived it their duty to obtain for their master every advantage possible from the struggling colonies at the least possible expense and risk. Supplies and stores were furnished, but the assistance was not acknowledged; munitions of war found their way across the Atlantic, while the fact was denied to England, and although some of these very supplies came from the arsenals of the Government, that fact even was denied to our own representatives who had forwarded them, and who, as matter of course, knew as much of the transaction as the minister who permitted and disavowed it. Day after day without tiring did Dumas, Deane, Franklin, and Lee press for open action on the part of France. Steadily did they receive promises and secret aid, but always were they postponed as to the great step which should produce France openly to the world as the ally of the colonies and the avowed enemy of England. Before the eyes of Count Vergennes was successfully dangled the bait of a practically exclusive share in American commerce, but still he hoped to secure this advantage without an open rupture with England.

In this condition did matters rest until the news arrived of Burgoyne's defeat. This news, which reached France early in December, 1777, "apparently occasioned as much general joy as if it had been a victory of their own troops over their own enemies." (The commissioners to Committee on Foreign Affairs, Paris, December 18, 1777.) The negotiations instantly took so long a stride forward that before the 18th of December it was decided to conclude a treaty of amity and commerce, the King becoming fixed in his determination to acknowledge and support the independence of the colonies by every means in his power. Nothing could be more generous and liberal than the whole tone and manner of the French negotiation from this time. Once decided and committed as to the policy of openly supporting the colonies, there were no half-spirited measures, no halting at petty de-

tails, no discussion of unimportant trifles, but a generous and open support; nevertheless, it was not until Gates's victory at Saratoga had seemed to turn the tide of events, and while still in ignorance of the want and suffering at Valley Forge, that this action, so vital to the future of the American Republic, was taken. The war for independence was with the assistance of France prosecuted to a successful issue, and at Yorktown the surrender of Cornwallis was made to the combined armes of Washington and Rochambeau under the guns of the fleet of De Grasse.

This brief view of the situation, rehearsing, as it does, details of most familiar history, is only of importance as it relates to what may be called sentimental points made in the argument. The treaties of 1778 were made in obedience to a popular demand in France; they were made for a consideration then deemed valuable by France, and at a moment which then seemed opportune to France; but they came to us when the tide was apparently turning against us, and the aid they promised was generously given us.

The 30th day of November, 1782, provisional articles of peace, acknowledging the thirteen former colonies "to be free and independent," were signed at Paris by the representatives of the United States and Great Britain; the 20th of January, 1783, a cessation of hostilities was declared, and the 3d of September, 1783, the definitive treaty of peace was concluded. France had thus given the major portion of the consideration offered by her for the contract of 1778, and the United States were free, sovereign, and independent, as she had stipulated they should be.

The treaties of 1778 were two in number; that of "alliance," the one of most immediate, and, in fact, at the time, of absolutely vital importance to the United States; and that of "amity and commerce." While separate instruments, they were concluded upon the same day, were the result of the same negotiation, signed by the same plenipotentiaries, and are, in diplomatic effect, one instrument. The treaty of alliance, after referring to its companion, the treaty of commerce, states that the two powers "have thought it necessary to take into consideration the means of strengthening the engagements therein made," and of "rendering them useful to the safety and tranquillity of the two parties: particularly in case Great Britain, in resentment of that connection, . . . should break the peace with France, either by direct hostilities or by hindering her commerce and naviga-

tion in a manner contrary to the rights of nations and the peace subsisting between the two crowns;" and the two powers resolving in such case to join against the common enemy determined upon the treaty, which provided that if war should break out between France and Great Britain during the war for American independence, each party should aid the other according to the exigencies, as good and faithful allies; that the essential end of the alliance, called a "defensive" alliance, was the "liberty, sovereignty, and independence, absolute and unlimited, of the United States."

Provision was also made for a possible conquest of Canada, Bermuda, and the islands in the Gulf of Mexico, and each party was forbidden to conclude a truce or peace with Great Britain without the consent of the other. It was further agreed that neither should lay down arms until the independence of the United States was assured by treaties terminating the war. No claim was to be made by one against the other for compensation, whatever the result, and then came the guaranty, out of which afterwards arose so serious complications, national and international, which not only drove our country, weak and exhausted from seven years' strife, to the verge of war, but also stirred up at home a bitter political contest, carried even into the intimacy of a President's Cabinet.

These stipulations are contained in the eleventh and twelfth articles, whereby each party guaranteed "forever against all other powers"—first, the United States to France: all the possessions of France in America as well as those it might acquire by any future treaty of peace; second, France to the United States: "their liberty, sovereignty, and independence, absolute and unlimited," together with their possessions and their additions or conquests made from Great Britain during the war. Such, in substance, was the treaty of alliance; it has never been contended, so far as known to us, that France did not fulfill the requirements which this instrument imposed upon her during our contest with Great Britain.

The provisions of the other agreement, the treaty of commerce, of importance in this case (alluding to them briefly) required protection of merchantmen; required ships of war or privateers of the one party to do no injury to the other; and provided especial, purely exceptional, and exclusive privileges by each party to the other as to ships of war and privateers bringing prizes into port.

The treaty of alliance was not one-sided, for it imposed upon the

United States a possible duty and burden in the fulfillment of the guaranty of French possessions in America "forever" against all other powers. This issue was presented without delay. The French revolution began; in 1793 the King was beheaded, when France was instantly brought face to face with the powers of Europe, and her possessions in America were soon wrested from her.

England was in the vanguard of the war, and concluded twenty-three treaties with her allies, in which they agreed to starve out the common enemy. To this end was it stipulated that all the ports should be shut against France; that no provisions should be permitted to be exported to France, and that these measures should be continued and others employed for the purpose of injuring French commerce and to bring that nation to just conditions of peace. (Treaty between Great Britain and Prussia, July 14, 1793.) The animus of the alliance is further shown in the instruction of the Czar, who directed his admiral, in fulfillment of stipulations with Great Britain, to prevent the French from receiving supplies, and to that end to seize all French vessels and to send back to their own ports all neutral vessels bound to France, stating that while these measures were not "strictly conformable to the natural laws of war" they were justifiable when employed against "those arrant villains, who have overturned all duties observed towards God, the laws, and the Government; who have even gone so far as to take the life of their own sovereign."

All Europe, except Sweden and Norway, was now arrayed against the new Republic in a bitterness of warfare scarcely with parallel, and which openly descended to an attempt to starve the French people into submission through an attack upon neutral commerce, a course admittedly unjustified by the laws of war. Naturally France looked to the United States for aid, relying upon the pledge of the treaty of 1778 and the assistance rendered us in our scarcely-concluded struggle by her fleet, armies, and treasury.

The commercial relations between France and the United States were already most unsatisfactory. Exceptional favors granted the United States in 1787 and 1788 (Foreign Relations, vol. 1, pp. 113–116) and had been withdrawn and the equality upon which French and British vessels were put in our ports had excited jealousy. "No exceptional advantages had come to France from the war of the revolution, and American commerce had reverted to its old British channels." (*Treaties and Conventions*, etc., Bancroft Davis, 985.)

Jefferson, who had been transferred from the legation in Paris to the office of Secretary of State, endeavored to secure the conclusion of a new commercial treaty, but unsuccessfully, and in April, 1792, we find him instructing Mr. Morris that "it will be impossible to defer longer than the next session of Congress some counter regulations for the protection of our navigation and commerce. I must entreat you, therefore, to avail yourself of every occasion of friendly remonstrance on this subject. If they wish an equal and cordial treaty with us we are ready to enter into it." (Jefferson's Works, vol. 3, p. 356.) In June he again writes that "we can not consent to the late innovations without taking measures to do justice to our own navigation" (*ibid.* 449), and after the imprisonment of the King he informed Morris that some matters, such "as reforming the unfriendly restrictions on our commerce and navigation," might be transacted even by the revolutionary government, as a government *de facto*. (*Ibid.* 489.)

The new French minister, M. Genet, started for the United States in the spring of 1793 armed with three hundred blank commissions "to distribute to such as [would] fit out cruisers in our ports to prey on the British commerce." (Foreign Relations, vol. 1, p. 354.) Finally, the condition of affairs caused by the war led to the President's proclamation of neutrality, from which, curiously, and by way of compromise, the word "neutrality" was omitted. (Jefferson's Works, vol. 3, p. 591.)

Genet arrived in the United States the 8th of April, and on the 22d of that month the proclamation was issued declaring that "the duty and interest of the United States require that they should with sincerity and good faith adopt and pursue a conduct friendly and impartial towards the belligerent powers."

Already at Charleston, where he landed, Genet had commissioned privateers and sent them to sea, asserting this action to be authorized by the treaty of 1778, and informing the Secretary of State of his wish that the Federal Government "should observe, as far as in their power, the public engagements contracted by both nations; and that by this generous and prudent conduct they will give at least to the world the example of a true neutrality which does not consist in the cowardly abandonment of their friends in the moment when danger menaces them, but in adhering strictly, if they can do no better, to the obligations they have contracted with them." (Foreign Relations, vol. 1, p. 151.)

In September following Genet asked for fire-arms and cannon to protect the French possessions guaranteed by the United States, but he was answered by the Secretary of War, with what he terms "an ironical carelessness," that "the principles established by the President in his proclamation did not permit him to lend us so much as 'a pistol.'" (Senate Doc. 102, 19th Cong., 1st sess., p. 219.)

The French law of May 15, 1791, which "inhibited Americans from introducing, selling, and arming their vessels" in France, and "from enjoying all the advantages allowed to those built in the ship-yards of the Republic," was suspended by the national convention the 19th day of February, 1793, when extensive privileges were granted our commerce (*ibid.* 35), but in less than three months (9th May, 1793), seventeen days after the date of the President's proclamation, but before news of its contents could have been received, the National Convention issued a decree ordering the arrest of any neutral vessels laden with provisions bound to an enemy's port. That this was an open and palpable violation of neutral rights was not denied, for it was a measure understood to be retaliatory to the course pursued by Great Britain, and compensation was promised to those neutrals who should suffer by its operation. (*Ibid.* 42.)

This decree of May 9, 1793, authorized French vessels of war and privateers to arrest neutral vessels laden with provisions, the property of neutrals, but destined to an enemy's port, or laden with enemy's merchandise, the merchandise to be prize, and the neutral provisions to be paid for, together with proper freight and indemnity for delay. The 23d of the same month American vessels were exempted from the operation of this decree (Foreign Relations, vol. 1, p. 244); five days later this second decree was suspended; July 1 it was again put in force; and July 27 it was repealed, leaving the decree of May 9 finally in force as against American commerce. (*Ibid.*, vol. 3, p. 284.) Our minister remonstrated, and the national assembly vacillated; nevertheless the decree was executed in plain and admitted violation of neutral rights.

The decree of May 9, 1793, and that of November 18, 1794, directed the seizure of neutral vessels containing enemy's goods, although the treaty of 1778 expressly provided that "free ships make free goods" (Art. 23, Treaty of Commerce); and further, under an ordinance of 1744, revived for the purpose, a foreign vessel having on board a supercargo or officer from an enemy's country, or whose crew was by more

than one-third subjects of an enemy, was adjudged prize. Mere clearance for some of the West India Islands, by decree of February 1, 1797, subjected neutral vessels to capture and confiscation; the decree of January 18, 1798, issued by the council of five hundred, condemned neutral vessels carrying any British merchandise, and March 2, 1797, came into force the requirement of the crew list or "*rôle d'équipage,*" which will be more fully considered hereafter. (Doc. 102, p. 160.)

President Washington, in 1793 (message December 5), spoke of the vexations and spoliations understood to have been committed on our vessels and commerce by the cruisers and officers of some of the belligerent powers as requiring attention, and suggested that, on receipt of proofs, "due measures would be taken to obtain redress of the past and more effectual provisions against the future;" whereupon proof began immediately to be furnished.

Before this, the Secretary of State, then Mr. Jefferson, had advertised to the world assurances of governmental protection and aid.

> I have it in charge from the President [he said in his circular of August 27, 1793,] to assure the merchants of the United States concerned in foreign commerce or navigation that our attention will be paid to any injuries they may suffer on the high seas or in foreign countries, contrary to the laws of nations and existing treaties, and that on their forwarding hither well authenticated evidence of the same, proper proceedings will be adopted for their relief.

Mr. Morris had already brought to the attention of the French minister of foreign affairs "the obnoxious acts of the late assembly," but without securing redress, as the "attention of the Government was too strongly directed towards itself" to think of exterior interests. "and the assembly, at open war with the executive, would certainly reject whatever should now be presented to them." (Doc. 102, p. 31.)

Meantime our relations with Great Britain had become extremely threatening, various questions growing out of the revolution still remained unadjusted, and when the instructions given by the admiralty, June 8, 1793, became known in the United States it was felt that decisive action could not be longer delayed. These instructions directed the commanders of His Majesty's ships of war and privateers to seize all vessels loaded with corn, flour, or meal bound to any port in France,

or to any port occupied by French armies, and to send the vessels thus seized into any convenient harbor that the cargo might be purchased by the British Government and the ships released; also to seize all ships, whatever their cargo, bound to a blockaded port; also to warn off under penalty of seizure any vessel destined to a port not actually blockaded, but "declared" to be blockaded. (Foreign Relations, vol. 1, p. 240.)

Great Britain, when complaint was made of these orders, attempted to justify them upon the insufficient plea that provisions were contraband of war. (Foreign Relations, vol. 1, pp. 240, 448 *et seq.*) Correspondence leading to no prospect of a satisfactory result, the President nominated Mr. Jay as minister, saying to the Senate (April 16, 1794), that "as peace ought to be pursued with unremitted zeal before the last resource, which has so often been the scourge of nations, and can not fail to check the advanced prosperity of the United States, is contemplated," he had concluded to take this action. (*Ibid.* 447.) The instructions given Mr. Jay are not of importance in this connection, as it is sufficient to note the result of his negotiation in the treaty which bears his name, and to compare its important provisions with our agreement made in 1778 with the King of France.

We had promised France that their ships of war and privateers might freely carry whithersoever they pleased the ships and goods taken from their enemies; that these prizes should not be arrested or seized, or examined, or searched in our ports, but might at any time freely leave, while no shelter or refuge was to be given to vessels having made prize of her "subjects, people, or property." (Art. 17, Treaty of Commerce, 1778.) The United States had thus given France, and for consideration, not only a valuable, but an exclusive right; yet the Jay treaty, in the twenty-fifth article, gave these same privileges to Great Britain, excluding all vessels which "should have made prize upon [her] subjects."

The conflict of the treaties is evident and of course was fully appreciated at the time.

While the Jay treaty was concluded in November, 1794, its ratifications were not exchanged until October the following year, and meantime the British orders in council directing seizure of our vessels and provisions bound to France were so enforced as to call forth from Mr. Randolph, then Secretary of State, the warning, as late as July, 1795, that the Jay treaty had not yet been ratified by the President;

"the late British order in council for seizing provisions is a weighty obstacle to ratification. I do not suppose that such an attempt to starve France will be countenanced." (Foreign Relations, vol. 1, p. 719.) Every endeavor was made by the United States to secure a repeal of the admiralty order, but without success, and finally our minister in London, Mr. Adams, was instructed that if, after every prudent effort, he found it could not be removed, its continuance was not to be an obstacle to the exchange of ratifications. The order was not removed or modified; nevertheless ratifications of the treaty were exchanged the following October.

It should here be noted that soon after the exchange a commission was organized which, among other subjects, was to ascertain the amount of the claims of American citizens on Great Britain for captures made in violation of international law. After various interruptions the labors of this tribunal closed in February, 1804, when awards considerably exceeding a million and a quarter pounds sterling had been made in favor of the United States on account of these claims. (*Treaties and Conventions,* etc., Bancroft Davis, 1014–1016.) This commission existed by virtue of the sixth and seventh articles of the Jay treaty, the latter of which provided that whereas complaints had been made by citizens of the United States that during the course of the war "in which His Majesty is now engaged they have sustained considerable losses and damage by reason of irregular or illegal captures or condemnations of their vessels and other property under color of authority or commissions from His Majesty," it was agreed that where adequate compensation could not then be actually obtained in the ordinary course of justice full compensation would be made by the British Government.

Note further that these claims were for spoliations committed by England to starve the French, as the claims now before us are for spoliations committed by France to feed her people, and, again, remember, by way of explanation, that the remedy alluded to in the Jay treaty as being perhaps obtainable in due course of justice, was a possible recovery by the captured vessel in an action against the privateer upon his bond.

Mr. Morris, proving unacceptable to the French Government, was recalled at their request, and succeeded by Mr. Monroe, who endeavored to secure from his colleague, Mr. Jay, information as to the latter's negotiation, which was refused, as Monroe declined to pledge

himself not to communicate it to the French Government. (Foreign Relations, vol. 1, pp. 517, 700.) France was restive under the situation, and, shortly after the ratification of the treaty, asked whether the President had caused orders to be given to prevent the sale of prizes conducted into the ports of the United States by vessels of the Republic or privateers armed under its authority. As to this question the Secretary of State informed the President:

> That the twenty-fifth article of the British treaty having explicitly forbidden the arming of [French] privateers, and the selling of their prizes in the ports of the United States, the Secretary of the Treasury prepared, as a matter of course, circular letters to the collectors to conform to the restriction contained in that [article of the British treaty] as the law of the land. This was the more necessary, as formerly the collectors were instructed to admit to an entry and sale the prizes brought into our ports by the French.

The Secretary also wrote our minister in London that orders had been given to prevent the sale of prizes brought into United States ports by French privateers, "conformably with the twenty-fifth article" of the Jay treaty. So we had finally and openly transferred any exclusive rights of France under the treaty of commerce to her bitter enemy, Great Britain.

But we had another obligation towards our former ally, that of guaranteeing her West India Islands.

Long prior to this (December 11, 1787) Jefferson, while in Paris, had told the British minister there, during a discussion as to the effect of the treaties of 1778, in case of war between France and Great Britain, and told him "frankly and without hesitation," that the dispositions of the United States would then be neutral, and that this would be to the interest of both powers, because it would relieve both from all anxiety as to feeding their West India Islands; that England, too, by suffering us to remain so, would avoid a heavy land war on our continent, which might very much cripple her proceedings elsewhere; that our treaty [with France] indeed obliged us to receive into our ports the armed vessels of France, with their prizes, and to refuse admission to the prizes made on her by her enemies; that there was a clause, also, by which we guaranteed to France her American possessions, and which might perhaps force us into the war if these

were attacked. "Then it will be war," said the minister, "for they will assuredly be attacked."

In 1790 another American minister informed the English secretary of state for foreign affairs "that in a war between Great Britain and the House of Bourbon (a thing which must happen at some time) we [the United States] can give the West India Islands to whom we please, without engaging in the war ourselves, and our conduct must be governed by our interest" (Wait's American State Papers, vol. 10, p. 97); and this in face of a treaty concluded but twelve years before wherein we pledged ourselves to a guaranty "forever" of the possessions in America of that very House of Bourbon. Early in 1794 Mr. Jefferson, then Secretary of State, said, as to this subject, that he had no doubt we should interpose at the proper time "and declare both to England and France that these islands are to rest with France, and that we will make a common cause with the latter for that object." (Jefferson to Madison, April 3, 1794, Jefferson's Works, vol. 4, p. 103.)

The understanding, therefore, seems to have been clear, yet the West India Islands went to England.

The French spoliations began heedlessly through the mistaken action of subordinates, who confounded Americans with English, because of the identity of race and language. In October, 1793, Mr. Deforgues wrote to Mr. Morris:

> We hope that the Government of the United States will attribute to their true cause the abuses of which you complain, as well as other violations of which our cruisers may render themselves guilty in the course of the present war. It must perceive how difficult it is to contain within just limits the indignation of our marines, and, in general, of all the French patriots, against a people speaking the same language and having the same habits as the free Americans. The difficulty of distinguishing our allies from our enemies has often been the cause of offenses committed on board your vessels. All that the administration can do is to order indemnification to those who have suffered and to punish the guilty. (Doc. 102, p. 70.)

Not long, however, could this plaintive response suffice as an excuse for the outrages committed upon our citizens and their property, for, as we have seen by the decrees already cited (and there were many more), the assembly soon joined in the attack, authorized it, and rendered it governmental.

A single mistaken capture might be forgiven, provided proper compensation were made for injury to the citizen; but, when wholesale seizures were directed by the legislature and thereupon made by the executive, the matter assumed a much more serious and difficult aspect. To use the words of Mr. Sumner:

> As intelligence of these spoliations reached the United States our whole commerce was fluttered. Merchants hesitated to expose ships and cargoes to such cruel hazards, and thereupon appeared the circular letter of the Secretary of State and the President's proclamation encouraging, by the promise of protection, those injured by the spoliators.

So ended the first phase of this controversy with a nation to whom we were bound by the strongest treaty ties, a nation engaged in war against an apparently overwhelming force and whose enemies used means of attack openly admitted to be contrary to the laws of civilized warfare; in alleged self-defense, it pursued an equally if not more indefensible course, which resulted in severe and unjustifiable loss to our citizens. That this system of seizures or spoliations was forbidden by every principle of civilized warfare was frankly admitted at the time, and later, England, which had pursued a similar course, made ample amends, and Spain which had countenanced the policy of France, and lent her ports in aid of it, did the same.

Nor were we altogether clear of blame. We had not complied, so far as appears, with the stipulations of the treaties of 1778, intended to provide for possible war; we had not protected the West India Islands, and not only had we refrained from acting as the ally of France, but, by the Jay treaty, we had given to her enemy the exclusive port privileges which she most valued, and which were secured to her by the treaty of amity and commerce.

It is not for us to criticise the patriotism and wisdom of the American statesmen of that day, the leading figures of our history, the men who bore the brunt of the fight which brought thirteen struggling colonies through a war with one of the mightiest and bravest nations of Europe to the successful issue which made possible the United States of today, with their thirty-eight States, eight Territories, and population of not far from sixty millions. Responsible for the welfare and future of a little republic of some two and a half millions of inhabitants, exhausted by seven years' warfare, and environed on

this continent by the three great monarchies of Europe; their country poor in finance, weak in population, and an object of jealousy and distrust to every sovereign, these eminent men dealt in a spirit of enlightened patriotism and high courage with the political questions presented to them, according to their best and well-trained judgment, in the light of the information they then had. We now, as a judicial body, treat the facts as they are presented in relation to private rights, and no judgment of ours can properly be held, as it has been argued it would be, to reflect in any manner upon the course pursued by the President, his advisers and subordinates, in the anxious period between 1789 and 1800. Upon their diplomatic foresight and ability no decision of ours can cast a shadow, and it must be clearly understood that we deal only with those private rights which may possibly have been invaded in the pursuit of a policy aiming at the life and prosperity of the nation.

The French complained of our course during the war then progressing, while we complained of spoliation and maltreatment of our vessels at sea, losses by the embargo at Bordeaux, non-payment of drafts drawn by the Colonial administration, seizures of cargoes of vessels, non-performance of contracts by Government agents, condemnation of vessels and their cargoes in violation of the treaties of 1778, and captures under the decree of 1793. (Foreign Relations, vol. 1, pp. 748 *et seq.*)

Pinckney was ordered out to replace Monroe under particular instructions to "look into" the claims of our citizens (*ibid.* 742), but before he arrived the decree of October 31, 1796, was made public, which prohibited the importation of manufactured articles, whether of English make or English commerce (6 Garden, 117), and Pinckney upon his arrival was not recognized or received, but ordered to leave France, as that Government would receive no minister from the United States "until after a reparation of the grievances demanded of the American Government, and which the French Republic had a right to expect." (Foreign Relations, vol. 1, p. 746.)

The strained relations between the two countries can not be better illustrated than by an extract from the speech of the president of the Directory made to Monroe, in the presence of the diplomatic corps, when the latter, on the 30th December, 1796, took his official leave. Upon that occasion the president said:

> By presenting this day to the Executive Directory your letters of recall you offer a very strange spectacle to Europe. France, rich in her freedom, surrounded by the train of her victories, and strong in the esteem of her allies, will not stoop to calculate the consequences of the condescension of the American Government to the wishes of its ancient tyrants. The French Republic expects, however, that the successors of Columbus, Raleigh, and Penn, always proud of their liberty, will never forget that they owe it to France. They will weigh in their wisdom the magnanimous friendship of the French people with the crafty caresses of perfidious men who mediate to bring them again under their former yoke. Assure the good people of America, Mr. Minister, that, like them, we adore liberty; that they will always possess our esteem, and find in the French people that republican generosity which knows how to grant peace as well as to cause its sovereignty to be respected. (Foreign Relations, vol. 1, p. 747.)

This speech, as President Adams said, discloses sentiments

> more alarming than the refusal of a minister, because more dangerous to our independence and union, and at the same time studiously marked with indignities towards the Government of the United States. It evinces a disposition to separate the people of the United States from the Government. . . . Such attempts ought to be repelled with a decision which shall convince France, and the world, that we are not a degraded people, humiliated under a colonial spirit of fear and sense of inferiority, fitted to be the miserable instruments of foreign influence, and regardless of national honor, character, and interest. (Foreign Relations, vol. 1, p. 40.)

The President added that, having no diplomatic representative in France, he had no means of obtaining official information, but believing that a decree had been passed contravening in part the commercial treaty of 1778, he laid a copy of that instrument before the Congress, stating that it was his "indispensable duty to recommend to [their] consideration effectual measures of defense." The Congress were, however, peacefully inclined, although before adjourning they passed the law providing passports for American vessels. (1 Stat. L. 489.)

Soon after the adjournment (June 22) Pinckney, Marshall, and Gerry were commissioned envoys to France for the purpose of endeavoring to renew relations with that country.

Jefferson, then Vice-President, immediately wrote Gerry:

> That peace is undoubtedly at present the first object of our nation. Interest and honor are also national considerations. But interest, duly weighed, is in favor of peace, even at the expense of spoliations, past and future, and honor can not now be an object. The insults and injuries committed on us by both the belligerent parties from the beginning of 1793 to this day, and still continuing, can not be wiped off by engaging in war with one of them. Our countrymen have divided themselves by such strong affections to the French and the English that nothing will secure us internally but a divorce from both nations. (Jefferson's Works, vol. 4, p. 187.)

The tone and intent of the instructions to these envoys may be understood from one paragraph in Mr. Pickering's letter to them (Doc. 102, p. 464, July 15, 1797):

> Finally, the great object of the Government being to do justice to France and her citizens, if in anything we have injured them, to obtain justice for the multiplied injuries they have committed against us, and to preserve peace, your style and manner of proceeding will be such as shall most directly tend to secure these objects.

The envoys had hardly reached Paris when another decree was aimed against our suffering merchants which prohibited every vessel that had entered an English port from being admitted into any port of the French Republic, and handed over to condemnation every vessel laden in whole or in part with merchandise coming out of England or her possessions. (Doc. 102, p. 483.) The American ministers protested, saying that the decree attacked the interests and independence of neutral powers; that it took from them the profits of an honest and lawful industry, as well as the inestimable privilege of conducting their own affairs as their judgment might direct, and added that acquiescence in it would establish a precedent for national degradation which would authorize any measures power might be disposed to practice. (*Ibid.* 483 *et seq.*)

France leaned to dictation, not negotiation. With Bonaparte successful in Italy and Talleyrand at the head of foreign affairs, she was in a far from conciliatory temper. The result was that, without ever being received officially, the envoys returned, not, however, before Talleyrand had, as a set-off to their demands, presented the counterclaims of France. (Foreign Relations, vol. 2, p. 190.)

During this mission occurred the notorious X. Y. Z. episode, when demands were made upon the ministers by individuals, veiled in the dispatches under these mysterious letters, for a large sum of money as a *douceur* to the Directory and an additional and much larger amount as a loan to France. Talleyrand later, and over his own signature, proposed a loan, omitting reference to the *douceur,* and in the same note complained of the Jay treaty as a principal grievance. The dispatches containing an account of the X. Y. Z. episode coming back from the United States in print, Gerry, the only envoy then remaining, left Paris on the 26th July, 1798. (*Treaties and Conventions,* etc., Bancroft Davis, 997, 998.)

The return of the mission created an effect at home very inimical to France; the President said he would never send another minister without assurances that he would be received, respected, and honored as "the representative of a great, free, powerful, and independent nation" (Foreign Relations, vol. 2, p. 199); but before this (June 21, 1798), Congress had passed the act "to more effectually protect the commerce and coasts of the United States" (May 28, 1798, 1 Stat. L. 561), the act suspending commercial relations with France (June 13, 1798), and various other laws of similar import, which will be considered hereafter in connection with another branch of this case.

Washington was put in command of the army as lieutenant-general and commander-in-chief, and in accepting said (5 Annals of Cong., 622):

> The conduct of the Directory of France towards our country; their insidious hostility to its Government; their various practices to withdraw the affections of the people from it; the evident tendency of their acts and those of their agents to countenance and invigorate opposition; their disregard of solemn treaties and the law of nations; their war upon our defenseless commerce; their treatment of our ministers of peace; and their demands, amounting to tribute, could not fail to excite in me corresponding sentiments with those my countrymen have so generally expressed.

This state of affairs could not long continue. Talleyrand, appreciating the dangers of the situation, soon opened indirect communication with the United States, and on the 28th September, said that our plenipotentiary if sent would be "received with the respect due to the representative of a free, independent, and powerful nation." (Foreign

Relations, vol. 2, p. 242.) This was an exact compliance with the President's condition precedent, and thereupon Oliver Ellsworth, Chief Justice of the United States, William R. Davie, late governor of North Carolina (Patrick Henry declining to serve), and William Vans Murray, minister resident at The Hague, were commissioned envoys extraordinary and ministers plenipotentiary "to discuss and settle by a treaty all controversies between the United States and France." (*Ibid.* 243.) This mission, appointed in March, 1799, closed its labors by the treaty signed September 30, 1800.

Arriving in France they found the Directory no longer in existence, but treated with Napoleon, then become First Consul. Ministers were appointed to meet them, and the 7th April, 1800, powers were exchanged and negotiations began. (Doc. 102, p. 579.)

The Americans were instructed to inform the French ministers at the opening that we expected, "as an indispensable condition of the treaty," a stipulation to make to our citizens "full compensation for all losses and damage which they shall have sustained by reason of irregular or illegal captures or condemnations of their vessels and other property, under color of authority or commissions from the French Republic or its agents." Other points were urged upon them, but for the purpose of this case it is necessary only to note that they were to obtain a claims commission, to refuse recognition of the treaties of 1778, to refuse a guaranty, to refuse any aid or loan, and to make no engagement contrary to the Jay treaty. (Foreign Relations, vol. 2, p. 306.)

The Secretary of State said, in his instructions:

> Instead of relief, instead of justice, instead of indemnity for past wrongs, our very moderate demands have been immediately followed by new aggressions and more extended depredations, while our ministers, seeking redress and reconciliation, have been refused a reception, treated with indignities, and finally driven from its territories. This conduct . . . would well have justified an immediate declaration of war, but . . . the United States contented themselves with preparations for defense, and measures calculated to protect their commerce.

At the close of his instructions the Secretary sets out certain points to be considered as ultimata, of which the following only is now important:

1. That there be established a board to determine the claims of our citizens, which France should bind herself to pay.

Having carried the history of the claims down to this point let us look back upon it and see what rights we had at that time as against France, laying aside for the moment certain defenses set up by the defendants, such as the existence of war and the abrogation of the old treaties. Apart from these points, which have been urged upon us with great ability by the learned counsel for the Government, were the claims at the opening of the negotiations in 1800 valid international obligations against France?

That nation had seized upon the high seas neutral vessels laden with neutral cargo. In the case at bar, for example, the American schooner *Sally,* owned by citizens of the United States, commanded by a citizen of the United States, duly registered under the laws of the United States, bound from Massachusetts to Spain, laden with cargo belonging to American citizens, was seized upon the high seas, taken into a French port, condemned and confiscated for the benefit of the privateer which seized her; and all this, not upon the ground that she had violated the law of nations, but because she had violated the French regulations "concerning the navigation of neutrals." It seems hardly necessary to discuss the proposition that such a proceeding was unwarranted; the French themselves admitted it in their decrees and correspondence; the Russian Czar, in ordering his admiral to pursue a similar course, said it was not "strictly conformable to the natural laws of war." England paid for damages thus committed, as did Spain, which had countenanced the acts of French consuls in condemning American vessels brought into Spanish ports. (Treaty of 1819.)

Senator Livingston, in the Twenty-first Congress, first session, said, in the report made by him:

> The committee does not recollect that the justice of the claims has ever been denied. . . . To deny [it] would be assertion of a right on the part of France to indiscriminate plunder of neutral property. . . . But the justice of the claims was not denied, and the necessity of providing indemnity was expressly acknowledged.

This is true as a matter of pure international law; how much more true is it in the face of a treaty which guaranteed the protection to

our vessels (Art. 6) of French ships of war; which made free ships free goods (Art. 23); which prohibited opening hatches or disturbing packages when the vessel had a passport (Arts. 12 and 13); which directed the commanders of French ships to do no "injury or damage" to vessels of the United States (Art. 15); and which contained other provisions insuring an exceptional amount of protection to our commerce and guardianship of our commercial rights?

Mr. Jefferson thought this class of claims valid when he issued his circular of August, 1793, assuring the mercantile community that due attention would be paid to these injuries and proper proceedings adopted for their relief. The President thought them valid when, later in the same year, he wrote to Congress that due measures would be taken to "obtain redress of the past and more effective provisions against the future." Pickering thought them valid when he made their settlement an ultimatum, and the French Government thought them worthy of consideration when they proposed a commission to decide upon them coupled with the counter proposition that the United States indemnify American creditors then existing, or to be created through the agency of this commission, by way of a loan to France, which that country was to be pledged to repay. (Doc. 102, p. 467.)

The defendants contend that the seizures were justified, as war existed between this country and France during the period in question; and, as we could have no claim against France for seizure of private property in time of war, the claimants could have no resulting claim against their own Government; that is, the claims, being invalid, could not form a subject of set-off as it is urged these claims did in the second article of the treaty of 1800. It therefore becomes of great importance to determine whether there was a state of war between the two countries.

It is urged that the political and judicial departments of each Government recognized the other as an enemy; that battles were fought and blood shed on the high seas; that property was captured by each from the other and condemned as prize; that diplomatic and consular intercourse was suspended, and that prisoners had been taken by each Government from the other and "held for exchange, punishment, or retaliation, according to the laws and usages of war." While these statements may be in substance admitted and constitute very strong evidence of the existence of war, still they are not conclusive, and the facts, even if they existed to the extent claimed, may not be incon-

sistent with a state of reprisals straining the relations of the States to their utmost tension, daily threatening hostilities of a more serious nature, but still short of that war which abrogates treaties, and after the conclusion of which the parties must, as between themselves, begin international life anew.

The French issued decree after decree against our peaceful commerce, but on the ground of military necessity incident to the war with Great Britain and her allies; they refused to receive our minister, but in that refusal, insolent though it was, there is nothing to show tha' war was intended, and the mere refusal to receive a minister does not in itself constitute a ground for hostilities.

The Attorney-General, Mr. Lee, in August, 1798, very strongly sustained the defendants' position, for he wrote the Secretary of State that there existed with France "not only an actual maritime war," but "a maritime war authorized by both nations;" that consequently France was an enemy, to aid and assist whom would be treason on the part of a citizen of the United States; but we can not agree that this extreme position was authorized by the facts or the law.

Congress enacted the various statutes hereinafter referred to in detail, and when one of them, the act providing an additional armament, was passed in the House, Edward Livingston, who opposed it, said:

> Let no man flatter himself that the vote which has been given is not a declaration of war. Gentlemen know that this is the case.

Those were times of great excitement; between danger of international contest and the heat of internal partisan conflict statesmen could not look at the situation with the calmness possessed by their successors, and those successors, with some exceptions to be sure, regarded the relations between the countries as not amounting to war.

The question has been carefully examined by authorized and competent officers of the political department of the Government, and we may turn to their statements as expository of the views of that branch upon the subject.

In 1827 Senator Holmes reported that there had been "a partial war," but no "such actual open war as would absolve us from treaty stipulations. . . . It was never understood here that this was such a war as would annul a treaty." (19th Cong., 2d sess., Senate Rep., Feb. 8, 1827, p. 8.)

Mr. Giles, reporting to the House of Representatives as early as 1802, called it a "partial state of hostility" between the United States and France.

Mr. Chambers reported to the Senate in 1828 that—

> The relations which existed between the two nations in the interval between the passage of the several acts of Congress before referred to and the convention of 1800 were very peculiar, but in the opinion of your committee can not be considered as placing the two nations in the attitude of a war which would destroy the obligations of previously existing treaties.

Mr. Livingston reported to the Senate in 1830 that—

> This was not a case of war, and the stipulations which reconciled the two nations was not a treaty of peace; it was a convention for the putting an end to certain differences. . . . Nowhere is the slightest expression on either side that a state of war existed, which would exonerate either party from the obligations of making those indemnities to the other. . . . The convention which was the result of these negotiations is not only in its form different from a treaty of peace, but it contains stipulations which would be disgraceful to our country on the supposition that it terminated a state of war. . . . Neither party considered then they were in a state of war. (Rep. 4, p. 445.)

Mr. Everett made a statement in the House of Representatives on the 21st February, 1835, in which he said:

> The extreme violence of the measures of the French Government and the accumulated injuries heaped upon our citizens would have amply justified the Government of the United States in a recourse to war; but peaceful remedies and measures of defense were preferred; [and, after referring to the acts of Congress, he adds:] These vigorous acts of defense and preparation, evincing that, if necessary, the United States were determined to proceed still further and go to war for the protection of their citizens, had the happy effect of precluding a resort to that extreme measure of redress.

Finally, Mr. Sumner considered the acts of Congress as "vigorous measures," putting the country "in an attitude of defense;" and that the "painful condition of things, though naturally causing great

anxiety, did not constitute war." (38th Cong., 1st sess., Rep. 41, 1864.)

The judiciary also had occasion to consider the situation, and the learned counsel for defendants cites us to the opinion of Mr. Justice Moore delivered in the case of *Bas* v. *Tingy* (4 Dall. 37), wherein the facts were as follows: Tingy, commander of the public armed ship the *Ganges,* had libelled the American ship *Eliza,* Bas, master, setting forth that she had been taken on the high seas by a French privateer the 31st March, 1799 and retaken by him late in the following April, wherefore salvage was claimed and allowed below. Upon appeal the judgment was affirmed. Each of the four justices present delivered an opinion.

Justice Moore, answering the contention that the word "enemy" could not be applied to the French, says:

> How can the characters of the parties engaged in hostility or war be otherwise described than by the denomination of enemies? It is for the honor and dignity of both nations, therefore, they should be called enemies; for it is by that description alone that either could justify or excuse the scene of bloodshed, depredation, and confiscation which has unhappily occurred, and surely Congress could only employ the language of the act of June 13, 1798, towards a nation whom she considered as an enemy.

Justice Washington considers the very point now in dispute, saying (p. 40):

> The decision of this question must depend upon . . . whether at the time of passing the act of Congress of the 2d of March, 1799, there subsisted a state of war between two nations. It may, I believe, be safely laid down that every contention by force between two nations, in external matters, under the authority of their respective Governments, is not only war, but public war. If it be declared in form it is called solemn and is of the perfect kind, because one whole nation is at war with another whole nation, and all the members of the nation declaring war are authorized to commit hostilities against all the members of the other in every place and under every circumstance. In such a war all the members act under a general authority, and all the rights and consequences of war attach to their condition. But hostilities may subsist between two nations more confined in its nature and extent, being limited as to places, persons, and things, and this is more properly termed imperfect war, because not solemn, and because those who are authorized to commit hostilities act under

> special authority and can go no further than to the extent of their commission. Still, however, it is public war, because it is an external contention by force between some of the members of the two nations, authorized by the legitimate powers. It is a war between the two nations, though all the members are not authorized to commit hostilities such as in a solemn war where the Government retains the general power.

Applying this rule he held that "an American and French armed vessel, combating on the high seas, were enemies," but added that France was not styled "an enemy" in the statutes, because "the degree of hostility meant to be carried on was sufficiently described without declaring war, or declaring that we were at war. Such a declaration by Congress might have constituted a perfect state of war which was not intended by the Government."

Justice Chase, who had tried the case below, said:

> It is a limited, partial war. Congress has not declared war in general terms, but Congress has authorized hostilities on the high seas by certain persons in certain cases. There is no authority given to commit hostilities on land, to capture unarmed French vessels, nor even to capture French armed vessels in a French port, and the authority is not given indiscriminately to every citizen of America against every citizen of France, but only to citizens appointed by commissions or exposed to immediate outrage and violence. . . . If Congress had chosen to declare a general war, France would have been a general enemy; having chosen to wage a partial war, France was . . . only a partial enemy.

Justice Paterson concurred, holding that the United States and France were "in a qualified state of hostility"—war *"quoad hoc."* As far as Congress tolerated and authorized it, so far might we proceed in hostile operations and the word "enemy" proceeds the full length of this qualified war, and no further.

The Supreme Court, therefore, held the state of affairs now under discussion to constitute partial warfare, limited by the acts of Congress.

The instructions to Ellsworth, Davie, and Murray, dated October 22, 1799, did not recognize a state of war as existing, or as having existed, for they said the conduct of France would have justified an immediate declaration of war, but the United States, desirous of maintaining peace, contented themselves "with preparations for defense and measures calculated to defend their commerce." (Doc. 102, p.

561.) Yet all the measures relied upon as evidence of existing war had taken effect prior to the date of these instructions. So the ministers, in a communication to the French authorities, said, as to the acts of Congress, "which the hard alternative of abandoning their commerce to ruin imposed," that "far from contemplating a cooperation with the enemies of the Republic [they] did not even authorize reprisals upon her merchantmen, but were restricted simply to the giving of safety to their own, till a moment should arrive when their sufferings could be heard and redressed." (Doc. 102, p. 583.)

France did not consider that war existed, for her minister said that the suspensions of his functions was not to be regarded as a rupture between the countries, "but as a mark of just discontent" (15 Nov., 1796, Foreign Relations, vol. 1, p. 583), while J. Bonaparte and his colleagues termed it a "transient misunderstanding" (Doc. 102, p. 590), a state of "misunderstanding" which had existed "through the acts of some agents rather than by the will of the respective 'Governments,'" and which had not been a state of war, at least on the side of France. (*Ibid.* 616.)

The opinion of Congress at the time is best gleaned from the laws which it passed. The important statute in this connection is that of May 28, 1798 (1 Stat. L. 561) entitled "An act more effectually to protect the commerce and coasts of the United States." Certainly there was nothing aggressive or warlike in this title.

The act recites that, whereas French armed vessels have committed depredations on American commerce in violation of the law of nations and treaties between the United States and France, the President is authorized—not to declare war, but to direct naval commanders to bring into our ports, to be proceeded against according to the law of nations, any such vessels "which shall have committed, or which shall be found hovering on the coasts of the United States for the purpose of committing, depredations on the vessels belonging to the citizens thereof; and also to retake any ship or vessel of any citizen or citizens of the United States which may have been captured by any such armed vessel."

This law contains no declaration or threat of war; it is distinctly an act to protect our coasts and commerce. It says that our vessels may arrest a vessel raiding or intending to raid upon that commerce, and that such vessel shall not be either held by executive authority or confiscated, but turned over to the admiralty courts—recognized inter-

national tribunals—for trial, not according to municipal statutes, as was being done in France, but according to the law of nations. Such a statute hardly seems necessary, for if it extended at all the police powers of naval commanders upon the high seas it was in the very slightest degree, and it is highly improbable that then or now, with or without specific statutory or other authority, an American naval commander would in fact allow a vessel rightfully flying the flag of the United States to be seized on the high seas or near our coasts by the cruiser of another Government. But if the act did enlarge the power of such officers, and give to them authority not theretofore possessed, it tied them down to specified action in regard to specified vessels.

They might seize armed vessels only, and only those armed vessels which had already committed depredations, or those which were on our coast for the purpose of committing depredations, and they might retake an American vessel captured by such an armed vessel. This statute is a fair illustration of the class of laws enacted at this time; they directed suspension of commercial relations until the end of the next session of Congress, not indefinitely (June 13, 1798, *ibid.*, § 4, p. 566); they gave power to the President to apprehend the subjects of hostile nations whenever he should make "public proclamation" of war (July 6, 1798, *ibid.* 577), and no such proclamation was made; they gave him authority to instruct our armed vessels to seize French "armed," not merchant, vessels (July 9, 1798, *ibid.* 578), together with contingent authority to augment the army in case war should break out or in case of imminent danger of invasion. (March 2, 1799, *ibid.* 725.) Within a few months after this last act of Congress the Ellsworth mission was on its way to France to begin the negotiations which resulted in the treaty of 1800 and even the act abrogating the treaties of 1778 does not speak of war as existing, but of "the system of predatory violence . . . hostile to the rights of a free and independent nation." (July 7, 1798, *ibid.* 578.)

If war existed why authorize our armed vessels to seize French armed vessels? War itself gave that right, as well as the right to seize merchantmen, which the statutes did not permit. If war existed why empower the President to apprehend foreign enemies? War itself placed that duty upon him as a necessary and inherent incident of military command. Why, if there was war, should a suspension of commercial intercourse be authorized, for what more complete suspension of that intercourse could there be than the very fact of war?

And why, if war did exist, should the President, so late as March, 1799, be empowered to increase the army upon one of two conditions, viz., that war should break out or invasion be imminent, that is, if war should break out in the future or invasion become imminent in the future?

Upon these acts of Congress alone it seems difficult to found a state of war up to March, 1799, while in February, 1800, we find a statute suspending enlistments, unless, during the recess of Congress, "war should break out with France." This is proof positive that Congress did not then consider war as existing, and in fact Ellsworth, Davie, and Murray were at the time hard at work in Paris. In May following the President was instructed to suspend action under the act providing for military organization, although the treaty was not concluded until the following September.

This legislation shows that war was imminent; that protection of our commerce was ordered, but distinctly shows that, in the opinion of the legislature, war did not in fact exist.

Wheaton draws a distinction between two classes of war, saying:

> A perfect war is where one whole nation is at war with another nation, and all the members of both nations are authorized to commit hostilities against all the members of the other, in every case, and under every circumstance permitted by the general laws of war. An imperfect war is limited as to places, persons, and things [to which the editor adds:] Such were the limited hostilities authorized by the United States against France in 1798. (Lawrence's Wheaton, 518.)

There was no declaration of war; the tribunals of each country were open to the other—an impossibility were war in progress; diplomatic and commercial intercourse were admittedly suspended; but during many years there was no intercourse between England and Mexico, which were not at war; there was retaliation and reprisal, but such retaliations and reprisals have often occurred between nations at peace; there was a near approach to war, but at no time was one of the nations turned into an enemy of the other in such manner that every citizen of the one became the enemy of every citizen of the other; finally, there was not that kind of war which abrogated treaties and wiped out, at least temporarily, all pending rights and contracts, individual and national.

In cases like this "the judicial is bound to follow the action of the political department of the Government, and is concluded by it" (*Phillips* v. *Payne,* 92 U. S. 130); and we do not find an act of Congress or of the Executive between the years 1793 and 1801 which recognizes an existing state of solemn war, although we find statutory provisions authorizing a certain course "in the event of a declaration of war," or "whenever there shall be a declared war," or during the existing "differences." One act provides for an increase of the army "in case war shall break out," while another restrains this increase "unless war shall break out." (1 Stat. L. 558, 577, 725, 750; see also acts of Feb. 10, 1800, and May 14, 1800.)

We have already referred to the instructions of the Executive, which show that branch of the Government in thorough accord with the legislative on this subject, and the negotiations of our representatives hereinafter referred to were marked by the same views, while the treaty itself—a treaty of amity and commerce of limited duration—is strong proof that what were called "differences" did not amount to war. We are, therefore, of opinion that no such war existed as operated to abrogate treaties, to suspend private rights, or to authorize indiscriminate seizures and condemnations; that, in short, there was no public general war, but limited war in its nature similar to a prolonged series of reprisals.

The general effect and purpose of the treaty of 1800 can be clearly gleaned from the negotiations preceding its signature, which will next be considered.

The treaties of 1778 provided that French men-of-war should protect our vessels and citizens (Treaty of Commerce, Art. 6); that our merchantmen having passports and certificates showing their cargoes not to be contraband should not have their hatches opened, their packages disturbed, or the "smallest parcels of goods" removed (Arts. 12 and 13); that a French man-of-war meeting an American merchantman should remain out of cannon-shot, and send on board not more than three men, when, should the merchantman have a passport, he might proceed (Art. 27); freedom of trade was secured and contraband defined.

Soon after the French revolution the series of attacks upon our commerce began, at first veiled under the excuse of mistake, then of a necessary self-defense, coupled with promise of compensation, and

finally open and undisguised. First it was said that the seizures were accidental, as the two English-speaking nations could not be distinguished by the French sailors; soon after all neutral vessels laden with provisions and bound to an enemy's port were ordered seized as a war measure, but compensation was promised; and it was then that the President and Secretary of State, having already issued the proclamation of neutrality, which greatly incensed France, voluntarily promised protection and redress to citizens of the United States thus injured by our former ally. At this point, therefore, we have on both sides an admission of the validity of claims arising from the spoliations—the President, in the proclamation and circular letter, the French, in their decrees, as well as in a letter to the Secretary of State (March 27, 1794), in which the French minister wrote that "If any of your merchants have suffered any injury by the conduct of our privateers . . . they may with confidence address themselves to the French Government." (Doc. 102, p. 264.) Nearly four months later the French commissioner of foreign relations informed our minister that there should not be a doubt of the disposition of the convention and Government to "make good the losses which circumstances inseparable from a great revolution may have caused some American navigators to experience." (July 5, 1794; *ibid.* 77.) Then came Genet's dismissal; Jay was sent to England, and Monroe, succeeding Morris, seemed to have progressed so successfully that Washington announced to Congress (Feb. 20, 1795), "that these claims are in a train of being discussed with candor, and amicably adjusted." (Wait's American State Papers, vol. 3, p. 402.)

The Jay treaty entirely changed the situation; France violently remonstrated, treated Monroe with insult, refused to receive Pinckney, threw off the last restraints upon its cruisers and privateers, and its colonial agents joined with so much vigor in the illegal attack upon a peaceful neutral commerce, that "American vessels no longer entered the French ports unless carried in by force." (Doc. 102, pp. 434, 435.)

Just complaint was not, however, confined to one side, for we had failed in performance of obligations imposed upon us by the treaties of 1778. We had undertaken a guaranty of French possessions in America, and pledged ourselves that "in case of a rupture between France and England the reciprocal guaranty . . . shall have its full force and effect the moment such war shall break out." (Art. 12,

Treaty of Alliance.) This guaranty was to endure "forever." It was contended by us that the *casus fœderis* could never occur except in a defensive war. As Secretary Pickering said:

> The nature of this obligation is understood to be that when a war really and truly defensive exists the engaging nation is bound to furnish an effectual and adequate defense, in cooperation with the power attacked. (Doc. 102, p. 457, *Pickering* to *Pinckney et al.,* July 15, 1797.)

Whether the treaty so limited the obligation, or whether France in her struggle with the allied powers was waging a defensive war, is not now important. France certainly believed herself entitled to demand our aid, and understood the *casus fœderis* to have occurred.

At the opening of the war France possessed the fertile islands of St. Domingo, Martinique, Guadeloupe, St. Lucia, St. Vincent, Tobago, Deseada, Mariegalante, St. Pierre, Miquelon, and Grenada, with a colony on the mainland at Cayenne, and "in little more than a month the French were entirely dispossessed of their West India possessions, with hardly any loss to the victorious nation." (Alison's History, vol. 3, p. 396.)

The French colonists urged us to intervene, but the French Government thought it wiser for us not then to embark in the war, as it might diminish their supplies from America; they would, however, they said, leave us to act according to our wishes, looking to us meantime for financial aid. (Foreign Relations, vol. 1, p. 688.) This was not a renunciation of the guaranty, nor was it so regarded here.

A study of the correspondence shows that these provisions of the two treaties, especially the guaranty, constantly hampered our ministers, and Jefferson said he had no doubt "we should interpose at the proper time" (Jefferson's Works, vol. 4, p. 102), while the French Government dwelt upon the "inexecution of the treaties" (Foreign Relations, vol. 1, p. 658), said "they had much cause of complaint against us" (*ibid.* 731), and finally refused to receive Pinckney "until after a reparation of grievances," while their minister here demanded "in the name of American honor, in the name of the faith of the treaties, the execution of that contract which assured to the United States their existence and which France regarded as the pledge of the most sacred union between two people the freest upon earth." (Foreign Affairs, vol. 1, pp. 579 *et seq.*)

The claims of France, national in their nature, were thus set up again against the claims of the United States, individual in their inception, but made national by their presentation through the diplomatic department of the Government.

It is not for us to say whether the claims of France had any validity in international law, because for the purpose of this case it need only be observed that they were urged in diplomacy with every apparent belief that the French position was tenable. Whether valid or not they were an efficient arm of defense against our contentions, and were so used with ability, skill, and success. In fact there is a recognition of apparent justness in these demands found in the instructions to the Pinckney mission, who were directed while urging our claims to propose a substitute for the mutual guaranty "or some modification of it," as "instead of troops or ships of war" "to stipulate for a moderate sum of money or quantity of provisions," to be delivered in any future defensive war "not exceeding $200,000 a year during any such war" (Foreign Relations, vol. 2, p. 155), and Talleyrand, on the other side, told Mr. Gerry (June 15) that the Republic desired to be restored to the rights which the treaties conferred upon it, and through these means to assure the rights of the United States. "You claim indemnities," he said; we "equally demand them, and this disposition being as sincere on the part of the United States as it is on its [the Republic], will speedily remove all the difficulties." (Doc. 102, p. 529.)

Such was the situation when the Ellsworth mission arrived in France.

The instructions to this legation directed them as an "indispensable condition" to obtain full compensation for all losses and damages sustained by citizens of the United States from irregular or illegal captures or condemnations.

The French representatives did not dispute the validity of the claims, but stood upon the treaties of 1778. To their opening propositions the American envoys received a courteous response, which, however, put a new phase upon the negotiation, and placed them in a most embarrassing position. Bonaparte and his colleagues said in substance (6 May, 1800, Doc. 102, p. 590): The discharge of damages between the two nations resulting from the "transient misunderstanding" can be "considered only as a consequence of the interpretation" given by mutual consent to the treaties. They agreed "upon the expediency of compensation," and suggested that the discussion had become confined to two points, the principles which ought to govern the political

and commercial relations of the two countries and the most suitable form for liquidating and discharging the indemnities due. The examination of principles should come first in order, they said, for "indemnification can only result from an avowed violation of an acknowledged obligation," and an "agreement upon principles can alone assure peace and maintain friendship." The French ministers then, alluding to the treaties, referred to the second article of the draft submitted by the Americans, which provided that the commission suggested should decide claims "conformably to justice and the law of nations, and in all cases of complaint prior to the 7th of July, 1798, they should pronounce agreeably to the treaties and consular convention then existing between France and the United States." Now this second article of the draft applied only to claims of citizens of each country, while July 7, 1798, was the date of the act of Congress annulling the treaties; but the French ministers ignoring this said that they saw no reasons for the distinction, as the treaties and convention are "the only foundations of the negotiations;" that from them arose the misunderstanding, and upon them "union and friendship should be established"; and they thus significantly concluded: "When the undersigned hastened to acknowledge the principle of compensation, it was in order to give an unequivocal evidence of the fidelity of the French Government to its ancient engagements, every pecuniary stipulation appearing to it expedient as a consequence of ancient treaties, and not as the preliminary of a new one." So the French were planted squarely on the treaties which the Americans were forbidden to consider as existing after July, 1798. Two days later our ministers explained their position (*ibid.* 592), and nine days later wrote to the Secretary of State (*ibid.* 607) that their success was still doubtful, as the "French think it hard to indemnify for violating engagements unless they can thereby be restored to the benefits of them." Soon followed a conference between the plenipotentiaries, when the negotiations were brought to a halt, as no further progress could be had until other "powers" or "instructions" for the two words seem to have been used synonymously, were received from the First Consul.

The French ministers had frequently mentioned the insuperable repugnance of their Government to surrender the claim to priority assured to it in the "commercial treaty of 1778," urging:

> The equivalent alleged to be accorded by France for this stipulation, the meritorious ground on which they generally represented

> the treaty stood, denying strenuously the power of the American Government to annul the treaties by a simple legislative act; and always concluding that it was perfectly incompatible with the honor and dignity of France to assent to the extinction of a right in favor of an enemy, and as much so to appear to acquiesce in the establishment of that right in favor of Great Britain. The priority with respect to the right of asylum for privateers and prizes was the only point in the old treaty on which they had anxiously insisted, and which they agreed could not be as well provided for by a new stipulation. (Doc. 102, p. 608.)

The American envoys (July 23, 1800), in answer to the French arguments, reducing to writing the substance of two conferences, said (Doc. 102, p. 612):

> As to the proposition of placing France with respect to an asylum for privateers and prizes, upon the footing of equality with Great Britain, it was remarked that the right which had accrued to Great Britain in that respect was that of an asylum for her own privateers and prizes, to the exclusion of her enemies, wherefore it was physically impossible that her enemies should at the same time have a similar right. With regard to the observation that by the terms of the British treaty the rights of France were reserved, and therefore the rights of Great Britain existed with such limitation as would admit of both nations being placed on a footing which should be equal, it was observed by the envoys of the United States that the saving in the British treaty was only of the rights of France resulting from her then existing treaty, and that that treaty having ceased to exist, the saving necessarily ceased also, and the rights which before that event were only contingent immediately attached and became operative.

Admission of the continuing force of the old treaties might involve admission of France's national claims, and in any event would put her ministers into a most advantageous position, giving them as consideration, to be surrendered at their pleasure in the new negotiation, what would then be a vested, existing, and acknowledged right to the guarantee, the alliance, and the use of our ports. Placed in this position, France would be without incentive to action; she would start in the discussion of a new treaty with more surrendered to her at the outset than she had hoped to obtain at the conclusion, and all that she afterward gave up would be by way of generous concession. What-

ever the law, whether the treaties were or were not abrogated by the act of Congress or the acts of parties, the American envoys were not permitted to admit the French contention, but were in duty bound to argue that the treaties were without continuing force. They followed this course, saying:

> A treaty being a mutual compact, a palpable violation of it by one party did, by the law of nature and of nations, leave it optional with the other to renounce and declare the same to be no longer obligatory. . . . The remaining party must decide whether there had been such violation on the other part as to justify its renunciation. For a wrong decision it would doubtless be responsible to the injured party, and might give cause for war; but even in such case, its act of public renunciation being an act within its competence would not be a void but a valid act, and other nations whose rights might thereby be beneficially affected would so regard it. (Doc. 102, p. 612.)

After further argument, they added that as it was the opinion of the French ministers that "it did not comport with the honor of France" to admit the American contentions, and at the same time be called upon for compensation, they offered "as their last effort" a proposition which suspended payment of compensation for spoliations "until France could be put into complete possession of the privileges she contended for, and at the same time they offered to give that security which a great pecuniary pledge would amount to for her having the privilege as soon as it could be given with good faith, which might perhaps be in a little more than two years; at any rate within seven." (*Ibid.* 613.)

The French answered (Doc. 102, p. 615) that they still found no reason to consider the treaties of 1778 as broken; the act of 1798, being that of one party, could not destroy, they said, "otherwise than by war and victory," that which was the engagement of two. After some further argument they wrote that they would not push further their observations, as—

> Those which they have repeated suffice to establish the rights of France, and to her the honor of a sacrifice which she would make in renouncing the exclusive right of entry into the ports of America for French privateers accompanied with their prizes. (*Ibid.* 615.)

As to the proposal of a money indemnity for delay they said:

> The proposition of the American ministers offers to the Republic at a distant time the hope of exclusive advantages, and for the present, and, perhaps, for seven years, an humiliating forfeiture of those rights, and a shameful inferiority with regard to a state [Great Britain] over which she had acquired these privileges by the services she had rendered to America when it made war with such state. When the ministers of France can subscribe to a condition unworthy the French nation, the price which they would put upon their humiliation would it not be the continuance of a subjection, which they consider to be contrary to the interest of the United States? The dependence of her ally can not be for her an indemnity for a national suffering. The French ministers believing it to be their duty to insist with their Government upon the immediate renunciation of a privilege well acquired, it would be contradictory that they should provide for its return at a distant time. (*Ibid.* 615, 616.)

Some two weeks later the French again insisted that the treaties were not broken by the state of "misunderstanding" which had existed "through the acts of some agents rather than by the will of the respective Governments," and which had not been a state of war, at least on the side of France. (*Ibid.* 616.) Yet, after this opening, the ministers use language in apparent antagonism with the position thus and before advanced that the treaties were still existent; their tone toward the United States is marked by extreme bitterness, but they finish by consenting to an abolition of the treaties and the conclusion of a new one. The alternative proposition is thus put:

> Either the ancient treaties, with the privileges resulting from priority and the stipulation of reciprocal indemnities, or a new treaty, assuring equality without indemnity. (*Ibid.* 618.)

To the first of these proposals our ministers were forbidden to assent, as it involved an admission of the continuing force of the treaties; to the second they could not assent, for their first duty was to obtain indemnity. The time had come when they must go beyond their instructions and assume personal responsibility. (Doc. 102, pp. 619, 620.)

In August, after some delay and apparent friction, the Americans, saying that "while nothing would be more grateful to America than

to acquit herself of any just claims of France, nothing could be more vain than an attempt to discourse to her reasons for the rejection of her own," made the following propositions (*ibid.* 623–625):

> (1) Let it be declared that the former treaties are renewed and confirmed and shall have the same effect as if no misunderstanding between the two powers had intervened, except so far as they are derogated from by the present treaty.
>
> (2) It shall be optional with either party to pay to the other within seven years 3,000,000 of francs in money or securities which may be issued for indemnities, and thereby to reduce the rights of the other as to privateers and prizes to those of the most favored nation. And during the said term allowed for option the right of both parties shall be limited by the line of the most favored nation.

The third proposition looked to such modification of the mutual guaranty that military stores should be furnished by the one party to the value of 1,000,000 francs to the other when attacked, but either might within the seven years pay the lump sum of 5,000,000 francs to be freed from the obligation. The fifth proposition provided indemnities for individuals, and that "public ships taken on either side [should] be restored or paid for," and the sixth that all property seized by either party and not yet "definitively condemned" should be restored on reasonable proof of it belonging to the other. So they finally agreed to recognize the existence of the treaties, the right of France to the guaranty and exclusive port privileges, and proposed to pay a lump sum to be free of their obligation in the future, for the propositions on this subject, while on their face mutual, were in effect for the benefit of the United States alone, France much preferring to revert to the *statu quo*.

Later during the negotiations an offer was made by us "to extinguish by an equivalent of 8,000,000 francs certain claims of France under the former treaties" (*ibid.* 626, 629); but even after all these concessions there was still no satisfactory promise of a result, although the existence of the treaties had in effect been recognized and "indemnity on either side in substance agreed to." The French now made a counter proposition continuing "the ancient treaties" "as if no misunderstanding had occurred," providing commissioners "to liquidate the respective losses," amending the article as to the use of ports by privateers, which was naturally a capital subject of differ-

ence, and providing that if after seven years the seventeenth and twenty-second articles of the treaty of commerce were not reestablished no indemnities should be paid, and, further, that the guaranty be converted into a "grant of succor for two millions" redeemable by a capital sum of ten millions. (*Ibid.* 627, 628.)

The Americans made a counter proposal, renewing their offer of 8,000,000 francs to be paid within seven years in consideration that the United States "be forever exonerated of the obligation, on their part, to furnish succor or aid under the mutual guaranty," and that the rights of the French Republic be forever limited to those of the most favored nation. (*Ibid.* 629.) To this the French tersely answered (*ibid.* 630):

> We shall have the right to take our prizes into your ports; a commission shall regulate the indemnities owed by either nation to the citizens of the other; the indemnities which shall be due by France to the citizens of the United States shall be paid for by the United States; in return for which France yields the exclusive privileges resulting from the seventeenth and twenty-second articles of the treaty of commerce and "from the rights of the guaranty of the eleventh article of the treaty of alliance."

Matters now again reached a halting point; neither side would yield; France acknowledged her real object to be to avoid payment of indemnity, while the United States, on the other hand, could not assent to her views as to the guaranty and use of ports. In considerable heat the ministers parted. (*Ibid.* 632, 633.) The next day the Americans made another effort, because, as they wrote in their journal (*ibid.* 634), "being now convinced that the door was perfectly closed against all hope of obtaining indemnities with any modifications of the treaty, it only remained to be determined whether, under all circumstances, it would not be expedient to attempt a temporary arrangement which would extricate the United States from the war or that peculiar state of hostility in which they are at present involved, save the immense property of our citizens, now pending before the council of prizes, and secure, as far as possible, our commerce against the abuses of capture during the present war;" therefore they proposed (*ibid.* 635) that as to the treaties and indemnities, the question should be left open; that intercourse should be free; then, with suggestions as to property captured and not definitively condemned and property

which might thereafter be captured, they asked an early interview.

The French still insisted that a stipulation of indemnities involved an admission of the force of the treaties (*ibid.* 635–637), and after argument proposed that the discussion of the indemnities, together with the discussion of article 11 of the treaty of alliance and articles 17 and 22 of the treaty of commerce, be postponed, but with the admission that the two treaties are "acknowledged and confirmed . . . as well as the consular convention of 1788;" that national ships and privateers be treated as those of the most favored nation; that national ships be restored and paid for, and that the "property of individuals not yet tried shall be so according to the treaty of amity and commerce of 1778, in consequence of which a *rôle d'équipage* shall not be exacted, nor any other proof which this treaty could not exact." So, after months of negotiation, the French ministers come back flat-footed upon the treaties as still existing, something which our representatives were forbidden by their instructions to admit. Nevertheless this proposal formed the text for discussion, and upon so slight a foundation was built the treaty of 1800.

After prolonged negotiation, and after striking out the word "provisional" in the name or description of the new treaty, the American commissioners signed it, although with great reluctance, "because they were profoundly convinced that, considering the relations of the two countries politically, the nature of our demands, the state of France, and the state of things in Europe, it was [their] duty, and for the honor and interest of the Government and people of the United States, that [they] should agree to the treaty rather than make none." (*Ibid.* 640.)

The vital effect of this negotiation as explanatory of the treaty of 1800, upon which the rights of these claimants are founded, explains the rehearsal of its details during which the so-called ultimatum of our Government was abandoned and the contention of the French Government as to the existence of the treaties was admitted.

Starting under their instructions, events had forced the ministers to offer unlimited recognition of the treaties of 1778, coupled with a pecuniary equivalent to extinguish in the future their most onerous provisions (*ibid.* 643); even this was not accepted, and the French, returning to their original ground, said that no indemnity could be granted unless the treaties were recognized without qualification as to the future, and this, they said, with the avowed object of avoiding

the payment of indemnity. (*Ibid.*) The American ministers had then but two courses open to them, either to quit France, leaving the United States involved in a dangerous contest, or to propose a temporary arrangement, reserving for later adjustment points which could not then be satisfactorily settled. (*Ibid.* 644.) They elected the latter course, and the treaty signed at Paris the 30th day of September, 1800, by Ellsworth, Davie, and Murray, on the one hand, and J. Bonaparte, Fleurieu, and Roederer, on the other, became part of the supreme law of the land, and was so proclaimed by the President the 21st day of December, 1801.

But between its signature and proclamation a very important history intervened, one extremely interesting to the claimants at this bar, and which has been the cause of much argument and contention.

The compromise by our ministers, to which they were forced by the position of the French Government, was contained in the second article, which read:

> The ministers plenipotentiary of the two parties not being able to agree at present respecting the treaty of alliance of 6th February, 1778, the treaty of amity and commerce of the same date, and the convention of the 14th of November, 1788, nor upon the indemnities mutually due or claimed, the parties will negotiate further on these subjects at a convenient time, and until they may have agreed upon these points the said treaties and conventions shall have no operation, and the relations of the two countries shall be regulated as follows.

It is apparent that this article makes the treaty temporary and provisional in its nature; it admits that the existence or non-existence of the treaties of 1778, with the liabilities thereby imposed, is open to discussion, and that the indemnities are not provided for; that is, that the very first of the so-called "ultimata" of Secretary Pickering is temporarily abandoned. The Senate advised and consented to the ratification of the treaty provided this article be expunged, and in its place the following article be inserted:

> It is agreed that the present convention shall be in force for the term of eight years from the time of exchange of ratifications.

Napoleon thereupon consented (July 31, 1801), "to accept, ratify, and confirm" the convention, with an addition importing that it shall

be in force for the space of eight years, and with the retrenchment of the second article:

> *Provided,* That by this retrenchment the two states renounce the respective pretensions which are the object of the said article.

The ratifications were exchanged in Paris, July 31, 1801. The treaty, with its addenda, was again submitted to the Senate, and in that form received the approval of that body (December 19, 1801), when it declared that it considered the convention "fully ratified," and returned it to the President for promulgation.

What the respective pretensions were which were the subject of the second article does not admit of a shadow of doubt: on the one hand, the alleged continuing existence of the treaties incidentally involving national claims for past acts on our part and more particularly a right to future privileges; on the other hand, indemnity to our citizens for spoliations.

Our claims were good by the law of nations, and we had no need to turn back to the treaties for a foundation upon which to rest our arguments. Not so with France. Her national claims must necessarily rest on treaty provisions, and the future privileges she desired above all else could in no way be so easily or fully secured as by an admission of the continuing force of those instruments. She therefore insisted that for indemnity we must give treaty recognition. This we absolutely refused to do, and upon this rock twice did the negotiations split, only to be renewed by the patience and patriotism of our ministers. After months of weary discussion the parties stood as to this point exactly where they started, and to save their young and struggling country from further contest the American ministers consented to the compromise. Then the Senate struck the compromise out, and France said in effect, "Yes, we agree, if it is understood that we mutually renounce the pretensions which are the subject of that article," to which the Senate and the President, by their official action, assented.

So died the treaties of 1778, with all the obligations which they imposed, and with them passed from the field of international contention the claims of American citizens for French spoliation.

In this whole transaction the treaties were urged on the one side against indemnities on the other. Admission of the continuing force

of the treaties was the great desire of France to which she subordinated all else, even her national claims; on the other hand, the United States could by no possibility admit such a contention, for to do so would set them instantly at odds with their former enemy. Having given, in 1794, to Great Britain the exclusive port privileges secured to France in 1778, they could not in 1800 again reverse their policy, and, by returning these privileges to France, infringe their agreement with Great Britain.

Yet this was the issue, an issue never retreated from by the French; as they put it, "either the ancient treaties with indemnity [for spoliations] or a new treaty without indemnity." Article 2 of the treaty of 1800 still presents these counter propositions linked together when it postpones the discussion of the treaties, and at the same time postpones the discussion of the indemnities.

When the United States struck out that second article and assented to Napoleon's proviso that by so doing both states renounced the pretensions which were its object (that is, the treaties and these claims), the contract was complete. That there was a "bargain," to use Madison's word, is apparent from the instrument and the negotiations which have been recited as preceding it.

Four years later Mr. Madison, then Secretary of State, instructed Mr. Pinckney, minister in Spain, that "the claims from which France was released were admitted by France, and the release was for a valuable consideration in a correspondent release of the United States from certain claims on them. The claims we make on Spain were never admitted by France nor made on France by the United States. They made, therefore, no part of the bargain with her, and could not be included in the release."

The counsel for defendants contends that Mr. Madison referred in this letter to "national" claims on the part of the United States for national injury, in the destruction of commerce, the increased cost of the Army and Navy, and the insult to the flag. It should be noted, in answer to this position, that the claims against Spain, then under discussion, were exactly these claims now at bar, except that Spain was the party defendant instead of France. As against France captures made by French privateers under French decrees were taken into French ports, and there condemned. As against Spain captures made by French privateers under French decrees were taken into Spanish ports and there condemned by French consuls under the

authority and protection of Spain. Spain plead that these claims were settled by the second article of the treaty of 1800, and it was in answer to this plea that Mr. Madison wrote his letter.

The subject-matter of the instruction to Pinckney was these claims and nothing else, for we were not urging "national" claims on Spain, but the claims subsequently described in the Spanish treaty as those "on account of prizes made by French privateers and condemned by French consuls within the territory and jurisdiction of Spain." (Treaty of 1819, Art. 9.) These claims were finally recognized, and paid through the Florida purchase. (*Id.*, Art. 11; see also treaty of 1802.)

But the negotiations of the Ellsworth mission are conclusive that the claims were not "national" in the sense of governmental as opposed to individual. It is unnecessary to repeat extracts from the correspondence already given, and we need only refer to the project submitted by our ministers, the 18th of April, 1800, which describes the claims as those "of divers merchants and other citizens of the United States" (Doc. 102, pp. 585–589), thus following their instructions, which called them "claims of our citizens." (*Ibid.* 575.)

Mr. Pickering, Secretary of State under the first two Presidents, and who, above all others, was familiar with the situation and with the rights of the parties, said that we bartered "the just claims of our merchants" to obtain a relinquishment of the French demand, and that—

> It would seem that the merchants have an equitable claim for indemnity from the United States. . . . The relinquishment by our Government having been made in consideration that the French Government relinquish its demands for a renewal of the old treaties, then it seems clear that, as our Government applied the merchants' property to buy off those old treaties, the sums so applied should be reimbursed. (Mr. Clayton's speech, 1846.)

Mr. Madison, as we have seen, said to Spain that the claims were admitted by France, and were released "for a valuable consideration," and he termed the transaction a "bargain."

Mr. Clay, in the Meade Case, in which his opinion was given in 1821, five years prior to his report upon French spoliations, said that while a country might not be bound to go to war in support of the rights of its citizens, and while a treaty extinction of those rights is probably binding, it appears—

> That the rule of equity furnished by our Constitution, and which provides that private property shall not be taken for public use without just compensation, applies and entitles the injured citizen to consider his own country a substitute for the foreign power.

In this conclusion Chief Justice Marshall strongly concurred, saying to Mr. Preston—

> Having been connected with the events of the period and conversant with the circumstances under which the claims arose, he was, from his own knowledge, satisfied that there was the strongest obligation on the Government to compensate the sufferers by the French spoliations. (Clayton's speech, 1846.)

And he repeated to Mr. Leigh distinctly and positively "that the United States ought to make payment of these claims."

This view of the distinguished jurist and diplomatist is sustained by forty-five reports favorable to the claims, made in the Congress, against which stand but three adverse reports, all of which were made prior to the publication of the correspondence by Mr. Clay in 1826. Besides Marshall, Madison, Pickering, and Clay, the validity of the claims has been recognized by Clinton, Edward Livingston, Everett, Webster, Cushing, Choate, Sumner, and many other of the most distinguished statesmen known to American history, and while opponents have not been wanting, among the most eminent of whom were Forsyth, Calhoun, Polk, Pierce, Silas Wright, and Benton, still the vast weight of authority in the political division of the Government has been strenuous in favor of the contention made here by the claimants.

The judiciary has seldom occasion to deal with the abstract right of the citizen against his Government; for in a case raising such a question the individual is without remedy other than that granted him by the legislature. The question of right, therefore, is usually passed upon by the political branch of the Government, leaving to the courts the power only to construe the amount and nature of the remedy given. Still judicial authority is not wanting in support of the position that by the agreement with France the United States became liable over to their individual citizens. Lord Truro laid down in the House of Lords as admitted law—

> That if the subject of a country is spoliated by a foreign Government he is entitled to redress through the means of his own Government. But if from weakness, timidity, or any other cause on the part of his own Government no redress is obtained from the foreign one, then he has a claim against his own country. (*De Bode* v. *The Queen,* 3 Clarke's House of Lords, 464.)

The same position is sustained by that eminent writer upon the public law, Vattel, who held that while the sovereign may dispose of either the person or the property of a subject by treaty with a foreign power, still, "as it is for the public advantage that he thus disposes of them, the state is bound to indemnify the citizens who are sufferers by the transaction." (Book 4, ch. 2.)

Napoleon, from his retirement in St. Helena, testified that by the suppression of the second article of the treaty of 1800 the privileges which France had possessed by the treaty of 1778 were ended, and the "just claims which America might have made for injuries done in time of peace" were annulled, adding that this was exactly what he had proposed to himself in fixing these two points "as equi-ponderating each other." (Gourgaud, Memoirs, vol. 2, p. 129.)

Finally, Senator Livingston, familiar with the whole subject as a contemporary, in his report upon it to the Senate, said:

> The committee think it sufficiently shown that the claim for indemnities was surrendered as an equivalent for the discharge of the United States from its heavy national obligations, and for the damages that were due for their preceding non-performance of them. If so, can there be a doubt, independent of the constitutional provision, that the sufferers are entitled to indemnity? Under that provision is not this right converted into one that we are under the most solemn obligations to satisfy? To lessen the public expenditure is a great legislative duty; to lessen it at the expense of justice, public faith, and constitutional right would be a crime. Conceiving that all these require that relief should be granted to the petitioners, they beg leave to bring in a bill for that purpose.

The word "national" has been largely used in argument in allusion to the different kinds of claims at different periods brought into the discussion, and is a convenient word if clearly understood in the connection in which it is used. All claims are "national" in the sense of the *jus gentium,* for no nation deals as to questions of tort with an

alien individual; the rights of that individual are against his Government, and not until that Government has undertaken to urge his claim—not until that Government has approved it as at least *prima facie* valid—does it become a matter of international contention; then, by adoption, it is the claim of the nation, and as such only is it regarded by the other country. The name of the individual claimant may be used as a convenient designation of the particular discussion, but as between the nations it is never his individual claim, but the claim of his Government founded upon injury to its citizen. Nations negotiate and settle with nations; individuals have relations only with their own Governments. Other claims, sometimes the subject of argument, rest upon injury to the state as a whole; of these an apt illustration is found in the so-called "indirect" claims against Great Britain, disposed of in the arbitration of 1872, and in the claims advanced by France for injury caused by non-compliance with the treaties of 1778.

Thus, while all claims urged by one nation upon another are, technically speaking, "national," it is convenient to use colloquially the words "national" and "individual" as distinguishing claims founded upon injury to the whole people from those founded upon injury to particular citizens. Using the words in this sense, it appears that in the negotiations prior to the treaty of 1800, and in effect in the instrument itself, national claims were advanced by France against individual claims advanced by the United States. France urged that she had been wronged as a nation; we urged that our citizens' rights had been invaded. If "national" claims had been used against "national" claims, and the one class had been set off against the other in the compromise, of course the agreement would have been final in every way, as the surrender and the consideration therefor would have been national, and no rights between the individual and his own Government could have complicated the situation. But in the negotiation of 1800 we used "individual" claims against "national" claims, and the set-off was of French national claims against American individual claims. That any Government has the right to do this, as it has the right to refuse war in protection of a wronged citizen, or to take other action, which, at the expense of the individual, is most beneficial to the whole people, is too clear for discussion. Nevertheless, the citizen whose property is thus sacrificed for the safety and welfare of his country has his claim against that country; he has a right to compensation, which exists even if no remedy in the courts or elsewhere

be given him. A right often exists where there is no remedy, and a most frequent illustration of this is found in the relation of the subject to his sovereign, the citizen to his Government.

It seems to us that this "bargain" (again using Madison's word), by which the present peace and quiet of the United States, as well as their future prosperity and greatness were largely secured, and which was brought about by the sacrifice of the interests of individual citizens, falls within the intent and meaning of the Constitution, which prohibits the taking of private property for public use without just compensation. We do not say that for all purposes these claims were "property" in the ordinarily accepted and in the legal sense of the word; but they were rights which had value, a value inchoate, to be sure, and entirely dependent upon adoption and enforcement by the Government; but an actual money value capable of ascertainment the moment the Government had adopted them and promised to enforce them, as it did in August, 1793, and constantly thereafter. That the use to which the claims were put was a public use can not admit of a doubt, for it solved the problem of strained relations with France and forever put out of existence the treaties of 1778, which formed an insuperable obstacle to our advance in paths of peace to the achievement of commercial greatness.

The defendants urge further that the treaty of 1803 finally disposed of all pretensions of citizens of the United States in regard to these spoliations.

One of the principal objects of this treaty is found in the instructions to Mr. Livingston, our minister, wherein the Secretary of State directed his particular attention to claims embraced in the fourth article of the treaty of 1800, describing them as arising from: "(1) Cases of capture wherein no judicial proceedings have been had; (2) cases carried before French tribunals, and not definitively decided on the 30th September, 1800; (3) captures made subsequent to that date." (Madison to Livingston, Sept. 28, 1801, Doc. 102, p. 701.)

Accordingly Mr. Livingston in January following complained to the French Government of infractions of the existing treaty (of 1800) in relation to "vessels taken after its signature," "vessels previously taken where no judicial proceedings had been had," "vessels on which no definitive sentence had been given before that day," or which were removable to the council of prizes; these are fourth-article claims embraced in the *modus vivendi* therein provided. Claims for vessels

which were to have been restored are clearly not claims which had matured prior to September 30, 1800, when the treaty was signed. (*Ibid.* 704.)

In the next month (February 24, 1802) Mr. Livingston speaks of the differences as "debts," about which he must transmit to his Government a statement of the measures about to be adopted by France, "with a view either to afford it the satisfaction that it will always feel in contributing to the interests of France . . . or of putting a stop to credits that must be ruinous to its citizens already suffering under heavy losses sustained by the detention of a considerable capital in the hands of the French Government." (*Ibid.* 708.) It is thus apparent that these claims, in the view of the negotiator, rested substantially on contract, and it is further apparent from the text of the note that these contracts were for supplies to the French fleets and armies.

This is the first subject of negotiation; the second is as to the council of prizes, about which there were "daily complaints of their entire disregard of the treaty," so much so that when a vessel was ordered restored it was sent back in a damaged state and charged with cost of "detention, storage, etc." Fourth-article claims these, as we have already seen.

Livingston later (April 17, 1802), in discussing the fifth and second articles of the treaty of 1800, says:

> The fifth article expressly stipulates that all debts due by either Government to the individuals of the other shall be paid, but as this would also have included the indemnities for captures and condemnations previously made, and it was the intention of the contracting parties, by the second article, to preclude this payment as depending on a future negotiation, it was necessary to except from this promise of payment all that made the subject of the second article. . . . On its [the second article] being erased, the fifth article stands alone as a promise to pay, with the single exception of indemnities for captures and condemnations. (*Ibid.* 717.)

And he adds that so far as relates to indemnities for captures and condemnations which had been made previous to the signature of the treaty his demands could not be supported.

It seems hardly necessary to quote further from the correspondence, which shows that Mr. Livingston not only never had in mind, but

expressly excluded, second-article claims, directing his attention first to debts, "confirmed by treaty," as he says (*ibid.* 729), and second, to vessels seized during or after the negotiation of the treaty of 1800; that is, claims "confirmed," to use his word, by that treaty's fourth and fifth articles.

The distinction between different classes of claims then existing between the United States and France must be clearly marked out before the treaty of 1803 can be properly understood. The second article of the treaty of 1800 covered claims for illegal seizures and condemnations which were tied to the treaties of 1778. But all the illegal captures were not covered by that second article, for the fourth article treated of others; that is, of "property captured, and not yet definitively condemned, or which may be captured before the exchange of ratifications;" and this property, it was agreed, should be restored. That is, while the negotiations of the Ellsworth mission were proceeding the French decrees remained in force and spoliations had not stopped; the cases of some seized American vessels were then pending before the French tribunals, and these were the ones to be restored if not "definitively condemned" by the time the treaty became a law; others might be seized pending the discussion and before exchange of ratifications; in fact such seizures were made, and these also were to be restored.

Additional proof that this fourth article was in effect a mere *modus vivendi* is found in its concluding paragraph, which provides that it shall take effect from the date of signature, not from the exchange of ratifications, and that if any property should be condemned—that is condemned in the future—before knowledge of the stipulation "shall be obtained, the property shall without delay be restored or paid for." Now, the property covered by this article, to wit, that then before the tribunals or which might thereafter come before the tribunals before the new treaty took effect, never was restored or paid for, although spoliations continued for some time.

It is important here to note the distinction between the position as against the French Government of cases pending during the negotiation or which might thereafter arise and that of cases now before this court wherein the condemnation had occurred before. This claim and those like it were "claims to indemnity" merely; the property had disappeared and could not be restored, the French tribunals had definitively acted, and payment for it would be made only upon admission

by the United States of the continuing force of the ancient treaties; while, as to then pending cases the property could be restored, or in case of mistaken sale its value could be easily and immediately ascertained, and the fourth article absolutely promised restoration or payment.

The agreement of 1803 is contained in three instruments forming the contract by which we acquired Louisiana; these treaties give no rights to these claimants, as is popularly supposed; on the contrary, it is contended by the Government that any rights which ever existed were destroyed by them. The third treaty, providing for the payment of "sums due by France to the citizens of the United States," is the only one bearing upon these cases.

Article 1 provides that these "sums," called "debts," contracted before September 30, 1800 (the date of the prior treaty), shall be paid, with interest.

Article 2 describes the debts as those set forth in an annexed conjectural note, which is a list of claims allowed by the French accounting officers for such articles as rice, flour, salt beef, cloth, leather, cotton and indigo, wines and spirits; while article 6 limits the preceding articles to debts still due American citizens yet creditors of France "for supplies, for embargoes, and prizes made at sea in which the appeal has been properly lodged within the time mentioned in the convention" of 1800. But there is no such time mentioned in that convention, nor is there a word in it looking to any appeal whatever from decisions of inferior tribunals; the only provision about prizes in that treaty is that contained in its fourth article, directing that in the future they be restored.

Proceeding now to article 5 of this somewhat mysterious instrument of 1803, we find another limitation upon the preceding articles, to wit, that they shall cover only captures wherein the council of prizes has ordered restitution if the claim was valid against France, and then only in case of "insufficiency of the captors," *i. e.*, that the privateer's bond was not good. Further, it shall apply to debts mentioned in the fifth article of the treaty of 1800, that is, "debts" (not claims for damage by tort) due by one nation to citizens of the other, and this fifth article of 1800 expressly bars claims for captures or confiscations, while the fifth article of 1803 expressly does not comprehend "prizes whose condemnation has been or shall be confirmed." Therefore, by this series of limitations, the scope of the treaty of 1803 is

confined on its face, and so far as the cases at bar are interested in it, to captures, of which the council of prizes shall have ordered restitution," provided the claim was a valid one and the captor insufficient. Really, there does not seem very much left of it, so far as "embargoes and prizes made at sea" (Art. 4) are concerned.

The significant fact is stated to us by counsel in this connection that there were presented to the commission formed under the treaty of 1831, which we shall soon have occasion to examine, claims for two vessels, the *Caroline* and the *Orlando,* which were rejected upon the express ground that the captures were made prior to September 30, 1800. Further, the report of the board under the treaty of 1803 shows that only eight captures at sea were allowed, a ridiculously small number if the class of claims now at bar were within the jurisdiction of that tribunal.

That the settlement and payment of "debts," not of claims for tort, was the primary object of the treaty of 1803 is explained in its preamble and is apparent from its text, while the treaty of 1800 dealt with torts and indemnities for wrongs committed upon our commerce. The claim for debts was not sacrificed by the treaty of 1800, but kept alive by the fifth article, which, in further proof of the abandonment of claims for tort, explicitly excepted from the benefits of its provisions all "indemnities claimed on account of captures and confiscations." But these "debts contracted by one of the two nations with individuals of the other" were not paid as the treaty of 1800 promised, nor, as Mr. Livingston said to the French Government in 1802, was there the most "distant hope of their payment." (Doc. 102, p. 714.)

The association of the second and fifth articles of the treaty of 1800 in the preamble of the treaty of 1803 has been deemed significant as showing an intention to revive and settle the second-article claims now commonly known as "spoliation" claims, whereas the allusion was intended to reaffirm the exclusion of these claims already made by the second article; for the fifth article (1800) includes "debts" which are to be settled and expressly excludes "indemnities"; that is, excludes the subject-matter of the second article, which was not to be settled; so that France, being desirous in 1803, as the preamble says, "in compliance with the second and fifth articles of the convention of 1800 to secure the payment of the sums due by France to the citizens of the United States," covenanted to pay "debts," not indemnity for torts other than those specified, and which had been turned into debts by

the fourth article of the treaty of 1800. To put it in another form: as the original second article had ceased to exist, and was replaced by a provision that the treaty should last eight years, of course a reference to this new second article in the treaty of 1803 would have been absurd; so we must conclude that the negotiators referred to the original second article, the article which had been expunged by agreement. That article, so far as claims of citizens were concerned, referred to torts and nothing else; the fifth article referred to "debts," and provided that payment should be made therefor; and then went on to make an express exclusion from its benefits of claims for captures and confiscations, that is, claims arising from torts which were covered by the second article as it then stood. What more natural, then, that, in rehearsing the objects of the treaty of 1803, the two articles should be brought together in the preamble, the fifth article as embracing the debts due and the second article as covering the express exception made in the fifth article, which "includes debts contracted," and excludes "indemnities claimed on account of captures and confiscations"? The language of the preamble is, therefore, in compliance with the second as well as with the fifth article of the treaty of 1800.

We are of opinion that the treaty of 1803 had no reference to the claims embraced in the second article of the treaty of 1800.

Turning to the particular case now on trial we consider it with the principle admitted that the claims popularly known as "French spoliation claims" were, as a class, and if embraced in the description of the second article of the treaty of 1800, valid claims against France, which were surrendered by our Government for the valuable consideration found in a release from the obligations of the treaties of 1778, and that, by this action, the Government of the United States assumed the liabilities of France in regard to them, and is in duty bound to recompense the individuals who suffered loss by the illegal captures and condemnations.

The findings show that the schooner *Sally,* owned by Americans, commanded by an American, and laden with an American cargo, while on a commercial voyage from Massachusetts to Spain, was, on the 5th day of June, 1797, seized by the French privateer *Intrépide,* taken to the port of Nantes, there condemned by a French tribunal, and "confiscated" for the benefit of the privateer. It was not alleged that she had violated the law of nations, either by attempting a blockade or by carrying contraband, or in any other manner, but that she had violated

a local French municipal regulation "concerning the navigation of neutrals." It appears upon the face of the decree that the Government of France, through laws passed by its own legislature, valid within its territorial jurisdiction and upon its own ships, but not elsewhere, attempted to regulate the conduct of neutral merchantmen upon the high seas, where they were subject only to the laws of their own country and that law of abstract right and justice which by mutual consent has become crystallized into the law of nations.

To learn wherein the schooner violated the French decree we must turn to the findings, which rehearse the judgment of the tribunal, as follows:

"That while the master may be correct in the sum total of his clearance papers he is flagrantly at fault as to his crew-list," and "considering that the obligation common to the French nation and to the United States, and which constitutes the safety of their respective navigation, is defined by the treaty of February 6, 1778, which decides, articles 25 and 27, that every captain who receives a passport must be provided with a list, signed and attested by witnesses, containing the names and surnames and place of birth and residence of the persons composing the crew of his ship and of all persons embarking upon her, which he will not receive without the knowledge and permission of the naval officers. Considering that the memorandum or crew-list fulfills none of these formalities, inasmuch as it is unsigned, that the places of birth and residence of the men composing the crew are not declared, and the permission of the naval officer is not given; considering that article 6 of section 7 of the marine regulations of 1781 declares to be lawful prize the cargoes of confiscated ships," and "considering finally that article 4 of the decree of the Executive Directory of the 12th Ventose, year five, is clear and precise, and that it declares to be a good and lawful prize every American ship which shall not have a crew-list in due form such as is described by the model annexed to the treaty of February 6, 1778," therefore, the court, in conformity with these laws, and especially with article 4 of the said decree, declared valid the capture of the *Sally* and her cargo, and declared the captain to belong to the "enemies of the Republic" because he did not have a crew-list in conformity with the French decree.

The vessel and cargo were confiscated because the crew-list, the *"rôle d'équipage,"* was not in form, although there is not a word or sentence, as the French afterwards admitted (Doc. 102, p. 637), in the

treaties of 1778 requiring any such document. The French decree required it, but we can not admit that the government of a foreign country may stretch its arm over the ocean, and, seizing an American vessel, direct it as to the papers it shall carry, under penalty of confiscation. There is no allegation in the proceeding that the *Sally* did not have all the papers, other than this crew-list, required by the treaty of 1778 and the laws of the United States. In fact, the court itself admits this in saying that the captain is correct "in the sum total of his clearance papers, . . . but flagrantly in fault as to his crew-list." How flagrantly at fault? He had complied with the laws of his country, he had not violated a provision of the treaties of 1778, and it is not hinted that he infringed the law of nations or intended to do so.

The confiscation rests upon the decree of March 2, 1797, authorizing the seizure and condemnation of every American vessel not having on board "a *rôle d'équipage,* in proper form, such as is prescribed by the model annexed to the treaty of the 6th of February, 1778." A *"rôle d'équipage"* is for all practical purposes a "crew-list," although technically, under French regulations, it contains the names of all on board, including the passengers. Still "crew-list" is a sufficient translation for the purposes of this case.

The treaty of 1778 required vessels of each party to be furnished with a passport and a certificate as to her cargo and destination, but no mention whatever is made of a crew-list. Seizures on account of the lack of this instrument were, however, made even before the decree of March, 1797, and our consul-general, in calling attention to this fact, said to the minister of foreign affairs (Feb. 23, 1797, *ibid.* 155):

> By no regulations of the United States are our ships subjected to this formality; and not one of our vessels has (*rôle d'équipage*) a crew-list thus countersigned. Moreover, in the different treaties and conventions that connect France with America there is not found a single article sufficient to justify the doctrine set forth by the privateer. . . . I consider it unnecessary for me to communicate on this subject the right and supreme law of nations, being persuaded that you will think with me that every free and independent nation should possess the exclusive right to establish regulations for the management of their own navigation; and that no nation possesses the right to subject the citizens of another power to formalities to be observed in a foreign country not exacted by the laws of said country or by those to which said citizens

> belong. . . . The principle which the captain [of the privateer] desires to see established would lead to the condemnation of all the ships belonging to my nation actually found in the different ports of France, under the faith of treaties, and to authorize the cruisers of the Republic to capture all our merchantmen.

Mr. Pinckney afterwards (May 15, 1797, *ibid.* 171) writes:

> Our papers are, as they ought to be, according to the maritime laws of our country.

And again (June 28, 1797, *ibid.* 176):

> Mr. Adet [the French minister] arrived at Havre in an American ship without a *rôle d'équipage*. The Courier Maritime du Havre . . . infers that Mr. Adet must have been convinced, with all other publicists, that a *rôle d'équipage* was not necessary, and that all that was requisite was a passport conformable to the model annexed to the treaty of 1778.

Mr. Pickering, then Secretary of State, wrote the next year (Dec. 13, 1798, *ibid.* 429):

> There is no shadow of foundation for the claims set up by the French Government of the necessity of our vessels being provided with a *rôle d'équipage*.

In default of express treaty provision no Government can prescribe to our merchantmen navigating the high seas the detailed form and number of the papers they are to carry, nor seize or confiscate those merchantmen for non-compliance with that nation's municipal statutes. The seizure of this vessel, and of others under like conditions, was clearly illegal and unjustifiable.

The defendants say, further, the condemnation can not be illegal because made by a prize court having jurisdiction, and the decisions of such courts are final and binding. This proposition is of course admitted so far as the *res* is concerned; the decision of the court, as to that, is undoubtedly final, and vests good title in the purchaser at the sale; not so as to the diplomatic claim, for that claim has its very foundation in the judicial decision, and its validity depends upon the justice of the court's proceedings and conclusion. It is an elementary doctrine of diplomacy that the citizen must exhaust his remedy in the

local courts before he can fall back upon his Government for diplomatic redress; he must then present such a case as will authorize that Government to urge that there has been a failure of justice. The diplomatic claim, therefore, is based not more upon the original wrong upon which the court decided than upon the action and conclusion of the court itself, and, diplomatically speaking, there is no claim until the courts have decided. That decision, then, is not only not final, but, on the contrary, is the beginning, the very corner-stone, of the international controversy. This leads us naturally to another point made by the defense in that the claimant did not "exhaust his remedy," because he did not prosecute an appeal. We of course admit that usually there is no foundation for diplomatic action until a case cognizable by the local courts is prosecuted to that of last resort; but this doctrine involves the admission that there are courts freely open to the claimant, and that he is unhampered in the protection of his rights therein, including his right of appeal. It is within the knowledge of every casual reader of the history of the time that no such condition of affairs in fact then existed.

The very valuable report of Mr. Broadhead shows (pp. 6 and 7) that prior to March 27, 1800, there was practically no appeal in these cases except to the department of the Loire-Inférieure; in the then existing state of bad feeling and modified hostilities, and under the surrounding circumstances, this was to the captains of the seized vessels, in most if not in all cases, a physical impossibility. Nor prior to the agreement of 1800 was there any practical reason for appealing to a court when the result, as our seamen believed, whether rightly or not, but still honestly, was a foregone conclusion, and while negotiations were progressing for a settlement; nor is there anything in these negotiations showing that a technical exhaustion of legal remedy would be required. We are of opinion that the claimant was not, under these purely exceptional circumstances, obliged to prosecute his case through the highest court, even if he could have done so, which we doubt.

This court is forbidden by the act conferring jurisdiction not only to examine claims embraced in the treaty of 1803, which we have considered, but also those allowed and paid in whole or in part under the treaty of 1819 with Spain and those allowed in whole or in part under the treaty of 1831 with France.

The reference heretofore made in this opinion to the Spanish treaty

is sufficient to show its inapplicability to vessels seized on the high seas by a French privateer, taken to a French port and there illegally condemned and confiscated; so that treaty may be thrown out of the consideration of this case.

The treaty of 1831 is a claims treaty, by which the French Government, "in order to liberate itself completely from all the reclamations preferred against it by citizens of the United States for unlawful seizures, captures, sequestrations, confiscations, or destructions of their vessels, cargoes, or other property," agreed to pay 25,000,000 francs to the United States, for distribution (Art. 1), while the United States on their part agreed to pay to France for claims, described in language somewhat similar, the sum of 1,500,000 francs (Art. 3). As to other claims each country opened its courts to the citizens of the other, and finally France abandoned its demands under the eighth article of the Louisiana treaty in return for a reduction of duties upon French wines.

The wording of this treaty is broad enough at first glance to sustain the defendants' contention that these claims are included in it; but treaties and statutes, like every other document, must be read in the light of the facts as they existed at the time. A treaty now made with Great Britain providing a settlement of "all claims" could not be held to reopen the proceedings of the Geneva arbitration and to authorize payment of claims there dismissed, for the award was final, both as to what was allowed and as to what was refused. Nor could a similar general convention with France permit an opening of the proceedings of the Franco-American Commission with possible payment of claims there refused and declared forever barred.

Such treaties look not to dead issues, but to living pending claims, forming at the time a subject of contention between the Governments, and not to those universally regarded as finally settled. Claims of the class of the one at bar had been disposed of in 1801, when the President and Senate concurred in Napoleon's stipulation as to the second article, and since that time, although they had been constantly pressed upon the United States as an obligation of that Government to its citizens, they nowhere appear as a subject of discussion between the nations. France, by the treaty of 1831, desired to liberate itself from claims "preferred against it," by citizens of the United States, but these spoliation claims were not then being preferred against it; on the contrary, since 1801 the claimants had turned their attention ex-

clusively to the United States, recognizing the force and effect of what was called the "retrenchment of the second article." The French Government clearly understood this treaty of 1831 as excluding all American claims of every description originating prior to the treaties of 1803. (Ex. Doc. 147, 22d Cong., 2d sess., p. 165.)

Our commissioners who distributed the fund also so understood it, and required every claimant to show that his "claim remained unimpaired and in full force against France" in 1831. (House Ex. Doc. 117, 24th Cong., 1st sess., p. 4.) But these spoliation claims had not only been impaired but destroyed as a French obligation by the treaty of 1800; many cases of captures made prior to September 30, 1800, were presented to the board and rejected. (Sumner's Report, p. 35.)

A broad distinction is made in the remedial statute (January 20, 1885) between the claims described in these different treaties of 1803, 1819, and 1831. As to the treaty of 1803 the act does not extend to claims "embraced" in its provisions; as to the treaty of 1819 the act does not extend to claims "allowed and paid in whole or in part" under its provisions; as to the treaty of 1831 the act does not extend to claims "allowed in whole or in part" under its provisions. It is not contended that this claim was "allowed in whole or in part" under the provisions of the treaty of 1831.

We have not considered the point that the treaties of 1778 were abrogated by the act of Congress passed in 1798. That question, which the ablest minds of the period were unable to solve, and which proved an ever present and enduring obstacle to all negotiation until forcibly removed by Napoleon, with our concurrence, we fortunately are not forced to deal with. The rights of this claimant rest upon no convention, but are founded upon international law. Treaty or no treaty, a foreign nation can not be permitted to confiscate an American merchantman engaged in legitimate commerce upon the high seas because his crew-list does not fulfill the requirements of that nation's local ordinances. That the act of Congress was binding within the jurisdiction of the United States and was necessarily to be so regarded by our courts does not now admit of question. The treaties were, however, not only part of the supreme law of the land wherein they were replaced, within the jurisdiction of the Constitution, by a later supreme law, to wit, a statute; but they were also, as between the two Republics, contracts, which one of the parties attempted to annul. Treaties containing no clause fixing their duration are, under certain

circumstances, voidable at the option of one party. Whether there existed in 1798 such circumstances as authorized and made valid an abrogation of the treaties of 1778 by the United States was the very question left unsettled by the treaty of 1800, the one question upon which by no possibility apparently could the parties agree.

For the same reason we find it unnecessary to examine how far the French violated the agreement by their treaty of 1786 with Great Britain (15 Martens, *Recueil de Traités,* 2 ed., vol. 4, p. 155), or the effect, by way of abrogation of these agreements, of the Jay treaty, or the change in the form of government in France.

Some argument has been made as to the ownership of this claim, based upon the provision of the statute that the court shall determine "the present ownership, and if by assignee, the date of the assignment, with the consideration paid therefor." (§ 3.) Whatever may have been the intention of Congress in inserting this provision, its terms are perfectly clear; the findings of fact show in this case that the claimant is the administrator with the will annexed of the owner of the *Sally,* and show all other facts necessary to a decision upon the subject, except as to one of the defendants' points; as to this we can not agree that Congress intended this court to perform what is in effect a physical impossibility and to throw upon us the task of probate courts in the investigation of the rights of thousands of descendants and devisees of the original claimants, who are now scattered, in all human probability, to the four quarters of the globe. To ask this court to go back to the year 1800 and follow from that time down the succession of every then existing claimant is to ask us to do that which under our jurisdiction and powers would be an impossibility. A much more reasonable interpretation of the act appears upon its face, and applying that interpretation to this case we have found that the claimant, as administrator of the owner of the schooner *Sally,* is the owner of the claim. We consider it no part of our duty under the statute to place ourselves in the position of a court of probate and report to Congress the manner in which any ultimate recovery should under the laws of the thirty-eight States and eight Territories of this Union be distributed among the numerous next of kin or devisees of the original claimants and their descendants. The administrators are officers of those probate courts, subject to their jurisdiction and control, and presumably have filed adequate bonds for the honest and proper performance of the trust reposed in them.

Congress asks us for two facts: First, the present ownership. The owner, both in law and equity, the Supreme Court has said, is the administrator (*Villelonga's Case,* 23 Wall. 35), and that suffices for this particular case. Secondly, Congress asks, where there has been an assignment, not only the name of the present owner, but the date of the assignment and the consideration paid therefor. Of course these facts will be reported when such a case is presented.

So we reach the end of this opinion as unlike the usual judicial expression in its form and supporting authorities as are the cases before us unlike those ordinarily submitted to a tribunal of the law. We are, however, for the moment invested with some of the powers and jurisdiction belonging to the political branch of the Government, and upon us is imposed an examination not usually or naturally committed to a judicial body. We have been required not to investigate legal rights, based upon the doctrines and principles of the common law, but to inquire into and to report upon the ethical rights of a citizen against his Government; rights which are never enforceable except by the consent of the sovereign—in this country the legislature —as whose substitute we act to the limited extent prescribed and marked out by the remedial statute.

The result which we have reached is supported by resolutions passed in each of the thirteen original States, by twenty-four reports made to the Senate by its committees, by over twenty similar reports made to the House of Representatives, by the fact that while three adverse reports have been made, one to the Senate and two to the House, no adverse report has been made in either body since the publication of the correspondence in 1826, and by the further facts that the Senate has passed eight bills in favor of these claimants, and the House has passed three of these, of which one is the present law, the other two having been vetoed, one by President Polk, substantially upon grounds not at this time important, the other by President Pierce for reasons which we have considered very fully in this opinion, and with which, after the most careful and painstaking consideration, we can not agree.

The arguments of counsel for claimants, marked as they were by ability, industry, and a frank desire for a just ascertainment of the rights involved, have been of great assistance to us; while the learned assistant attorney for the United States has presented the defense with a zeal and force of argument which we do not find in the history of the long discussions it has heretofore received.

The chief justice and all the judges concur in this opinion, and we shall, in accordance with the statute, report to Congress the conclusions of fact and law in this claim, together with a copy of this opinion, which contains (using the words of the statute) the conclusions which, in our judgment, "affect the liability of the United States therefor."

THOMAS CUSHING, ADMINISTRATOR, v. THE UNITED STATES[1]

[French Spoliations No. 132. Decided December 6, 1886]

On the Defendants' Motion

The general question of the liability of the United States for claims released to France by the treaty of 1800 is decided in the case of *Gray* (21 C. Cls. 340). Subsequently during the term, the law officers of the government move for a rehearing. All of the questions involved are reargued and reconsidered.

I. The French Spoliation Cases can not be maintained as subjects of legal right founded on municipal law; but Congress with full knowledge of the law and the facts, directed that they be investigated and determined under a different and broader rule, viz., *"According to the rules of law, municipal and international, and the treaties of the United States applicable to the same," Act of January 20, 1885.*[2] (23 Stat. L. 283).

II. The question, what are *"valid claims to indemnity upon the French Government,"* is international and not within the scope of ordinary judicial inquiry, and is to be measured by rules which relate to the rights and obligations of nations.

III. The purpose of the French Spoliation Act of 1885 is that the judicial shall assist the political branch of the Government in determining certain rights not enforceable in courts, but which are nevertheless obligatory under international law and the Constitution.

IV. The court now adheres to its former conclusions (1) that the French depredations upon American commerce were illegal; (2) that the United States by the treaty of 1800 set off these claims against others maintained by France, and released them for a valuable consideration beneficial to this nation; (3) that an appeal from a prize court is not an indispensable prerequisite to diplomatic interference and amid the circumstances is no defense in this case.

V. It is the purpose of the Spoliation Act that the court shall determine whether each claim brought before it is valid as against France, and whether the United States became liable over to the individual.

VI. Neither original of the treaty of 1800 with France can be found; but the published copies differ only in the caption, which is not a part of a treaty, and is usually the work of an editor.

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[1] Court of Claims Reports, vol. 22, page 1. [2] *Supra*, p. 92.

VII. The treaty was not a treaty of peace, nor did it conclude or recognize a state of war or a condition of hostilities. The decision in *Bas* v. *Tingy* (4 Dallas, 37[1]), and the statutes to which the decision refers, examined and explained.

VIII. The treaty is not an adjudication of these claims adverse to this Government. Its own terms negative that assumption; so do the negotiations which led to it, and so does the act of 1885.

IX. The reprisals of this country upon France were most limited in their nature; were allowed by the natural laws of self-defense, and defined and regulated by acts of Congress which were defensive in character, allowing French merchantmen to pursue their voyages unmolested and to refit and provision in our ports.

X. The seizure of an American merchantman can not be justified by the fact of her having been armed for defensive purposes. During the last century substantially all vessels were armed against pirates.

XI. Condemnations of prize courts are final in actions between individuals, and as to the vessels condemned, giving purchasers a good title as against all the world, but do not bind foreign nations nor bar claims valid by international law.

XII. The rights of prize courts are the rights of the capturing states. Their decrees do not relieve the state from responsibility nor preclude other powers from seeking redress or investigating the captures *de novo*.

XIII. The absence of a ship's papers may be punishable within local jurisdiction as a police measure, but never by absolute confiscation, if it be shown that the vessel was innocently pursuing a legitimate voyage.

The Reporters' statement of the case:

The cases now argued and submitted are the same as those determined at the last term (21 C. Cls. 340, 430), the present motion being merely a means for reviewing and resubmitting the legal questions previously considered. The cases were reported to Congress on the same day that this motion was decided. The findings in those cases are given below.

The Schooner *Industry*

No. 132. Thomas Cushing, administrator of Marston Watson.
No. 258. Charles F. Adams, administrator of Peter C. Brooks.
No. 258. William Sohier, administrator of Nath. Fellowes.
No. 1918. H. W. Blagge and Susan B. Samuels, administrators of Crowell Hatch.

[1] *Supra*, p. 104.

FINDINGS OF FACT

These cases having been tried together before the Court of Claims, William E. Earle, Esq., appearing for Thomas Cushing and Charles F. Adams, Edward Lander, Esq., for William Sohier, and George S. Boutwell, Esq., for Blagge and Samuels, claimants; and Benjamin Wilson, Esq., assistant attorney in the Department of Justice, with Robert A. Howard, Assistant Attorney-General, for the defendants, the court, upon the evidence, finds the facts to be as follows:

I. The schooner *Industry,* a duly registered vessel of the United States, of which Benjamin Hawkes was master, sailed on a commercial voyage from the port of Boston, Mass., June 1, 1798, bound for Surinam with a cargo of merchandise, both owned by Marston Watson, a citizen of the United States residing in said Boston, now deceased; said vessel was lawfully pursuing her voyage when she was seized and captured on the high seas by the French privateer *Victoire,* Captain Bandry, on the 26th of July, 1798, and was taken into the French port of Cayenne, and there libeled, condemned, and sold as a prize.

II. The sole ground of condemnation was that the *rôle d'équipage* which she had on board was "signed only by one notary public, without the confirmation of witnesses," and that there was written on the back of said *rôle* an unsigned certificate that a *rôle d'équipage* was unnecessary.

III. The value at the time of said seizure was as follows:

Vessel	$1,500
Freight	2,500
Cargo of merchandise	10,555
Cost of insurance	4,000
Total value	$18,555

IV. Said Watson had insurance thereon to the amount of $12,000, which the claimant, Cushing, his duly appointed administrator, admits was paid to said Watson, or that he is chargeable with the receipt thereof. Crowell Hatch, William Smith, David Greene, Benjamin Bussey, and Nathaniel Fellowes, all citizens of the United States, were among the insurers, each for $1,000, through Peter C. Brooks, also a citizen of the United States, an insurance broker, which said sums were paid to said Marston Watson on or before February 20, 1799, as for a total loss of said schooner with the cargo.

V. Henry W. Blagge and Susan B. Samuels are the duly appointed administrators of said Crowell Hatch, deceased, and William Sohier is the duly appointed administrator of said Nathaniel Fellowes, deceased, and in their said representative capacity they are the present owners of the claims of their respective intestates above set out.

VI. Said Smith, on the 15th of December, 1801, in consideration of $4,000 and the assumption by said Brooks of all the disadvantages of the said Smith as an underwriter in the office of the said Brooks and said Greene, on the 23d of December, 1801, in consideration of $6,000, and the assumption of the disadvantages of said Greene as an underwriter in the office of said Brooks and said Bussey, on the 15th of February, 1805, in consideration of $10,000 and the assumption by said Brooks of the disadvantages of the said Bussey as an underwriter in the office of the said Brooks, assigned to said Brooks all their respective underwriting accounts in his said office; and said Charles F. Adams, administrator aforesaid in said representative capacity, is the present owner of said claims so assigned.

VII. Said claims were not embraced in the convention between the United States and the Republic of France concluded on the 30th of April, 1803. It was not a claim growing out of the acts of France, allowed and paid in whole or in part under the provisions of the treaty between the United States and Spain, concluded on the 22d of February, 1819, and it was not allowed in whole or in part under the provisions of the treaty between the United States and France of the 4th of July, 1831.

CONCLUSIONS OF LAW

The court finds as conclusions of law that said seizure and condemnation were illegal, and the owners and insurers had valid claims therefor upon the French Government prior to the ratification of the convention between the United States and the French Republic, concluded on the 30th day of September, 1800, and were entitled to the following sums:

Marston Watson, owner of the vessel and cargo	$18,555
Less the amount of the insurance	12,000
Balance	$6,555

William Smith, David Greene, and Benjamin Bussey, represented by Charles Francis Adams, administrator of Peter Chardon Brooks,

assignee, Crowell Hatch, and Nathaniel Fellowes, each $1,000, the amount of insurance paid by them respectively.

That said claims were relinquished to France by the Government of the United States by said treaty in part consideration of the relinquishment of certain national claims of France against the United States.

The conclusions of law which, in our judgment, affect the liability of the United States therefor, are set forth in the opinions of this court, delivered May 17 and 24, and December 6, 1886.

The Schooner *Delight*

No. 505. George Holbrook, administrator of Edward Holbrook.

No. 249. Charles Francis Adams, administrator of Peter C. Brooks.

No. 249. Ebenezer Gay, executor of the last will and testament of Ebenezer Gay, who was assignee in bankruptcy of Thomas English.

No. 249. Charles T. Hunt, administrator of Joseph Russell, surviving partner of Jeffrey & Russell.

No. 249. Henry W. Blagge and Susan B. Samuels, administrator and administratrix of Crowell Hatch.

No. 252. Charles Francis Adams, administrator of Peter C. Brooks.

FINDINGS OF FACT

These cases, involving a claim under the act of January 20, 1885, were heard by the Court of Claims. The claimants were represented by William E. Earle, Esq., Messrs. Shellabarger & Wilson, and George S. Boutwell, Esq.; and the defendants by Benjamin Wilson, Esq., assistant attorney, with whom was the Assistant Attorney-General. After hearing the parties, their proofs, and arguments, the court from the evidence find the facts to be as follows:

I. That the schooner *Delight,* an American registered vessel of 78 and a fraction tons, owned by Asa Payson and Edward Holbrook, both of Boston, Mass., sailed upon a commercial voyage from Boston to St. Bartholomew's, June 22, 1799, laden with a cargo of bacon, soap, candles, butter, and similar goods.

II. That said vessel and cargo were owned by Payson & Holbrook,

with an adventure, belonging to Stephen Curtis, the captain, all of whom were citizens of the United States.

III. That on July 2, 1799, the owners obtained of Peter Chardon Brooks a policy of insurance on said schooner for $1,500, and on said cargo for $4,500, whereon the hereinafter named insurers underwrote as stated.

IV. That on June 21, 1799, Stephen Curtis obtained a policy of insurance of $500 on his adventure, whereon Tuthill Hubbart underwrote $500.

V. That the schooner *Delight* and her cargo was captured by the French privateer, *La Courageuse,* Captain Vendibourg, July 19, 1799, and condemned at Guadeloupe.

VI. That the sole grounds for the condemnation were that a part of the cargo was English merchandise, and that the *rôle d'équipage* was deficient.

VII. That the cargo contained nothing contraband of war, under the treaty of February 6, 1778, and nothing English.

VIII. That the cargo owned by Payson & Holbrook was worth $5,959, and the insurance paid thereon being $4,500, they lost on the cargo $1,459; that the schooner was worth $3,243, and the insurance paid thereon being $1,500, the loss thereon was $1,743; that the freight was reasonably worth $2,500; that the insurance premium paid was $600, making $6,302.

IX. That the said underwriters named in Finding No. III paid the said several sums for which they underwrote, amounting to $6,000, and Tuthill Hubbart also paid the amount for which he underwrote, as found in Finding No. IV, and thereupon the insured abandoned to the underwriters in writing to the extent of the insurance.

X. Crowell Hatch, Tuthill Hubbart, William Smith, Jeffrey & Russell, Benjamin Homer, Thomas English, David Greene, Daniel Denison Rogers, all citizens of the United States, were insurers for the following sums, to wit: Said Hatch, Hubbart, Smith, and Jeffrey & Russell, each in the sum of $1,000, said Homer, English, Greene, and Rogers, each in the sum of $500, through Peter Chardon Brooks, also a citizen of the United States and an insurance broker, which said sums were paid to the said Payson & Holbrook before January 25, 1800, as and for a total loss of said schooner and cargo.

XI. Tuthill Hubbart, a citizen of the United States, was an insurer in the sum of $500, through Peter Chardon Brooks, a citizen of the

United States and an insurance broker, which said sum was paid to Stephen Curtis before January 25, 1800, as and for a total loss of his adventure on board of said schooner.

XII. Henry W. Blagge and Susan B. Samuels are the duly appointed administrators of Crowell Hatch, deceased, and Charles F. Hunt is the administrator, *cum testamento annexo,* of Joseph Russell, deceased, surviving partner of Jeffrey & Russell; and Ebenezer Gay is the executor of the last will and testament of Ebenezer Gay, assignee in bankruptcy of Thomas English, deceased; and in their representative capacities they are the present owners of the claims of their respective decedents herein set forth.

XIII. That said Smith, on the 16th of December, 1801, in consideration of $4,000 and of the assumption of the liabilities of the said Smith as an underwriter in the office of Peter Chardon Brooks; and said Greene, on the 23d day of December, 1801, in consideration of $6,000 and the assumption of the liabilities of the said Greene in the office of said Brooks as an underwriter; and said Rogers, on the 19th of October, 1804, in consideration of $3,400 and the assumption of the liabilities of the said Rogers as an underwriter in the office of the said Brooks; and the said Homer, on the 23d of July, 1805, in consideration of $5,000 and the assumption of the liabilities of the said Homer in the office of the said Brooks as an underwriter; and the said Hubbart, on the 4th of April, 1808, in consideration of $60,000 and of the assumption of the liabilities of the said Hubbart in the office of the said Brooks as an underwriter, assigned to the said Brooks all their respective underwriting accounts in his said office.

XIV. That said claims were not embraced in the convention between the United States and the Republic of France, concluded on the 30th of April, 1803; that they were not claims growing out of the acts of France allowed and paid in whole or in part under the provisions of the treaty between the United States and Spain, concluded on the 22d day of February, 1819; and they were not allowed in whole or in part under the provisions of the treaty between the United States and France of the 4th of July, 1831.

CONCLUSIONS OF LAW

The court finds as conclusions of law that said seizure and condemnation were illegal, and the owners and insurers had valid claims therefor upon the French Government prior to the ratification of the

convention between the United States and the French Republic, concluded the 30th day of September, 1800, and were entitled to the following sums to wit:

Payson & Holbrook, owners of vessel and cargo, after deducting insurance, $6,302.

Benjamin Homer, Daniel Denison Rogers, and David Greene, represented by Charles Francis Adams, Jr., administrator of Peter Chardon Brooks, each $500.

Crowell Hatch, represented by Henry W. Blagge and Susan B. Samuels, $1,000.

Jeffrey & Russell, represented by Charles F. Hunt, $1,000.

Thomas English, represented by Ebenezer Gay, $500.

Tuthill Hubbart and William Smith, represented by Charles Francis Adams, Jr., administrator of Peter Chardon Brooks, $1,000 each.

Tuthill Hubbart, in case No. 252, represented by Charles Francis Adams, Jr., administrator of Peter Chardon Brooks, $500, the same being the amounts of insurance paid by them respectively.

That said claims were relinquished to France by the Government of the United States by said treaty in part consideration of the relinquishment of certain national claims of France against the United States.

The conclusions of law which in our judgment affect the liability of the United States therefor are set forth in the opinions of this court delivered May 17 and 24 and December 6, 1886.

The Schooner *Little Pegg*

No. 155. Francis King Carey, administrator of Samuel Hollingsworth.

FINDINGS OF FACT

This case was heard before the Court of Claims May, 1886.

The claimant was represented by William E. Earle, Esq., and John & David Stewart, Esqrs., and the defendants by Benjamin Wilson Esq., assistant attorney. After hearing the parties, their proofs and arguments, the court from the evidence finds the facts to be as follows:

I. In 1798, Thomas and Samuel Hollingsworth, of whom Samuel was the survivor, citizens of Baltimore and of the United States, were the owners of the schooner *Little Pegg,* a duly registered vessel of the United States.

II. In the same year said vessel sailed upon a lawful voyage from Baltimore, Md., to Kingston, Jamaica, under the command of William Auld, master, laden with a cargo of flour, crackers, peas, and shingles, all belonging to said owners. September 28, 1798, the vessel was captured by a French privateer, called *Le Macanda,* commanded by Lewis Duprat, and carried into Port au Paix. Said vessel and her cargo were subsequently condemned, to wit, October 3, 1799, as prize, at Cape François, by the French prize tribunal.

III. William Auld, the said master, was born in Scotland, but was naturalized as a citizen of the United States August 22, 1798, and had been a resident of Baltimore since January, 1795. The condemnation of the vessel and cargo was made on the ground that the master was a native of Scotland, with which country France was at war.

IV. At the time of the capture said vessel was worth $2,000, the cargo $2,760.50, and the freight $1,200, making in all $5,960.50. The claim has never been assigned. The claimant is the duly appointed administrator *de bonis non* of the estate of Samuel Hollingsworth, deceased, by the orphans' court of Baltimore.

V. This claim was not embraced in the convention between the United States and the Republic of France concluded on the 13th day of April, 1803; that it was not a claim growing out of the acts of France, allowed and paid, in whole or in part, under the provisions of the treaty between the United States and Spain, concluded on the 22d day of February, 1819; and that it was not allowed, in whole or in part, under the provisions of the treaty between the United States and France, concluded on the 4th day of July, 1831.

CONCLUSIONS OF LAW

The court finds as conclusion of law that Samuel Hollingsworth has a valid claim to indemnity upon the French Government prior to the ratification of the convention between the United States and the French Republic, concluded on the 30th day of September, 1800, and was entitled to the sum of $5,960.50, and that the claim was relinquished to France by the Government of the United States by said treaty in part consideration of the relinquishment of certain national claims of France against the United States.

The conclusions of law which in our judgment affect the liability of the United States therefor are set forth in the opinion of this court delivered the 17th and 24th of May and the 6th of December, 1886.

The Ship *Theresa*

No. 142. R. Stewart Strobel and Henry L. Bruns, administrators of Thomas Stewart.

FINDINGS OF FACT

This case, involving a claim under the act of January 20, 1885, was heard before the Court of Claims in May, 1886. The claimant was represented by William E. Earle, Esq., and the defendants by Hon. Benjamin Wilson, assistant attorney. After hearing the parties, their proofs and arguments, the court from the evidence finds the facts to be as follows:

I. In 1797 Thomas Stewart, a citizen of Charleston, S. C., was the owner of the ship *Theresa*. The *Theresa* was duly registered as a vessel of the United States. In the same year, under the command of James Brown, the master, she sailed, in ballast, upon a lawful voyage from London to Nantes, where she was to take in a cargo of salt. She bore a letter from Mr. King, the United States minister to Great Britain, to P. F. Dorbee, vice-consul of the United States at Nantes. Arriving at Nantes she was seized by the French marine officers, and, on April 25, 1798, condemned by the tribunal of commerce, whereby she became lost to the owner.

II. The *Theresa* was condemned "upon the plea of the want of a muster-roll or *rôle d'équipage.*" The legality of condemnation for this cause, the liability of France to make restitution, and the transfer of such liability to the United States by the operation of the treaty of 1800, were considered by the court and ruled upon adversely to the defendants in the case of *William Gray, Administrator,* v. *The United States,* No. 7 of these claims.

III. The value of the *Theresa* was $6,350. The claim has never been assigned, nor is it embraced in the convention between the United States and the French Republic concluded on the 30th day of April, 1803; nor to such claims growing out of the acts of France as were allowed and paid, in whole or in part, under the provisions of the treaty between the United States and Spain, concluded on the 22d day of February, 1819; nor to such claims as were allowed, in whole or in part, under the provisions of the treaty between the United States and France concluded on the 4th day of July, 1831.

IV. The claimants were duly appointed administrators *de bonis non* of the estate of Thomas Stewart, deceased, by the probate court of Charleston County, S. C.

CONCLUSIONS OF LAW

The court finds as conclusion of law that the said Thomas Stewart had a valid claim to indemnity upon the French Government prior to the ratification of the convention between the United States and the French Republic, concluded on the 30th day of September, 1800, and was entitled to the following sum of $6,350, and that the claim was relinquished to France by the Government of the United States by said treaty in part consideration of the relinquishment of certain national claims of France against the United States.

The conclusions of law which in our judgment affect the liability of the United States therefor are set forth in the opinions of this court delivered the 17th and 24th of May and the 6th of December, 1886.

The questions submitted by the counsel for the defendants on the present motion were the following:

1. Whether the ship's paper called a *rôle d'équipage,* or muster roll, or crew list, was properly exacted of the original claimants by the French admiralty courts.

2. Whether the original claimants were excused from an exhaustion of their remedies against the privateer owners in France.

3. The question of the conclusiveness against the original claimants of the admiralty condemnations in France.

4. Whether there was war between France and the United States at the time these claims arose, and how that fact affected their validity.

5. Whether the French Government ever admitted the validity of the present claims.

6. Whether this Government bargained away and appropriated the present claims while pending against France.

Mr. Solicitor-General Jenks, for the defendants, requested the court to find the following conclusions of law:

1. That the act of the 20th of January, 1885, submits to this court two questions for its consideration and report: (*a*) The validity of the claims presented as against France. (*b*) Such facts and conclusions of law as may affect the liability of the United States therefor. (23 Stat. L. 283, § 1, 3.)

2. That the court, in its report and conclusions of law, is required to conform to the rules of law, municipal and international, and the treaties of the United States applicable to the case. (23 Stat. L. 283, § 3.)

3. That the acts of Congress of the United States, unrepealed, within the limits of the Constitution, are conclusively obligatory upon this court as law in this case.

4. That this court is not empowered under the law to go behind an act of Congress, unrepealed, to inquire into the motives, reasons, or facts which induced the passage of the act, and pass upon the verity or sufficiency of the facts, motives, or reasons which occasioned the legislative power to pass it, or decide, because it may differ with the legislative power as to the verity of the facts and the sufficiency of the reasons, therefore the act regularly passed, approved, unrepealed, and within the limits of the Constitution, is not law. (*Osborne* v. *U. S.,* 7 Wheaton, 866; *Fisher* v. *Blight,* 2 Cranch, 390; *U. S.* v. *Wiltberger,* 5 Wheaton, 95, 105.)

5. It is a prerogative of sovereignty to judge and determine conclusively whether war is justifiable; and when a sovereign so determines it is conclusive on the whole world. (Story on the Constitution, § 207.)

6. France, at the time of the seizure of the property for which claim is made, was a sovereign nation, and, as such, had a right to determine conclusively as to the United States whether her status should be that of peace or war; and if the latter, whether it should be general or limited; and, in either event, the principles of international law applicable to the status she selected are those which should control in determining her liability for the property for which claim is made. (*The Charming Betsy,* 2 Cranch, 118; 1 *id.* 28–39; 3 Wheaton, 315.)

7. That the deliberate act of France by which she authorized the seizure by force, the condemnation, and confiscation of the merchantmen and armed vessels of the United States, under which the property claimed in this case was seized, was the actual assertion and exercise of a belligerent power, and, as such, constituted a maritime war on her part against the United States. (*Bas* v. *Tingy,* 4 Dall. 39, 40, 41; Dana's Wheaton, § 291.)

8. That the right to redress by the United States or her citizens for the seizure of the property claimed should be determined by the principles of international law, as applicable to a nation engaged in a maritime war. (*Talbot* v. *Seeman,* 1 Cranch, 28.)

9. That during the existence of a maritime war, if a vessel and cargo of a citizen be seized by one of the belligerents, and be not recaptured by one of his own nation, his title is gone; and, unless by the treaty which terminates the war the rights are reserved, or indemnity is provided for or received for the seizure, he has no valid claim for his loss. (Vattel's *Law of Nations,* 385, 386; 2 Blackstone, 400; 8 Cranch, 145.)

10. The determination as to whether war is justifiable and exists belongs, under the United States Government, to the political departments of the Government, and their determination is conclusive as law on the judiciary. (2 Black, 670; 12 Wall. 702; 15 *id.* 560, 561.)

11. If the political departments of the Government enact such laws, make such proclamations, as authorize the forcible capture of the property of another nation on the high seas, make conquests, and condemn the property captured as booty, it is a political determination of the existence of war. (Prize Cases, 2 Black, 670; 12 Wall. 702; 15 *id.* 560.)

12. The act of Congress of the 9th of July, 1798, and other similar acts, at and about the same time, in pursuance thereof, followed by the capture and condemnation of the property of the French, and other warlike acts of retaliation by force, is a conclusive determination by the political departments of the Government that war existed by the United States against France. (*Bas.* v. *Tingy,* 4 Dall. 42, 43, 44, 46; 1 Cranch, 28, 31.)

The syllabus in *Bas* v. *Tingy* is as follows:

> Under the seventh section of the *Act of March* 2, 1799 (1 Stat. L. 716), France was to be deemed an enemy of the United States in March, 1799, and a French privateer having captured an American vessel, a public armed vessel of the United States was entitled to salvage or recapture.

The opinion declares as follows:

> The decision of this question must depend upon another, which is whether, at the time of passing the act of Congress of the 2d of March, 1799, there subsisted a state of war between the two nations. It may, I believe, be safely laid down that every contention by force between two nations, in external matters, under the authority of their respective Governments, is not only war, but public war. If it be declared in form, it is called solemn, and is of

the perfect kind; because one whole nation is at war with another whole nation, and all the members of the nation declaring war are authorized to commit hostilities against all the members of the other in every place and under every circumstance. In such a war all the members act under a general authority, and all the rights and consequences attach to their condition.

But hostilities may subsist between two nations, more confined in its nature and extent, being limited as to places, persons, and things, and this is more properly termed imperfect war, because not solemn, and because those who are authorized to commit hostilities act under special authority and can go no farther than to the extent of their commission. Still, however, it is public war, because it is an external contention by force between some of the members of the two nations, authorized by the legitimate powers. It is a war between the two nations, though all the members are not authorized to commit hostilities such as in a solemn war where the Government restrain the general power.

Now, if this be the true definition of war, let us see what was the situation of the United States in relation to France. In March, 1799, Congress had raised an army, stopped all intercourse with France, dissolved our treaty, built and equipped ships of war and commissioned private armed ships; enjoining the former and authorizing the latter to defend themselves against the armed ships of France; to attack them on the high seas, to subdue and take them as prize, and to recapture armed vessels found in their possession.

What, then, is the evidence of legislative will? In fact and in law we are at war. An American vessel fighting with a French vessel to subdue and make her prize is fighting with an enemy, accurately and technically speaking; and if this be not sufficient evidence of the legislative mind, it is explained in the same law. The sixth and the ninth sections of the act speak of prizes, which can only be of property taken at sea from an enemy, *jure belli;* and the ninth section speaks of prizes taken from an enemy, in so many words, alluding to prizes which had been previously taken. But no prize could have been then taken except from France; prizes taken from France were, therefore, taken from the enemy. This, then, is a legislative interpretation of the word enemy; and if the enemy as to prizes, surely they preserve the same character as to recaptures. Besides, it may be fairly asked, Why should the rate of salvage be different in such a war as the present from the salvage in a war more solemn and general. And it must be recollected that the occasion of making the law of March, 1799, was not only to raise the salvage, but to apportion it to the hazard in which the property retaken was placed, a circumstance for which the former salvage law had not provided.

> The two laws, on the whole, can not be rendered consistent unless the court could wink so hard as not to see and know, that in fact in the view of Congress, and to every intent and purpose, the possession by a French armed vessel of an American vessel was the possession of an enemy, and, therefore, in my opinion, the decree of the Circuit Court ought to be affirmed.
>
> But by the acts of Congress an American vessel is authorized: 1st. To resist the search of a French public vessel; 2d. To capture any vessel that should attempt by force to compel submission to a search; 3d. To recapture any American vessel seized by a French vessel; and 4th. To capture any French armed vessel wherever found on the high seas.
>
> An imperfect war, or a war as to certain objects and to a certain extent, exists between the two nations; and this modified warfare is authorized by the constitutional authority of our country. It is war *quoad hoc*. As far as Congress tolerated and authorized the war on our part, so far may we proceed in hostile operations. It is a maritime war, a war at sea as to certain purposes. The national armed vessels of France attack and capture the national armed vessels of the United States; and the national armed vessels are expressly authorized and directed to attack, subdue, and take the national armed vessels of France, and also to recapture American vessels.

Now, is that the truth or is it false? Is that law to this court or is it not law; and was not that a capture exactly like this of the *Sally?* But if it were a war and the laws of war apply, there was no title, no right of recovery whatever left in the owner of the *Sally* twenty-four hours after she was taken under general international law. Under our statute there was none at all, unless on recapture. The same view is expressed in another form by each and every justice in that cause. Now, if you will take that case and make any possible distinction between the case of *Bas* v. *Tingy* and this case at bar, it is more than I am capable of making on principle, because you will have to find it was captured just as the *Sally* was.

13. The United States having elected to redress the wrongs France had done her and her citizens by retaliation—a warlike measure—and having actually obtained redress in that way, can not afterwards, in the absence of treaty stipulations, deny the justice of the judgment in this last and highest tribunal of nations, nor claim another remedy and payment for the same wrong. (Treaty of 1800, Rev. Stat., § 225; Vattel, 437, 438.)

14. The claim in this case, if any existed, having then been redressed by the war measures of retaliation as against France, is barred by the redress received in the judgment of that court of last resort.

15. When a sovereign appeals to the judgment of the tribunal of war, that appeal is final and conclusive as to the parties in the controversy and all their citizens as to the subject-matter of the dispute, and is conclusively presumed to be fully executed in the treaty by which the appeal is terminated.

16. That by the treaty of 1800 as ratified, no rights of the citizen were reserved, nor any indemnity provided for or received; but both the United States and France expressly renounced their respective pretensions to indemnity for past alleged wrongs committed by either. (Rev. Stat., § 232.)

17. That the very cause of the warlike measures determined upon by the United States as against France, which was terminated by the treaty of 1800, was the capture, condemnation, and destruction by the French of American vessels and cargoes, in which was included the property claimed by the petitioner in this case. (Rawle on the Constitution, 109.)

18. That under the law and facts of this case, the claimant had no right, at, immediately before, or after the treaty of 1800 to indemnity for his claim against France.

19. A nation, by the compact of Government, does not insure against nor agree to indemnify its citizens for all wrongs done them, either individual or national. (Vattel, 402, 403.)

20. The fact that the United States did not require an indemnity of France for the spoliations committed on the commerce of her citizens does not impose on the United States the legal duty of paying all or any claims for which she as a sovereign did not see fit to demand indemnity.

21. That the judgment of the political departments of the Government in making and ratifying the treaty of 1800 being a political act, and within the jurisdiction of the political departments, is, as law, conclusive on this court; and this court is not empowered to reopen the justice or expedience of the treaty, nor to rejudge it on any grounds. (*Williams* v. *Suffolk Insurance Co.*, 13 Pet. 420; *Phillips* v. *Payne*, 92 U. S. 132. *The Amiable Isabella*, 6 Wheat. 72.)

22. That by the act of Congress of the 7th of July, 1798 (1 Stat. L., p. 578), the treaty of 1778 between the United States and France was

annulled, and France, after the passage of the act, had no lawful claim against the United States for or on account of that treaty, or for or on account of any breach or infringement thereof. (1 Stat. L. 538; Rawle on the Constitution, 109; *Chirac* v. *Chirac,* 2 Wheat. 272; *The Charming Betsy,* 2 Cranch, 118.)

23. That under the law and treaties in this case no claim of France against the United States for any breach or infraction of the treaty of 1778 was paid by set-off, defalcation, or compromise of any rights, if such existed, which this claimant had against France for spoliation.

24. That at the time negotiations for the treaty of 1800 were had between the United States and France, no treaty existed between them, nor any treaty obligation.

25. The United States, by the treaty of 1800, did not receive, reserve, nor stipulate for any additional redress for the alleged wrong claimed in the case of the petitioner; but, upon its ratification, expressly renounced its pretensions of claim therefor. (Rev. Stat., 43d Cong., Post Roads and Treaties, p. 232.)

26. That the claimant in this case has no legal claim or right against the United States.

Mr. B. Wilson, for the defendants, proposed the following additional requests:

1. That international law concerning neutral commerce required, as proofs of the neutrality of a vessel, the same proofs which are mentioned in the treaty of 1778, which are, 1st, the certificate of the several particulars of the cargo (Ordinance of 1681; Chitty's Com. Law, 487; DeMartens' Armateurs, § 21); 2d, a passport (Chitty's Com. Law, 487); Ordinance of 1681; 3 Phillimore Int. Law, 734, cases there cited); 3d, the certificate of the ownership of the vessel (regulation of the Hanseatic League, 1369); 4th, the report or *procès-verbal* of the captain of what was done during the voyage (Boucher Droits Maritimes, §§ 368, 498; Emérigon, sec. tom. 1, fol. 276); 5th, the carrying of the flag of the country to which the vessel belongs (1 Rob. Adm. Rep. 1, 19, 161); 6th, the *rôle d'équipage* (Règlements of 1704, 1774, 1778; Chitty's Com. Law, 487; Valin, Traité des Prises, etc.).

2. That the treaty of 1778, so far as the proofs of neutrality or innocence were concerned, was therefore declaratory of international law already existing and to be interpreted accordingly.

3. That the treaty required a *rôle d'équipage,* or list of the crew,

giving the names and places of birth of the crew and of all who should embark on board, duly authenticated by the officers of the Government.

4. That the object of such a list, not being stated in the treaty, is to be sought for in international law, and is there declared to be to prove the neutrality of the crew. (DeMartens' Armateurs, § 21; Chitty's Com. Law, 487.)

5. That the Government of the United States having failed and refused to live up to the offensive and defensive alliance (treaty of 1778) existing between it and France, and proclaimed itself neutral, it was competent for the French Government to recognize us as neutrals, and thereafter legal for the French courts to treat our vessels as those of neutrals were to be treated under international law, and no longer as those of allies, disregarding anything in the treaties arising out of the favored position of allies.

6. That when the vessel of a belligerent captured any suspected vessel, the question of prize belongs exclusively to the jurisdiction of the courts of the captor's country. (9 Cranch, 359; 1 Wheat. 238; 2 Gallison, 29.)

7. That where there is probable cause of capture, *i. e.,* circumstances to warrant a reasonable suspicion of illegal conduct, the captors are justified and exonerated from all losses and damages sustained by reason of the capture, and the burden of proof is on the captured. (*The Rover,* 2 Gallison, 240; *Maissonnaire* v. *Keating,* 2 Gallison, 336; *The George,* 1 Mason, 24; *Shattuck* v. *Maley,* 1 Wash. C. C. 248.)

8. In the prize court the *onus probandi* rests on the captured. (*The Amiable Isabella,* 6 Wheat. 77; 3 Phillimore Int. Law, 723; 8 Cranch, 155.)

9. That as the neutrality or innocence of the property of the claimant was not proven beyond a reasonable doubt, it was rightly condemned. (*Id.*)

10. That municipal laws to enforce a nation's rights under international law are *facts* of the relations of two nations, and *acts* performed by a nation, of which the prize court takes notice in order to enforce international law as applicable thereto; that this was done in the cases of the present claimants, and the condemnation of this property was not rendered illegal by such procedure.

11. That claimants had no valid claim against France, for the reason, among others, that they did not exhaust their remedies in the French

courts by appeal or action upon the bond and against the property of the captor.

12. That not to appeal from the decision of the inferior court condemning the claimant's vessel was an acknowledgment of the justice of the sentence and conclusive. (Lee on Captures, 220.)

13. It is universally admitted that the decree of a prize court is conclusive against all the world as to all matters decided and within its jurisdiction. (17 Otto, p. 80, authorities there cited; note, *Cushing* v. *Laird*. See also Article 5, French and United States Treaty, 1803.)

14. That it is contrary to public policy to ask a nation to reprobate the long-continued conduct of its political department. (Ellsworth, Ch. J., quoted below; also Vattel, bk. 2, ch. 7, § 85.)

15. That the capture of claimant's property was an act of war, and as such gave rise to no valid claim for indemnity. (Vattel, bk. 3, ch. 13, § 190; 1 Rob. Adm. Rep. 581; 3 Dallas, 226, 227, etc.)

16. That to render a war lawful, and legalize the damage done in the course of it, no declaration is necessary. (Bynkershoek on the Law of War, ch. 2; Grotius, lib. 3. ch. 3, § 6, notes 1 and 2.)

17. That when a state authorizes reprisals for national injury to be made by an indiscriminate seizure of the property of the subjects of another, this order is equivalent to a declaration of war. (Dana's Wheaton, § 291.)

18. That in recognizing that France was at war against us we recognized that the laws of war were applicable to her proceedings, and were estopped to claim that they were piratical. (1 Stat. L., act of July 9, 1798; *Bas* v. *Tingy,* 4 Dallas, 38; 1 Cranch, 1.)

19. That the political departments of the Government having recognized that France was at war in respect of the seizures of our vessels, the courts can not consider as piratical those acts of hostility which were so directed against our vessels. (*U. S.* v. *Palmer,* 6 Wheaton, 634.)

20. That the confiscation of enemy's vessels and cargoes is lawful under the law of nations, and rests upon the sound discretion of the national sovereign. (8 Cranch, 145.)

21. That the property of the subjects of one nation may be confiscated by another, after a failure to satisfy for an injury and without a war. (Vattel, bk. 2, ch. 18, § 342; Dana's Wheaton, § 290; Klüber, *Droits des Gens,* § 234, note C; Burlamaqui, *Droits des Gens,* pt. 4, ch. 3, § 42.)

Mr. William E. Earle, having participated in the original argument for claimants and filed printed briefs, submitted the following propositions:

I. That certain claims of American citizens have been released to France. This we established by the treaty of 1800, and by the correspondence and negotiations relative thereto, as officially published in Ex. Doc. 102, 1st sess., 19th Cong.

II. That these claims for indemnity were valid against France, and that her liability for them was admitted by France. This we have established by well settled principles of the law of nations and the treaties between the two nations, and the evidence in Ex. Doc. 102.

III. That the United States released to France these claims of American citizens "for a valuable consideration for the public benefit," ignoring the rights of individual citizens who had suffered by the spoliations. This we have established by the treaty of 1800, and the correspondence and negotiations as to it, as published in Ex. Doc. 102, and the proceedings of the two nations as to its ratification.

IV. That the release by France, of her claims for indemnity, for the failure to keep the treaties of 1778, and for making the Jay treaty, in 1794, was to the United States a "valuable consideration," for their release to France of these claims of their citizens against her. This we have established by the official correspondence published in Ex. Doc. 102, and the treaties of 1778, and well recognized principles of the law of nations.

V. That whilst prize courts may hold themselves bound to administer the local laws and regulations of their own country, and whilst their own decrees are final as to property in *the res,* yet their judgment is the act of their government, and a valid diplomatic claim rests upon it, if the condemnation is in derogation of the law of nations or impairs a treaty. This we have established by decisions of our Supreme Court, and by the settled law of nations.

VI. That in the treaty of 1800, the governments of the two countries came together in an adjustment of their differences or "misunderstanding," as on the basis of the continued existence of the treaties of 1778, and agreed "to negotiate further" as to those treaties and the mutual claims for indemnity for their mutual violations of them; and subsequently, in its ratification, the United States secured a release from the future obligations of the treaties of 1778 and their liabilities for having failed to observe them, in con-

sideration of a release to France of their claims for reclamation of American citizens. The bargain was not only a set-off of the mutual claims to indemnity, but a release to the United States from these treaties for the future.

VII. That war leaves the right to captured property with the possessor at the time of the signing of the treaty; but in view of the fact that there had been no war, this treaty mutually restored all captures on hand.

VIII. That the question arises as to what cases come within the class of those released to France, in the bargain effected by the rescission of the second article, and were therefore valid claims against France, and not excluded by the terms of the exceptions relating to the three other treaties, as declared in the terms of the jurisdictional act, referring these claims to this court. And the answer to this is, all "for illegal captures, detentions, seizures, condemnations, and confiscations, made prior to July 31, 1801," which do not come within one of the three exceptions of the jurisdictional act, and which were made in violation of the treaties between France and the United States, and in violation of the law of nations. And this answer must be applied to the state of facts established by the evidence in each particular case.

IX. That most of these condemnations were based on the want of a *rôle d'équipage,* which was required by the ancient maritime regulations of France, and this regulation was reenacted after the treaties of 1778. The civil tribunals on appeal from the tribunals of commerce, held that this regulation was binding on the courts of France without regard either to the treaties or to the laws of nations. These condemnations, we maintain, were not only in violation of the treaty but of the law of nations.

X. That condemnations because the captain or mate was foreign-born, though a naturalized American citizen, were in violation of the law of nations.

XI. That condemnations for running a blockade were unlawful, for it is a well-established historical fact that the French had not a blockade in the West Indies, and the very proclamations of blockade themselves, show that they were *brutum fulmen* and mere pretexts for making captures.

XII. That the few remaining captures were on the ground of carrying British productions or trading to British ports, both whereof are indisputably in violation of the treaty and are in contravention of the law of nations.

XIII. An illegal condemnation by a prize court is the act of the government of that court, and the valid basis of a diplomatic claim.

Mr. William Gray, Mr. George S. Boutwell, Mr. Edward Lander, Mr. Lawrence Lewis, Jr., Mr. Samuel Shellabarger, Mr. Jere Wilson and *Mr. Leonard Myers* were also heard in support of the position taken by the claimants.

Argument of *Mr. B. Wilson* for the defendants:

The third section of the jurisdictional act January 20, 1885, provides that this court "shall decide upon the validity of said claims according to the rules of law, municipal and international, and the treaties of the United States applicable to the same, and shall report all such conclusions of fact and law as in their judgment may affect the liability of the United States therefor."

By the sixth section it is provided that such finding and report shall be only advisory.

Congress wants no information from the court, but positive fact and positive law, and when the court finds such a thing is the fact and such a principle is the established law, and so report to Congress, that body proposes to take action according to its own wisdom upon the report so made. For example, the Supreme Court, interpreting the acts of the political department, have settled the question as to war in all its bearings, and the law to be that it was such a war as authorized captures and condemnations as prize and made one government the enemy of the other. (4 Dallas, 38; 1 Cranch, pp. 1–9, 31, 32, 39, 40, 41.) What more can be done but to report accordingly? Again, the Supreme Court (*Ware, Administrator,* v. *Hylton, et al.,* 3 Dallas, 258, 1796) have settled the law of nations to be that treaties between sovereign powers when broken by one are voidable at the option of the other; and in *Chirac* v. *Chirac,* the same court, Marshall, Ch. J., delivering the opinion, held that in 1799 no treaty was in existence between France and the United States. (2 Wheaton, 272.)

What can be done by this court but report that such is the law on that subject? In the same manner, by reference to standard authorities, should all other legal principles be ascertained and reported, as, for example, the *conclusiveness* of prize adjudications (*Cushing* v. *Laird,* 107 U. S. 69), and *invalidity* in *law* of claims, based

either upon such adjudications (Lord Eldon in 2 Swanston, 576) or upon acts of war, and the necessity of *exhausting* remedies in the courts in such cases (other than *prize* cases, however), where valid claims *may* exist. All these things are settled *law,* and operate favorably to the United States in this matter. Special exemptions from the general law must be specially pleaded and proven. For example, if some of the captured were prevented from exhausting their remedies, and it appears that all were not, it is incumbent on each claimant to show that he was so prevented. The burden must be on some one to show it, and he who asserts a fact must prove it, and not he who denies it prove the negative. Most, practically all these claims would be invalid for want of exhaustion of remedies, if not already invalid because prize judgments are conclusive and final.

The facts to be reported are, of course, the when and how, where and why, seizures and captures were made by the French. These being found, then the question of law arises, were they illegally made? Were they made in pursuance of international law? It is not pretended that they were made without authority of French law. But it is pretended that France had no right under the law of nations to pass such laws. If this was pretended of the laws of Congress in 1798 authorizing condemnation of French property we should call the pretense an absurdity. However, were the laws illegal according to international law? Upon what alleged right of France were they based? Evidently on the right, which every nation has, of using force to retaliate upon another nation which she believes to have deprived her of her rights secured by treaty, and to have wronged her otherwise. Was this using of force by France for such a purpose legal or illegal? Vattel and Grotius, and other writers on the law of nations, tell us that such laws are proper, and that it is for every sovereign nation to decide for itself when they ought to be passed, not because might is right, but because there is nobody else to decide the question. If the law is right and proper, was it legal to enforce it in the courts? To ask such a question is to answer it. The right of a sovereign to enact such laws is as well settled as any international question can be.

When the commander of a French vessel captured an American vessel there was only one legal way to determine whether he had legally captured her, and whether she was *lawful* prize under the treaties and the law of nations, and that was by trial in a prize court

of the captor's country; so says the law of nations. That trial and the finding were not only legal, but the only legal ones possible. Any other trial and a finding, in any other kind of court, in any other country, would have been illegal, but not this. This is another conclusion of the law of nations which affects the liability of the Government of the United States when subrogated to the liability of France. Prize judgments are not disregarded by international commissions created by the *consent* of nations, because they are, properly speaking, illegal, but for reasons of diplomacy and compromise. For example, the Alabama Commission, as one of the opposite counsel stated, disregarded decisions of the Supreme Court in prize cases. The reports of those Commissioners show that the correctness and legality of the court's decisions were not disputed, but *under the treaty* they were to decide according to *abstract justice* rather than according to *law*. Law works absolute justice in most cases, but fails to do so in the exceptional cases. Nations can *waive* their right to the enforcement of law in such exceptional cases.

This was proposed by American envoys for France to do in 1800, but she refused because we did not agree to her propositions. In the Alabama cases the waiver was agreed upon. That consent could *rightly* have been withheld, and the *law* insisted on, but *policy* induced the contrary. To quote from the argument used in those cases:

> It was further maintained on behalf of the claimants that, under the treaty of Washington, the Commissioners were not constituted a tribunal which in prize cases had a merely appellate jurisdiction to review the judgments of the prize court of last resort; that the Commissioners had, by the *terms* of the *treaty*, greater and more absolute power to do justice than was or could be exercised by the prize courts of the United States; and that even if the Commissioners should be satisfied that upon the record presented to the prize court, the facts disclosed *warranted* condemnation under the *law of nations*, yet if they found, under all the circumstances of the case, that in *justice and equity* the claimants were entitled to indemnity, it was their solemn duty to award it, even though it were in the face of the technical rule of the prize courts.

As stated, nations may waive their right under international law, and reach results mutually satisfactory by diplomacy, but diplomacy is not international law.

This can only be done by consent of sovereign nations, and money

paid upon claims thus admitted or *created,* is a gift or donation for purely political and diplomatic reasons (2 Swanston, 576). France did not waive her legal right as to the conclusiveness of the judgments of her prize courts, nor to the necessity for claimants to exhaust their remedy by appeal or otherwise, nor as to the effect of the public maritime war between the two nations. She declined to waive these rights, because we refused to revive without modification the ancient treaties.

As to the alleged admissions and the statements made and omitted in the notes exchanged between the French and American negotiators of the treaty of 1800, embraced between pages 580 and 637, Senate Ex. Doc. 102, 19th Cong., 1st sess., a perusal of those pages with care and anxiety does not reveal either the admissions or omissions relied on by claimants. Neither any waiving of the exhaustion of remedies by France, nor any admission of the validity of the claims, occurs anywhere in that negotiation. The various proposals and counter-proposals, being mere diplomatic chaffering, might explain, but could not alter, what was done. Claims for indemnities due *or* claimed were renounced (that is, as the word means, *withdrawn*), and Congress has asked this court to determine, under international law and the treaties, which were also *law,* whether they were due or not.

The American envoys (Ex. Doc. 102, 19th Cong., 1st sess., p. 587, etc.), admitted the following rights of France under the law of nations by asking her to *waive them,* viz., the conclusiveness of prize judgments (*i. e.,* the exclusiveness of prize jurisdiction in the *capturing* Government), the right to construe for itself the treaty of 1778, as to the *rôle d'équipage* and the right to pass the retaliatory decree of January 18, 1798. The principle of conclusiveness of judgments actually was incorporated in the treaties of 1800 (Art. 4) and 1803 (Art. 5), and the necessity for exhausting remedies into the latter treaty (Art. 4), for payments were to be made in cases "appealed within the time necessary." (See the treaty in French, 8 Stat. L.) The proposition to waive her rights was responded to by France with the proposition that the hostile measures, including the abrogation of treaties, must be *receded from;* for, of course, if the nations did not now agree that they had been at peace, no indemnities would be due for hostile acts. They must first of all settle what their status had been and was now—peace or war. If peace, what had been done that was of a hostile character would thus be adjudged to be illegally and piratically done, and indemnities might be due; but if war, the ravages

of *war* give rise to no indemnities. The two nations, disregarding the unauthorized makeshift reported by their respective agents in the second article, adopted the latter alternative—war, and no indemnities due. It had to be called war or piracy on both sides, and the President and Senate, with the concurrence of France, adjudged that it was not piracy, but war. The Chief Justice, Ellsworth, our principal envoy, had said to the President: "Having given your draft of instructions such perusal as the hurry and pressure of a court crowding two terms into one admits of, I remark, with all the freedom you invite, that to insist that the French Government acknowledge its orders to be piratical, or, which is the same, absolutely to pay for depredations committed under them, is, I believe, unusually degrading, and would probably defeat the negotiation, and *place us in the wrong.*" (2 Flanders' Chief Justice, 236.)

One's eyes must be shut to all the rights of France as a sovereign, and all the plainest law of nations, and the decisions of our Supreme Court, not to see the *legality* of the laws passed by France in retaliation for our injuries to her and to force us to fulfill the treaties we had violated and refused to fulfill. The Supreme Court said the nations were in a state of *public war* authorized by *both* Governments. One of its reasons for deciding was, that war and only war, could justify the depredations, confiscations, and bloodshed, on either side, and the honor of both nations required it to be called war. Now, is it not necessary to establish these eight propositions before declaring the condemnation of these ships illegal?

(1) That the treaty did not require the crew-list when it mentioned the crew-list.

(2) That the French court had no right to construe the treaty according to its own understanding of it.

(3) That the French Government had no right to pass the retaliatory decree.

(4) That the French courts had no right to decide whether the French Government had such right under international law.

(5) That the treaty, though violated by us, was still binding in all its details on France.

(6) That the treaty dispensed with all proofs except the passport, which it said *must* be on board.

(7) That the judgments of prize courts are not exclusive and conclusive against all the world.

(8) That there was peace.

Allow all of these eight propositions, and it may be admitted that the condemnation of these vessels was illegal. Deny any *one* of them, and these cases must fall to the ground. It is said by counsel that the decisions of the French courts as to these captures were always against the Americans. Perhaps international law was likewise against them. They were found violating belligerent rights of France. But in no less than three out of the four or five cases exhibited here merely to show the jurisdiction of the court of cassation, the supreme court of error in France, the vessels of these Americans were released. But it is said the inferior tribunals at least always decided against the captured. This is also erroneous, for we have here a list of cases from St. Domingo decided in 1797 and 1799, and out of a little over a hundred captures of suspected vessels there were thirty-three releases. It is in St. Domingo that the French are charged with being most lawless.

In the midst of the most bitter war ever waged between France and England, the English courts never in any case disputed the conclusiveness of French prize judgments. It is true that they decided that neutrals were saved from danger when recaptured from the French; and so said Napoleon; so said our Supreme Court in 1 Cranch, 1. But Napoleon said that the injustice of the French laws, so far as they affected real neutrals, was just retaliation as regarded the Americans, for their Jay treaty, and our Supreme Court, in that very case, decided that France and America were enemies and at war.

The whole world, it is said, are *parties* to an admiralty cause, and, therefore, the whole world *is bound* by the decision. So says Judge Marshall. (9 Cranch, 126.) "These sentences are admissible and *conclusive* between the assured and the underwriters as to *every fact* which they profess to decide." (B. & P. 20.) If a ship is condemned as enemy property, whatever "ordinances" may be referred to, it is conclusive. (5 East. 155.) If the court comes to the conclusion that the vessel is not neutral, it is quite *immaterial* through what media it arrived at it. (Lord Mansfield, 2 Taunton, 85.) If infraction of treaty be the ground, the condemnation is legal and conclusive, although, where a treaty required certain documents on the ship, *municipal laws* were referred to as showing what the treaty required, and although the court "construed the treaty iniquitously." (Lord Ellenborough, 5 East. 99.) If the court, by the aid of the ordinances of its country, reached the conclusion that it was enemy property, it is

conclusive. The sentence is conclusive if based on breach of treaties, however there may not have been such a breach. (*Id.;* Piggott, Foreign Judgments, 258; 4 Cranch, 433.) *Croudson, et al.* v. *Leonard,* Johnson, J., delivering the opinion, held: "I am of the opinion that the sentence of condemnation was *conclusive* evidence of the *commission of the offense* for which the vessel was condemned." In 6 Mass. Reports, 277, *John Baxter, et al.* v. *The New England Marine Insurance Company,* it was held: In an *action upon a policy of insurance,* the sentence of a foreign court of vice-admiralty, condemning the ship insured for a breach of blockade is conclusive evidence of the *fact of such breach of blockade.* (8 Term Rep. 192; *id.* 434; 2 Douglas, 575; 6 Bee's U. S. Rep. 165, affirmed on appeal; 7 Term Rep. 681; 2 Shower, 232; 3 B. & P. 201; *id.* 499; 2 Taunton, 7, 35; 8 Mass. 536.)

The honorable Chief Justice inquired whether all the cases cited as to conclusiveness did not apply to private parties, as distinguished from sovereign nations.

The litigants were private parties in these cases; but Chief Justice Ellsworth and our other envoys claimed no such distinction when they asked the Government of France to waive the principle. The two nations, when they negotiated the treaty of 1800 (Art. 4) and the treaty of 1803 (Art. 5), recognized that the principle applied between nations. We have only to look at the reason for this principle. What is the reason? Harmony, peace, concession to the universal welfare of mankind; that which in our municipal cases is called the policy of the law. It is the policy of the law of nations. If the political department of one nation could erect itself into a court of appeals to reverse the decisions of the supreme court of another nation having by international law jurisdiction of the parties and subject-matter, what litigant could ever be satisfied until his country had become involved in war? (Reference is made on this point to Douglas, 619 and 617, and treaties there cited. Also, to the treaty between Great Britain and Denmark, July 11, 1670, article 37; treaty between Russia and Great Britain, October, 1801, article 2; treaty between Louis XIV and Great Britain, 1677, article 12; treaty between the Netherlands and Charles II of England, 1647, article 12; same parties, 1668, article 16. Also Piggott's Foreign Judgments, 249; Vattel, b. 2, ch. 7, § 85; 9 Cranch, 126; *Campbell* v. *Mullett,* 2 Swanston, 576, 577, 578, 579, 584, 585; also, article 5, treaty of the United States and France, 1803.)

The treaties referred to recognize that the jurisdiction of prize belongs exclusively and finally to the capturing Government. For instance: "If the King of France shall complain of the unjustness of sentences which have been given concerning the ships or merchandise taken at sea (or of the wrong interpretation of the treaty by the courts), the King of Great Britain shall forthwith commission under his great seal nine of his privy counsel to adjudge such matters and to confirm or revoke these sentences." So we see that according to the theory of these treaties unless the Government of the captor does not choose to reverse the decision of his own courts their decisions stand conclusive against the other nations. Such is the law of nations as to prize judgments. This does not prevent a nation from claiming anything it may desire or another nation from granting what is claimed if it sees fit.

DAVIS, J., delivered the opinion of the court:

This case, with others like it, was fully argued at the last term, and after careful study and industrious conference an opinion was delivered upon the general principles applicable to the claims as a class, while final and detailed findings were delayed, at the defendants' request, until after the summer recess. During this recess the law officers of the Government, diligently and jealously guarding the interests intrusted to them, have carefully studied not only the facts of the several cases, but have reexamined the general principles applicable to the claims as a class—principles understood to have been finally settled, so far as this court is concerned, by the former decisions.

The defendants now move for a rehearing, and somewhat contrary to the usual practice, but in furtherance of the substantial ends of justice, a full, able, and learned argument, occupying nearly two weeks, has been had, in which all the questions heretofore considered have again been exhaustively discussed. Thus, upon a motion for permission to reargue the case, it has in fact been reargued, and in deciding the motion we act with all the light we should have received had the more technical course been pursued of first allowing the motion and then hearing the reargument.

The learned Solicitor-General, who has personally appeared with the assistant attorney of the United States who so competently conducted the defense of these claims, takes as the text of his argument certain suggested conclusions of law, twenty-five in number, many of

which may be readily admitted, either standing alone or in the connection in which they are used, without leading to a result different from that already reached by this court; while considered as a whole they form the successive links of a chain of argument which, if perfect, defeats all the claims submitted under the act of Congress.

Many of the difficulties surrounding these cases will disappear under the touchstone of the jurisdictional act, for it must always be remembered that we are not now to decide in accordance with the general statutes giving us exclusive jurisdiction of actions between the citizen and his Government founded on contract, nor yet under the special jurisdiction conferred by such laws as the "Bowman Act," by which, in aid of Congress, we report facts to that body or its committees, and facts and law to the Executive Departments for their "guidance and action;" nor under the jurisdiction given by Section 1063 of the Revised Statutes, which authorizes us to proceed to final judgment in claims of a certain nature transmitted to us by the heads of the principal Executive Departments. In all these cases we sit as a court bound to administer the law found in the Constitution, statutes, and common law of the United States as interpreted by the Supreme Court, and, so far as we have yet seen, not one of the spoliation claims could have the slightest pretense of a successful result were the investigation to be measured by the standard set for us in other causes. It can not be presumed that Congress, in passing the act of 1885, with full knowledge of the law and facts, intended an empty form; therefore it follows that they desired us not only to examine these claims, but to examine them in the light of some rule different from that upon which we must ordinarily proceed.

The statute says that those citizens or their legal representatives who had "valid claims" of a specified class upon the French Government, arising out of certain illegal acts committed prior to the ratification of the treaty of 1800, may apply to this court (§ 1); we are then to determine the validity and amount of these claims "according to the rules of law, municipal and international, and the treaties of the United States applicable to the same," but we can not enter judgment; on the contrary, after the hearing we may only report to the Congress such conclusions of fact and law as in our opinion may affect the liability of the United States for these claims (§§ 3 and 6), and this report is binding on neither the claimant nor the Congress (§ 6).

The first question presented, then, is as to the validity of the claims against France. This is an international question not within the scope or ordinary judicial inquiry, and is to be measured by rules of law well known, thoroughly recognized, and often enforced, but which in the very nature of things are not, in the absence of special legislative authority, presented to, argued before, or passed upon by the judicial departments of Governments. These rules of law relate to the rights and obligations of nations, not to the title to property, nor to the rights of individuals between themselves, nor yet to the rights of individuals against their own Governments.

While many of the propositions of the defense are in the abstract sound, they rest upon the basis that these claimants are prosecuting a legal right in a court of law acting under the usual common-law restrictions of such a tribunal sitting as a subordinate agent of the State with strictly defined procedure and jurisdiction. So far as power is concerned this court is not so sitting in these cases; "judicial power is the internal or civil branch of executive power exerting itself under such checks and controls as the legislative power has subjected it to" (11 Rutherforth, 59); those checks and controls are well defined and well understood, and are such as operate to defeat in judicial tribunals diplomatic claims founded upon international right.

We are for the present, to a limited degree, absolved by express act of the legislature from these checks and controls.

That is, we are to aid the political department of the Government, by its direction, in the disposal of contentions which arise from past international transactions, and while the claims of individuals now before us are not, from a judicial point of view, legal rights—that is, they do not constitute causes of action—they may be none the less rights; that is, they may be founded on law but not enforceable in a court of law.

We do not intend to assume any legislative function or to determine any abstract right, for our power is fixed and defined by the Act of Congress, which authorizes no such course, but which does require something more than a bare opinion that there can be no recovery on these claims in the courts: that was known before the statute was passed, and the legislature have instructed us by that statute to advise them not as to the law enforceable in courts of law, not as to abstract rights, but as to the law enforceable within their own higher jurisdiction.

We have already held that the depredations made by France upon our commerce were illegal, and notwithstanding the able argument of the defense, sustained by the results of most industrious investigation, we do not see reason for changing this conclusion. The quotations in our previous opinion show that the Government of the United States uniformly insisted upon the illegality of the conduct of France and never failed to demand redress; they show that France admitted the principle of the American contention; that Spain paid claims of this class; that England did the same, and that by the principles of the law of nations aside from any definite compact such as that of 1778, the injuries to our commerce afforded good foundation for diplomatic demand. Upon the second branch of the case we held, and in support of the position cited copiously from the contemporaneous negotiations and instructions of the American Secretaries of State, and from the correspondence and journals of the American ministers charged with the protection of American interests, that by the cancellation of the second article of the treaty of 1800 the United States set off the spoliation claims against those claims which France had against us, claims which our representatives thought of so much gravity and of so much value as to authorize an offer, refused by France, of many millions of francs for a release.

It seems unnecessary to repeat those voluminous citations, or to add to them, from the mass of correspondence which we have read, extracts which would be merely cumulative. We have carefully reexamined the question in the light of the reargument, and nevertheless adhere to the conclusions reached last term after exhaustive discussion by counsel and patient and laborious investigation by ourselves, that these claims (as a class) were valid obligations from France to the United States, that the latter surrendered them to France for a valuable consideration benefiting the nation, and that this use of the claims raised an obligation founded upon right, and upon the Constitution (which forbids the taking of private property for public use without compensation), to compensate the individual sufferers for the losses sustained by them.

We do not decide nor have we attempted to decide that the conduct of the Government after the Revolution and prior to the treaty of 1800 was or was not wise, proper, or justifiable, questions which are within the domain of the historian, and have not been submitted to us; we advise, whether in performance of their public duties, and in

protection of the commonwealth, and in carrying out the directions of those having the right to give them, or in fulfillment of the powers and obligations conferred and imposed by the Constitution and laws, the statesmen of that period took such action in relation to private rights as raised an obligation on the part of the Government to compensate the citizen.

We are to see whether the claims urged on France were valid, whether each particular claim brought before us is one of the class defined in the statute, whether it was valid in law against France, and whether the United States became, by their action in 1800 and 1801, liable over to the individual.

The Government again urges that, as there was war between the United States and France, the seizures were justifiable. This point we have so fully discussed in the opinion delivered at the last term that now it seems necessary only to sum up our conclusions and to consider one or two incidental points pressed with particular energy by the defense at this argument.

There were what were called by some "hostilities," by others "differences," by Congress "the system of predatory violence" (1 Stat. L. 578), by Justice Paterson "a qualified state of hostility," "war *quoad hoc*," and by Justice Chase "limited partial war." The executive department said the conduct of France would have justified a declaration of war, but the United States, "desirous of maintaining peace," contented themselves "with preparations for defense and measures calculated to defend their commerce" (Doc. 102, p. 561), while the United States ministers, speaking of the American statutes, wrote that "they did not even authorize reprisals upon [French] merchantmen, but were restricted simply to the giving of safety to their own till a moment should arrive when their sufferings could be heard and redressed."

Congress did not consider war as existing, for every aggressive statute looked to the possibility of war in the future, making no provision for war in the present, and France, our supposed enemy, absolutely denied the existence of war. So then, the legislative, judicial, and executive branches of our Government recognized no war, no public solemn war, as existing, and the opposing party denied the fact.

It has been urged that the compact of 1800 was a treaty of peace; but we do not agree with this contention, for reasons which we give further on, after first considering the subordinate suggestion made in relation to the caption of that treaty as found in print.

Curiously neither of the originals, that supposed to be in the custody of France nor that supposed to be in the Department of State, is obtainable. That belonging to this Government long since disappeared, and we are informed that a like fate has befallen the French copy. We are therefore forced to turn to the copies in print in various compilations of treaties to see what assistance can be obtained from a careful comparison of them. No material difference appears anywhere but in the caption, and there we should expect to find it, as the caption is not part of the treaty, and is usually drawn to suit the taste of the editor. The caption in the Revised Statutes runs as follows:

> Convention of peace, commerce, and navigation with France, concluded at Paris, September 30, 1800; ratification advised by Senate, with amendments, February 3, 1801; ratified by President, February 18, 1801; ratified by First Consul of France, with Senate's amendments, etc.

Martens' French collection of treaties contains the head-note, "Convention entre la République Française et les Etats-Unis d'Amérique, signée le 30 Septembre, 1800," and the editor says he had not a copy from the original treaty, but relied upon another publication. Le Clerc has a brief caption containing the word "peace." The caption in the Bancroft Davis edition of treaties entitles the compact a "Convention between the French Republic and the United States of America," and gives the dates of signature, exchange, and proclamation; while the caption in volume 8 of the Statutes at Large, prepared in 1846, runs simply as follows: "Convention between the French Republic and the United States of America." It should be noticed as to this copy that the letter from the committees of Congress found at the beginning of volume 8 states that they "learn that every law and treaty has been carefully collated with the originals in the Department of State."

In Mr. Adams's message, dated December 15, 1800, transmitting the treaty to Congress, the head-note is exactly as in volume 8 of the Statutes (2 F. R. 295).

No inference, therefore, can be drawn from the caption, and the nature of the treaty must be gleaned from its contents, for if it concludes a war that fact will necessarily appear in some form as it does in the treaties of 1783 and 1814 with Great Britain, and in the treaty of 1848 with Mexico. The object of the treaty is stated to be a termination of the "differences" between the two countries, not of the

"war" nor even of the "hostilities" alleged here to have existed between them. Next it should be observed, and this is a vital distinction, that the treaty is of limited duration; it is to be in force for eight years only. Article V speaks of a "misunderstanding"; and in the twenty-seven articles of the agreement, which cover the many different subjects at that time usually found in a treaty of amity and commerce, there is nothing to indicate that in the opinion of the parties there had been a public solemn war or that they were making a treaty of peace.

We are again cited to *Bas* v. *Tingy* (4 Dallas), a case which we considered very carefully in our previous opinion and from which we made very full quotation, holding that it decided the state of affairs under discussion to constitute partial war limited by the acts of Congress. The opinions of the Supreme Court speak very clearly as to the relations of the nations, but it is well to bear distinctly in mind that the court was dealing not so much with broad principles of international law as with the interpretation of statutes. Tingy claimed salvage for the rescue of the *Eliza* from a French privateer, and this claim he based upon the seventh section of the *Act of March* 2, 1799 (1 Stat. L. 716).

The act is entitled "An act for the government of the Navy of the United States," and the seventh section makes provision for salvage to naval vessels for American vessels retaken from France; in construing this statute the court referred to the act of June 13, 1798, as explanatory of the relations between the United States and France. This latter act being "An act to suspend the commercial intercourse between the United States and France, and the dependencies thereof," does not in any way lead to the inference that public solemn war existed, for if such war existed a formal suspension of commercial relations would be unnecessary, and the contents of the statute negative the inference of war especially in the provision that no French vessels "armed or unarmed, commissioned by or for or under the authority of the French Republic, or owned, fitted, hired, or employed by any person resident within the territory of that Republic, or any of the dependencies thereof, or sailing or coming therefrom, excepting any vessel to which the President of the United States shall grant a passport . . . shall be allowed an entry or to remain within the territory of the United States unless driven there by distress of weather or in want of provisions," and these distressed vessels are to be allowed

to provision and refit (§ 3), something certainly not permitted either in time of war or reprisal.

The *Act of June* 28, 1798 (1 Stat. L. 574), also considered by the court, was intended as an addition to that of June 13, 1798 (1 Stat. L. 565), and makes provision as to the amount of salvage to be received by American war vessels capturing French armed vessels during what the latter act describes as the "aggressions, depredations, and hostilities" encouraged and maintained "by the Government of France," and which it does not describe as war.

The decision of the Supreme Court therefore goes to this extent and no more, that for the purpose of a recovery of salvage France was an enemy to the extent the acts of Congress prescribed.

It has been urged that the treaty of 1800 was a solemn adjudication of the claims adverse to this Government, but we are of opinion not only that this position is negatived by the treaty itself, but that the negotiations which preceded that contract, and which may very properly be referred to for explanation if there be ambiguity in the document, do not support such a contention. Those negotiations having been commented upon by us heretofore, we need not now repeat them, while as to the expunged second article of the treaty, that upon which this contention hangs, it is sufficient to note the statement that as the ministers were "not able to agree respecting" the treaties of 1778 and 1788, nor upon the indemnities "mutually due and claimed, the parties will negotiate further on these subjects at a convenient time." Meanwhile the treaties are to have no effect and the relations of the countries are to be governed by the treaty of 1800.

The claims made by France, for which the United States offered millions of francs for release, were national, and were based upon the provisions of the treaties of 1778. The claims for indemnity which we had constantly urged, and whose payment Pickering demanded as an ultimatum, were what are known as the "spoliations claims." In the entire negotiation, as we have shown in our former opinions, French claims based upon treaty obligations, past and future, were set up against American claims for illegal seizures, condemnations, and confiscations.

To be sure, Pickering makes a passing mention of national claims on the part of the United States, adding that, as national claims may probably be less definite than those of individuals, and consequently more difficult to adjust, "national claims may on both sides be relin-

quished." (Doc. 102, p. 566.) An examination of the negotiations will show that such claims on our side were not pressed, while on the French side they were strongly urged.

Nowhere is the contention more concisely formulated than in the communication of J. Bonaparte and his colleagues to the American Commissioners, wherein the French ultimata are set forth in this form: "Either the ancient treaties, with the privileges resulting from priority and the stipulation of reciprocal indemnities, or a new treaty assuring equality without indemnity." (Doc. 102, p. 618.)

"At the opening of the negotiations," said the Secretary of State to the American ministers, "you will inform the French ministers that the United States expect from France, as an indispensable condition of the treaty, a stipulation to make to the citizens of the United States full compensation for all losses and damages which they shall have sustained by reason of irregular or illegal captures or condemnations of their vessels and other property under color of authority or commissions from the French Republic or its agents" (Doc. 102, p. 562); and he closed this instruction with several points "to be considered as ultimata," the first of which was: "That an article be inserted for establishing a board, with suitable powers to hear and determine the claims of our citizens for the causes hereinbefore expressed, and binding France to pay or secure payment of the sums which shall be awarded," while the second point prohibited recognition of the old treaties.

There never was a substantial retreat on either side from these absolutely diverse positions, although there was considerable vacillation, until finally, in a spirit of patriotism, the representatives of the United States, abandoning Mr. Pickering's ultimata, consented to leave the question still open, as it is found in the second article of the treaty. That article, in terms, admits that there existed differences as to the treaties of 1778, and in terms it states that indemnities are "mutually due and claimed." If indemnities are mutually "due" and indemnities are mutually "claimed," the instructions and the negotiations prior to the treaty should show what those "due" and "claimed" indemnities are. They do show that upon one side they were claims for national indemnity under treaty obligations; on the other side, claims for indemnity for spoliations. As the treaty states that indemnities are "claimed," and as it states that indemnities are "due," we can not agree that it operates as an adjudication of those claims upon which the indemnities are founded.

The jurisdictional act also negatives this assumption in its direction that we shall examine valid claims arising out of certain acts committed prior to the ratification of the treaty of 1800, thus negativing so far as this court is concerned any possible final adjudication by that international agreement. The statute instructs us not to investigate claims now valid against France, or claims which citizens now have against France, but valid claims which citizens "had" against France and which arose out of certain illegal acts committed prior to the treaty's ratification.

By the action of the President and Senate on the one side, and of Napoleon on the other, the second article was expunged from the treaty upon agreement that "the two states renounce the respective pretensions which were its object." Thus, for the purpose of quieting the difficulties and dangers flowing from the treaties of 1778, to avoid the French claims, from which a release had been asked at an offered price of many million francs, to save the young Republic from internal dissension and from danger from without, the American authorities surrendered to France the claims for spoliations upon which up to that moment they had most steadily and most strenuously insisted.

The alleged reprisals committed by this country upon French commerce were most limited in their nature, and hardly amounted to more than is allowed by the natural law of self-defense—that law which, by not obliging us to part with our lives, our limbs, or our property, allows us to defend our persons and our goods.

The reprisals were authorized and defined by acts of Congress, the first of which was passed in June, 1798, and the last in January, 1799.

The *Act of June* 25, 1798 (1 Stat. L. 572), authorized "the defense" of merchant vessels against "French depredations," and to that end permitted the merchantman to oppose search, restraint, or seizure attempted by an armed French vessel, permitted the merchantman to repel by force any assault by such a French vessel, authorized him to capture such an assaulting vessel, and permitted the merchantman to retake any other American merchantman captured by any armed French vessel.

The second section of this act, which provided for salvage, refers to the case of the capture of a French "armed" vessel, from which an assault or other hostility "shall be first made"; and Section 3 requires a bond from armed merchantmen that they shall commit no "unprovoked violence" against the vessel of any nation in amity with the

United States. Finally, the sixth section directs that when France shall stop the "lawless depredations and outrages hitherto encouraged and authorized by that Government against the merchant vessels of the United States, and shall cause the laws of nations to be observed," the President shall instruct the merchantmen to submit to search and to refrain from violence.

As to the next act, passed three days later (1 Stat. L. 574), it is only necessary to note that recaptures were to be restored after salvage paid the recaptors, nothing going to the Treasury. The 9th of July following an act was passed to "protect the commerce of the United States," which authorized the President to give private armed vessels the same license and authority to take armed vessels of France, and to recapture American vessels, as public armed vessels of the United States had by law (1 Stat. L. 578, § 2); "armed" French vessels captured to be absolutely forfeited to the capturing vessel, which should receive also just and reasonable salvage on all recaptures. (§§ 5, 6.)

The license and authority given the public armed vessels of the United States are found in the first section of this act of 9th July, 1798, and also in a prior act entitled "An act more effectually to protect the commerce and coasts of the United States," approved May 28, 1798 (1 Stat. L. 561), which permitted the seizure only of such French armed vessels as had committed, or were hovering on our coasts for the purpose of committing, depredations on vessels belonging to citizens of the United States, and also permitted the recapture of American vessels seized by the French. The act of July went further than this, and authorized the President to instruct the commanders of public armed vessels to "subdue, seize, and take any armed French vessel which shall be found within the jurisdiction of the United States, or elsewhere on the high seas." The authority, therefore, given to armed merchantmen by this statute was to subdue, seize, and take any French "armed" vessel, and to recapture any American vessel.

These statutes seem to us not only defensive in their character, but also marked by self-restraint and calm judgment. Notwithstanding the persistent attacks by France upon the American mercantile marine, no permission is given in this legislation to injure French commerce; armed vessels only are to be seized, and American vessels may be recaptured; peaceable French merchantmen may pursue their voyages unmolested.

A system of reprisals goes further than this, for it is based upon the

principle of compensation, and is aggressive, not defensive, in spirit and intent.

> Reprisals [says Vattel, lib. 2, p. 342] are used between nation and nation to do justice to themselves when they can not otherwise obtain it. If a nation has taken possession of what belongs to another; if it refuses to pay a debt, to repair an injury, to make a just satisfaction, the other may seize what belongs to it and apply it to its own advantage, till it has obtained what is due for interest and damage, or keep it as a pledge until full satisfaction has been made. In the last case it is rather a stoppage or a seizure than reprisals, but they are frequently confounded in common language.

Dr. Woolsey says reprisals consist in recovering what is our own by force, then in seizing an equivalent. We do not attempt to lay down any general rule of law on this question of reprisals, but a study of the authorities leads to the conclusion that the action is affirmative and aggressive in character, having for its object compensation. The essence of reprisals has been said to be security—that is, the seizure of property for protection until just claims are settled, but we do not see that the principle of compensation is thereby changed, as the seizure of property for security must be directed by an effort to obtain security sufficient in amount to provide compensation should the demand for redress be unsuccessful.

The statutes we have cited have no such object; they are not aggressive in their provisions or in the power they give, but entirely defensive, except in the instance of seizing armed vessels or retaking captured American vessels. The aim of the statute is defense of our merchantmen, not depredations upon the commerce of France, not compensation to the United States for losses already incurred, not security for demands heretofore made, but protection and safety in the future. It seems to us, therefore, that these acts lack the essential elements of statutes of reprisals. Two suggestions occur to us in concluding this point. If there were a state of war or a state of reprisals existing, why should distressed French vessels be allowed to refit and provision in our ports as they were by the express provisions of the *Act of January* 30, 1799 (1 Stat. L. 614)? The Government of the United States could not have considered that it was at war, or that a state of reprisals existed, for the instructions of Mr. Pickering, the Secretary of State, and the mouthpiece of the Government, entirely negative such a supposition. (Doc. 102, pp. 561 *et seq.*)

In the face of these statutes the seizure of a merchant vessel can not be justified on the one ground that she was armed; and more especially is this true as to seizures during the period when these claims arose, a period when, to guard against the pirates of the Caribbean, of the Malay Archipelago, or of the Algerine coast, it was customary for merchant vessels to carry some armament.

> The laws of neutrality and nations, in no instance that I know of [says Judge Bee, in 1795, while holding the District Court of South Carolina], interdict neutral vessels from going to sea armed and fitted for defensive war. All American Indiamen are armed, and it is necessary they should be so. . . . When the wisdom of Congress substituted an embargo for a declaration of hostilities, preparations of this sort might have been seen in every State in the Union. From the instructions and circular letter to the different collectors, it was clear that the vessels of the belligerent powers alone were comprehended in the restrictions. Even they might arm for defense; and if, as respected French vessels, it should appear doubtful whether their equipment was applicable to war or commerce, such equipment was declared lawful.

Each case before the court must of course be examined separately upon the facts peculiar to it, and it is not impossible that such facts may be shown as to some of the private armed vessels of the United States as justified their seizure and condemnation.

The vessels whose cases are now decided were either unarmed or were armed for strictly defensive purposes.

The jurisdictional act requires us to inquire into illegal condemnations, and it is urged on behalf of the defendants that all condemnations by the French courts are final and conclusive upon this court if the French court had jurisdiction. Many citations are made in support of this contention, among them the case of *Baring and others* v. *The Royal Exchange Assurance Company* (5 East. 99 *et seq.*), which may be taken as a fair illustration.

The American ship *Rosanna,* insured by the defendants, was captured and condemned by the French, whereupon plaintiffs sued on the policy and recovered. Lord Ellenborough, Ch. J., interrupting the argument, said:

> Does not this [French] sentence of condemnation proceed specifically on the ground of infraction of treaty between America

> and France in the ship not having those documents with which in the judgment of the French court the American was bound by treaty to be provided? I do not say that they have construed the treaty rightly; on the contrary, suppose them to have construed it ever so iniquitously; yet, having competent jurisdiction to construe the treaty, and having professed to do so, we [the court] are bound by that comity of nations which has always prevailed amongst civilized states to give credit to their adjudication where the same question arises here upon which the foreign court has decided. After arguing for hours, we must come to the same conclusion at last, that the French court has specifically condemned the vessel for an infraction of treaty which negatives the warranty of neutrality. Then, having distinctly adjudged the vessel to be good prize upon a ground within their jurisdiction, unless we deny their jurisdiction, we are bound to abide by that judgment. Whenever a case occurs of a condemnation by a foreign court on the ground of *ex parte* ordinances only, without drawing inferences from them to show an infraction of treaty between the nation of the captors and captured, and referring the judgment of the court to the breach of treaty, I shall be glad to hear the case argued, whether such ordinances are to be considered as furnishing rules of presumption only against the neutrality or as positive laws in themselves, binding other nations *proprio vigore*.

The decision of the English court, then, goes to this extent, that in an action between individuals the decree of the French court which had jurisdiction is final; so would it also be final as to the vessel, and the purchaser at the confiscation sale could rest upon the decree as good title against all the world.

But all this does not affect the position of the United States Government against the Government of France.

Lord Ellenborough says that no matter how iniquitous the construction given the treaty by the French court, he, as a judge, is bound to follow it. But so is not the Government of the United States. That Government could have objected either that the court was corrupt, or that there existed no treaty, or that there had been manifest error in construing it. All such questions may be outside the right of a court to consider, but they are within the right and form part of the duty of the political branch of the Government. If the French court, acting within its jurisdiction, construed the treaty iniquitously, the courts might not have power to remedy the wrong, but the owner had a right to appeal to his Government for redress, and that Government, when convinced of the justice of his complaint, was bound to endeavor to redress it.

The decree is an estoppel on the courts, but it is no estoppel on the Government; in fact, the right to diplomatic interference arises only after the decree is rendered. Of course, precedents for cases of this kind are not to be found in the reports of courts, for no such case can, in the nature of things, come before a court unless by virtue of a special and peculiar statute, such as that under which we now act; but diplomatic history is full of them.

Rutherforth (Institutes, vol. 2, ch. 9, p. 19), speaking of the right of a state to proceed in prize, says:

> This right of a state to which the captors belong to judge exclusively is not a complete jurisdiction. The captors, who are its own members, are bound to submit to its sentence, though this sentence should happen to be erroneous, because it has a complete jurisdiction over their persons. But the other parties in the controversy, as they are members of another state, are only bound to submit to its sentence as far as this sentence is agreeable to the law of nations, or to particular treaties, because it has no jurisdiction over them in respect either of their persons or of the things that are the subject of the controversy. If justice, therefore, is not done them, they may apply to their own state for a remedy, which may consistently with the law of nations give them a remedy either by solemn war or by reprisals. (See Dana's Wheaton, 391.)

This brings us naturally to another point, admitted as a general principle, that appeal should be prosecuted to the court of last resort before there can be diplomatic intervention.

The exceedingly able British-American Commission which sat in Washington in 1872 not only unanimously decided that they had jurisdiction in prize cases in which the decision of the ultimate appellate tribunal of the United States had been had, a conclusion in which even the agents of the United States concurred, but also that they had jurisdiction when the claimant had not pursued his remedy to the court of last resort, provided satisfactory reasons were given for the failure to appeal. (Papers relating to the Treaty of Washington, vol. 6, pp. 88–90.) To this last conclusion the American Commissioner dissented; but even he held that a misfeasance or default of the capturing Government, by which means an appeal was prevented, was sufficient to excuse the failure to appeal. (*Id.* 92.)

The rights of the prize courts are the rights of the capturing state. These courts are its agents, deputed by it to examine into the conduct

of its own subjects before becoming answerable for what they have done, and the right ends when their conduct has been thoroughly examined. Therefore the state has a right to require that the captor's acts be examined in all the ways which it has appointed for this purpose, and on this principle is founded the doctrine that the complainant, unless he exhaust his appeal, shall be held to confess the justice of the decision. This presupposes, first, that there are appellate courts; second, that they are open to the complainant freely and honestly. The captor has no right to insist for his own protection upon the fulfillment of a form which he by his own acts prevents.

There is also a distinction, not often clearly drawn, between the validity of a claim *per se* and the right to enforcement. The justice of the claim is founded upon the injustice of the sentence. The appeal does not affect the merits of the claim; it does not palliate or destroy any wrong done; but it is simply a course provided for the captor's protection, that he may fully examine into the acts of his own agents, through his other agents, the courts.

> The whole proceeding, from the capture to the condemnation, is a compulsory proceeding *in invitum* by the state in its political capacity, in the exercise of war powers, for which it is responsible, as a body politic, to the state of which the owner of the property is a citizen. (Dana's Wheaton, note, 186.)

Therefore the capturing state may waive such a demand, and not insist upon exhausting its right to further investigation, and may waive it by failing to provide an appellate tribunal, or by preventing recourse to it, or in any other way which shows an intention not to insist upon this right of examination; but appeal or no appeal, the validity of the claim is founded upon the injustice to the claimants.

All writers lay down the principle that appeal should be taken from the inferior to the superior tribunal before resort by the injured Government to measures of redress; but this principle is always coupled with the extreme measures of war and reprisals (see Rutherforth, *supra;* Grotius, bk. 3, ch. 2, §§ 4, 5), and there is no assertion in the writers that illegal capture necessarily does not found an international claim even when appeal has not been taken.

It was notorious that justice could not be obtained in the French prize tribunals in existence at the time of those seizures. Mr. Pickering, writing to Mr. Pinckney in April, 1797, said:

> The report of Mr. Mountflorence, which you transmitted, shows that the merchants in the ports of France who constitute the tribunal of commerce in which our captured vessels are tried and, on the most frivolous and shameful pretenses, condemned, are often, if not commonly, owners of the privateers on whose prizes they decide. (Doc. 102, p. 165.)

Consuls were at one time forbidden to appear before the tribunals in defense of absent owners. (Prises Maritimes, vol. 2, pp. 317 *et seq.*)

> Soon [says Cauchy], upon the occasion of the rupture with England, the signal was given for privateering. The French gave to it all that could encourage speculations half mercantile, half warlike; they put at the disposition of the owners part of the sailors of the fleet, even to strangers and neutrals; they opened to them the storehouses of the state; they abandoned to the captors the total product of the captures, and they joined to that in certain cases premiums and rewards. They did more; they abolished with the offices of the admiralty the tribunal of prizes, and, in order to find judges more ready to sanction captures, they conferred upon the tribunals of commerce and of the district the judgment of these matters.
>
> It was erroneously that they had represented the benefits of privateering as a source of riches and public prosperity. In order to make the fortunes of four or five ports, the privateers were reducing the whole of France, a country by nature agricultural and industrial, so that she had neither raw materials for manufactures nor supplies for her navy, nor outlets for her products, for they kept away from our ports the neutral vessels which could alone supply the total absence of vessels sailing under the French flag.
>
> On the other hand, were not the relations of the Republic with foreign Governments at the mercy of simple judges of commerce or of district, imprudently invested by the law with the terrible right to put France in a state of war against the wish and knowledge of her Government? The Directory concluded that privateering, instead of receiving more extension and favor, ought to be restrained and regulated by law.
>
> But this progress, foreseen under the Directory, was not to be accomplished until after its fall. (*Le Droit Maritime International,* Eugene Cauchy, Paris, 1862, vol. 2, pp. 317, 318, 323–325.)
>
> The council of prizes, which was the supreme court of appeal in prize matters, was abolished in 1793. The 29th Germinal, year IV, the Council of Five Hundred passed a resolution thus expressed: "The appeals from the tribunals of commerce in matters of prize shall be carried to the tribunals of the departments."

> . . . Carried to the Council of the Ancients, this resolution was not opposed, and the 8th Floréal, year IV, it was converted into law. One only remembers too well (adds M. Merlin) how disastrous were the results of this strange legislation. The tribunals paid no attention in their decrees to the relation of France with foreign powers, whence arose numerous and pressing claims.
>
> However, to palliate the political inconvenience that might flow from thus vesting ordinary tribunals with the cognizance of maritime prizes, it was thought sufficient to authorize the commissaries near the civil tribunals to refer to the Government those matters which necessitated the interpretation of treaties, and in which the judgments of the tribunals might compromise the rights of a friendly or neutral power; but experience was not long in demonstrating that this palliation was a vain remedy, and that the legislation ought to be deeply modified, the tribunals having shown the greatest hostility against the measure, some determining in spite of it the causes which the commissaries had referred to the Executive Directory; others denying to the commissaries of the Government the right to judge alone of the propriety or necessity of the reference. Matters had come to such a point that in the year VIII the minister of justice, Cambacérès, being instructed by the Consuls as to the amendments to be made to the legislation as to prizes, was authorized to say "that privateering had become a system of brigandage, because the laws which had been applied to it were insufficient and bad; that they had heard complaints raised in all directions by merchants and foreign ministers, and that nevertheless the Government, convinced of the justice of these complaints, had always been without power to do right." (*Traité des Prises maritimes,* par Pistoye et Duverdy, Paris, 1858, vol. 2, pp. 157, 158.)

The form and expense of appeal were useless, for it was not denied that the adjudications below were in accordance with French ordinances, while it was contended that they were in violation of the rights of neutrals, measured either by treaty provision or by the precepts of the law of nations. Municipal law is not a measure of international reponsibility, but it is binding within the jurisdiction of the state upon all its subordinate agents, including the courts. The decree in one of the cases before us, which was appealed to the civil tribunal, shows the following as the grounds for affirming the condemnation below:

> The tribunal . . . considering the rules of 1704, 1744, 1778, prior as well as subsequent to the treaty between France and the United States of America, emphatically demand that all

> foreign ships shall be furnished with a *rôle,* authenticated by the public officers of the neutral port whence they have set out, under pain of being good prize. Considering that the execution of these regulations has been ordered by article 5 of the law of the 14th of February, 1793; considering that a ship, which can not be reputed neutral on account of a lack of papers sufficient to prove its neutrality, can not be regarded but as an enemy, and, being so, its cargo is to be confiscated, according to the terms of article 7 of the ordinance of the marine of 1681—title prize—says that it has been well judged by the judgment which has been appealed from, and orders that it shall have its full and entire effect.

So it appears that questions of treaty or international law were not ruled upon, the court being guided alone by the statutes of France. In the face of precedents of this kind an appeal was a vain and expensive form, as an affirmation of the judgment below necessarily must follow. The cases were class cases, the condemnations (so far as we have yet seen) proceeded upon substantially the same grounds, and one appeal was decisive of all similar cases. The state's right of investigation had therefore, in effect, been satisfied when it had affirmed in one case the legal principles applicable to many others presenting the same facts.

There were appeals also to the court of cassation, which were decided adversely to the claimant—necessarily so decided when the character and duty of the court are understood.

When the jurisdiction of the court of cassation is invoked there must take place a preliminary argument to determine whether the court under the particular facts of the case has or has not jurisdiction. This settled in the affirmative by one of the divisions of the court known as the chamber of requests, the cause is referred either to the chamber of civil causes, or to the chamber of criminal causes, and the jurisdiction of these chambers is simply to secure uniformity in the construction of the statutes. Merlin says:

> As resource to the cassation is only an extreme remedy which has no other object than the maintenance of the legislative authority and of the ordinances, it can not be made use of under the simple pretext that a case has been ill-judged in the main.

The opinion of the council of state, dated January 18, 1806, speaking of the court of cassation, says:

> If the forms have been violated [below] there is no judgment, properly speaking, and the court of cassation destroys an irregular decree. If, on the contrary, all the forms have been observed, the judgment is reputed to be truth itself. . . . If, then, a decree should be in formal opposition to a written provision of the law, the presumption of its justice disappears, for the law is and ought to be the justice of the tribunals; wherefore the court of cassation has the right to annul in this case the decrees of the courts. (See Merlin, *Répertoire. . . . de Jurisprudence.*)

What, then, could be the object of an appeal to the court of cassation when the court below had not misinterpreted the French law, especially as such an appeal would in no event have suspended the execution of the judgment? (Code, art. 16, title, Courts and tribunals (1790), Tripier's edition, 1865.)

The condition of affairs in regard to French courts is well illustrated by the letter from Pinckney, Marshall, and Gerry to the Secretary of State (October 22, 1797, Doc. 102, p. 467), wherein they quote their advocate as saying: "It is obvious that the tribunal have received instructions from the officers of the Government to hasten their decisions, and that it was hardly worth while to plead, for all our petitions in cassation would be rejected."

In the colonies matters were still worse than in France (Tuck's Report, and citations therein, H. R. Ex. Doc. 194, 49th Cong., 1st sess.) and appeals were much more difficult. After the decision of a court, organized in some instances for the purpose of condemnation, by an officer of the Government, himself interested in privateers, or in some instances after a decision by that officer in person (*id.*, p. 9), the only remedy was to obtain an appeal to the mother country. This trouble and expense were practically useless (see in this relation Skipwith to Berlier, Doc. 102, pp. 833, 834). Communication between France and the colonies was difficult; the masters of the seized vessels were poor and were often stripped by the privateers of what little they had.

The condition of French prize tribunals was so notorious as to cause a change in admiralty law, the reasons for which were thus expressed by Lord Stowell:

> It has certainly been the practice of this court, lately, to grant salvage on recapture of neutral property out of the hands of the French, and I see no reason at the present moment to depart from it. I know perfectly well that it is not the modern practice of the

law of nations to grant salvage on recapture of neutral vessels, and upon this plain principle, that the liberation of a clear neutral from the hand of the enemy is no essential service rendered to him, inasmuch as that same enemy would be compelled by the tribunals of his own country, after he had carried the neutral into port, to release him, with costs and damages for the injurious seizure and detention. This proceeds upon the supposition that those tribunals would duly respect the obligations of the law of nations; a presumption which, in the wars of civilized nations, each belligerent is bound to entertain in their respective dealings with neutrals. But it being notorious to all Europe, in the present war, that there has been a constant struggle maintained between the governing powers of France, for the time being, and its maritime tribunals, which should most outrage the rights of neutral property—the one by its decrees, or the other by its decisions—the liberation of neutral property out of their possession has been deemed, not only in the judgment of our courts, but in that of neutrals themselves, a most substantial benefit conferred upon them, in a delivery from danger against which no clearness and innocence of conduct could afford any protection. And a salvage for such service has not only been decreed, but thankfully paid, ever since these wild hostilities have been declared and practiced by France, against all acknowledged principles of the law of nations and of natural justice. When these lawless and irregular practices are shown to have ceased, the rule of paying salvage for the liberation of neutral property must cease likewise.

No proof is offered that the maritime tribunals of France have, in any degree, corrected either the spirit or the form of their proceedings respecting neutral property generally; and, therefore, I shall not think myself authorized to depart from the practice that has been pursued, of awarding a salvage to the captors. (*The Onskan,* 2 Robinson, 300, 301.)

And later he said:

It is certainly true that the standing doctrine of the court has been that neutral property, taken out of the possession of the enemy, is not liable to salvage. It is the doctrine to which the court has invariably adhered till it was forced out of its course by the notorious irregularities of the French cruisers and of the French Government, which proceeded, without any pretense of sanction from the law of nations, to condemn neutral property. On these grounds it was deemed not unreasonable by neutrals themselves that salvage should be paid for a deliverance from French capture. The rule obtained early in the war, and has continued to the present time. It is said that a great alteration

> has taken place in the French proceedings, and that we are now to acknowledge a sort of return of *"Saturnia Regna."* This court is not informed, in a satisfactory manner, that any such beneficial change has taken place in the administration of prize law in the tribunals of France; and, therefore, it will continue to make the same decree till the instructions of the superior court shall establish a different rule. (*Eleonora Catharina,* 4 Rob. 157.)

It is important to note that during the period of these seizures neither the Government of the United States, which consistently supported the claimants' contentions, nor the Government of France, from whom we were demanding redress, indicated the necessity of the form of appeal, nor later did the French, even in the long negotiations in which the validity of these claims was a principal subject of discussion, intimate in any way that they considered the appeal of importance or that they required it.

We conclude, therefore, that under these exceptional circumstances a claim properly founded in law is not excluded from our jurisdiction because the supposed remedy by appeal was not exhausted, and this we hold upon two principal grounds: First, that by the action of the French Government such an appeal was useless or impracticable; second, that as between the United States and France such an appeal as a condition precedent to recovery was in effect waived.

The decree condemning the *Industry* proceeds upon the theory that the vessel's *rôle d'équipage* was not in the form said to be required by article 25 of the treaty of February 6, 1778, and also said to be required by certain French decrees declaring to be good and lawful prize every American vessel not having a *rôle* in a form prescribed.

Colloquially a *rôle d'équipage* is usually treated as a crew list, whereas in French law it is a more formal paper, with more extended requirements.

To the first of the propositions contained in the court's decree a very clear answer is found in the fact that the treaty does not demand, as we have already decided, that a crew list of any kind be carried on the vessel. Article 25 of that instrument calls for a "letter or passport expressing the name, property, and bulk of the ship, as also the name and place of habitation of the master or commander of the said ship, that it may appear thereby that the ship really and truly belongs to the subjects of one of the parties;" this passport to follow a form annexed to the treaty. The ship was also to have a certificate

as to cargo, showing she was not carrying contraband; but this certificate is not brought in question in these cases. The treaty therefore required two documents: First, a passport; second, a certificate as to cargo. The form of passport annexed to the treaty runs as follows:

> The name of the master and the name, hailing port, and tonnage of the vessel are given, together with the name of the port in which she is lying, as well as that of the port to which she is bound; the general nature of her cargo is described, and it is made known and certified that permission has been given the master to proceed after he shall make oath that the vessel belongs to one or more American citizens.

Up to this point, therefore, the passport's requirement is a description of the vessel and cargo, with the name of the master and a sworn statement as to the citizenship of the owners. Up to this point also the document follows exactly article 25 of the treaty, contains everything demanded by that article, and we are informed that it was the custom of the United States in the English version of the passport to halt at this point, while the versions in foreign languages contained the concluding portion, which we are now about to consider. (See original sea-letter of the *Zebra;* claim allowed under treaty of 1831; original MSS. Department of State.)

The master "will," it says further, keep the marine ordinances on board, in every port he "shall" show his sea-letter, "shall" give a faithful account of his voyage, and "shall" carry the colors of his country; and he shall (or will) enter in the proper office (*remettra*) what:—"a list, signed and witnessed, containing the names and surnames, the places of birth and abode of the crew of his ship and of all who shall embark on board her, whom he shall not take on board without the knowledge and permission of the officers of the marine."

There is no requirement here that the master shall carry on his vessel the document described, be it *rôle d'équipage* or crew list. The demand of this clause is that such a document be deposited or filed (*remis*) in a proper place, and whether this be done before or after the passport issue is not material. That instrument simply declares that such a list has been, or at least will be, before sailing properly filed, not carried. (Doc. 102, pp. 467 and 564; 2 Prises Maritimes, 53.)

The provision of Article IX of the treaty of 1788, relating as it

does to consular rights in the arrest of deserting seamen, has no bearing upon this question. A semi-extraterritorial power is by that instrument given to French consular officers, and a way strictly marked out in which they shall pursue it; to arrest a deserter they must show him to be part of the vessel's crew, and this they must do by exhibiting "the registers of the vessel or ship's roll." This is a specific agreement relating to a specific subject, and has no reference to condemnations.

The *Industry* was not condemned because the crew list had not been filed in the home port, but because the *rôle d'équipage* was not in form. The careful study and patient research of Government counsel have failed to develop any treaty requirement that such a document be carried on board the vessel, while the United States Government constantly and most peremptorily insisted that during all the period now under discussion the French demand was illegal and unauthorized by treaty or other law. The Pinckney mission told M. Bellamy in October, 1787 (Doc. 102, pp. 466, 467), that none of our vessels had such a *rôle;* and that if they were to surrender the property taken from their fellow-citizens in cases where the vessel was not furnished with such a *rôle* the United States would become responsible for the property so surrendered, as "it would be impossible to undertake to assert that there was any plausibility in the allegation that our treaty required a *rôle d'équipage.*"

Pickering's interesting instructions to the Ellsworth mission, dated October 22, 1799 (Doc. 102, p. 561), contain a very definite statement of the position of the Government on this subject. He lays down as—

> an indispensable condition of the [proposed] treaty a stipulation to make to the citizens of the United States full compensation for all losses and damages which they shall have sustained by reason of irregular or illegal captures or condemnations of their vessels and other property. And all captures and condemnations are deemed irregular or illegal when contrary to the law of nations generally received and acknowledged in Europe, and to the stipulations in the treaty of amity and commerce of the 6th of February, 1778, fairly and ingenuously interpreted while that treaty remained in force, especially when made and pronounced:
>
> (1) Because the vessel's lading, or any part thereof, consisted of provisions or merchandise coming from England or her possessions.
>
> (2) Because the vessels were not provided with the *rôles*

d'équipage prescribed by the laws of France, and which it has been pretended were also required by treaty.

(3) Because sea-letters or other papers were wanting, or said to be wanting, when the property shall have been, or shall be, admitted or proved to be American. Such defect of papers, though it might justify the captors and exempt them from damages for bringing in such vessels for examination, could not with reason be a ground of condemnation.

Further on in the instruction Mr. Pickering says:

> There never was, indeed, any intimation on the part of France from 1778, when the treaty of amity and commerce was made, until the passing of the decree of the Directory, in March, 1797, that a *rôle d'équipage,* other than the ship's roll or the shipping papers [see act 1790], would be required. It was then suddenly demanded, and the decree . . . was instantly enforced and became a snare to the multitudes of American vessels, which, for want of previous notice, would not have on board the document in question, if their Government should permit them to receive a document which they were under no obligation to produce. For it can not with any semblance of justice be pretended that the vessels of one nation are bound to furnish themselves with papers in forms prescribed by the laws of another. And if we resort to the treaty of 1778, or to the sea-letter or passport annexed to it, on which letter the Directory pretended to found their decree concerning the *rôle d'équipage,* we shall see that these words are not to be found in either. (*Id.* 564.)

For the purpose of argument, however, we may for the moment admit the French contention in this matter—a contention now adopted by the defense—and concede that, by relation back through the passport to the twenty-fifth article of the treaty of 1878, it became the duty of the vessel's master not to file a crew list at the port of departure, but to carry on his vessel a *rôle d'équipage* drawn and certified in accordance with the ordinances and decrees of France, and not necessarily in accordance with the statutes of the United States, to which country his vessel belonged and of which country he was a citizen.

The position being admitted, we must consider the amount of penalty which the vessel is to suffer if such a *rôle* be lacking. What penalty does the treaty impose? That instrument says nothing about a *rôle* or crew list, but demands a passport, which latter document it is urged requires the presence of a *rôle* on the vessel; the treaty pen-

alty, therefore, for the lack of this *rôle,* not mentioned in the body of the instrument, can not be greater than the penalty for the lack of the passport which is there mentioned. The object of the passport provision is clearly to be gathered from the wording of the treaty: "To the end that all manner of dissensions and quarrels may be avoided and prevented," the twenty-fifth article, it is provided that when either party is at war the vessels of the other shall be furnished with passports describing the name, property, and bulk of the ship, together with the name and abode of the master, so that it may appear that the vessel "really and truly belongs to the subjects of one of the parties." Such is the substance of the twenty-fifth article, whose object as clearly expressed is not to affix penalties, but to avoid "dissensions and quarrels."

The twenty-seventh article provides, that if a merchant ship of either party meet a man-of-war or privateer of the other, the armed ship, "for the avoiding of any disorder," shall remain out of cannon-shot, send boats to the merchantman; put no more than two or three men on board, to whom the master shall show his passport; having done which he may pursue his voyage, and the vessel may not be molested or searched in any manner, nor chased, nor forced out of her course. The passport, then, being given for the purpose of preventing "dissensions and quarrels," is by virtue of its presence alone to free the ship from search, chase, or forced deviation. No penalty is affixed for the lack of this passport other than what may be inferred, as, for example, that without it she would be liable to detention and search, and possibly to investigation by a prize court or other competent tribunal as to the honesty of her character and the innocence of her voyage.

No treaty penalty being affixed for the absence of a definitely prescribed document, how can one be held to exist for the absence of a subsidiary document which the treaty does not require the master to exhibit, even if its presence on board be necessary? An American vessel boarded by a French officer need only, so says article 27, do one thing, need only show one paper, to wit, his passport; this done, he may immediately proceed.

No rule of international law has been called to our attention, and none is known to us, which, in the absence of specific agreement to the contrary, requires the presence on vessels of any particular document. Some papers undoubtedly should be carried for protection; that is,

carried for the benefit of the ship, to divert suspicion, to avoid detention and delay, and to afford at least *prima facie* proof that she is what she pretends to be, an innocent vessel engaged in legitimate business. The nature and character of ships' papers is, however, usually a matter of municipal regulation to which foreign vessels must conform or incur certain reasonable penalties, enforceable within the territorial jurisdiction of the enacting Government. Many examples of municipal acts of this nature may be found in our own statute books.

Speaking, generally, however, aside from local regulations not enforceable by the Government of one nation over the vessels of another on the high seas, the class and kind of papers to be carried by a merchantman are prescribed by his own Government, and as between him and a foreign vessel of war these papers are *prima facie* proof of innocence and honesty; but as they are not conclusive on these points, so is their absence no more than the foundation of a reasonable suspicion deserving inquiry into the true character of the vessel and voyage. (See, also, Merlin, 2 Prises Maritimes, 51.)

> It is of the highest importance [says Ortolan] that a vessel be in position to prove her nationality. The flag is the distinctive evident sign of the vessel's national character. Every state has its particular colors under which its citizens sail. . . . But this distinctive sign can not be the only one, for if it were it would be easy to disguise the nationality of a vessel. Therefore, to provide clear proof of this nationality, ships' papers or sea-letters are required, with which every merchantman should be provided. The number, nature, and form of these papers are regulated by the law of each country, usually through the provisions of codes of maritime commerce. (*Règles internationales et Diplomatie de la Mer.* Ortolan, vol. 1, p. 174.)
>
> The right to visit [says Hautefeuille] must be confined to an ascertainment through examination of official papers of the nationality of the vessel met, and also in case she is bound to an enemy's port, whether faithful to her duty she carries no arms or munitions of war; that is, that she is not guilty of interference in the hostilities. These two single points ascertained, and that only by documents coming from the neutral sovereign, or his delegates, the cruiser should retire and allow the vessel, now recognized as neutral, to continue her voyage. (Hautefeuille, vol. 3, p. 428; Parsons, Shipping, vol. 2, pp. 475–477.)

The lack of a particular ship's paper may be punishable under certain circumstances within local jurisdiction as a police measure, but

never, so far as we know, by absolute confiscation when it is shown that the vessel is innocently pursuing a legitimate voyage. An accident is easily supposable by which, after leaving port, and while on the high seas, all the papers of a ship may by fire or water be destroyed. On that account is she to be confiscated? We know of no rule of law, municipal or international, which would authorize such a course.

The *Industry,* it is said, did not have a proper *rôle d'équipage.* The treaty did not require any, or, if it did, then it punished the lack of the *rôle* by detention, search, and inconvenience only. The crew list is a paper usually carried on a merchant vessel, but its absence is not, by international law, punishable by confiscation.

After all the discussion between the two Governments in regard to the *rôle d'équipage,* we find in article 4 of the treaty of 1800 provision for a passport identical in form with that of 1778, which could only have been so therein inserted because both Governments had agreed upon what had always been contended for by the United States, and finally admitted by France, that this form imposed upon the shipmaster no obligation to carry on board his vessel the document technically known to the French law as a *rôle d'équipage.*

That France came openly to this position is shown by various cases.

In the case of the *Louise* (13 Thermidor, year IX) the council of prizes decided that the laws of France relative to *rôles d'équipage* should not be applied to foreign ships, it being sufficient that their *rôles* conformed to the laws of their own country. (*Traité des Prises maritimes,* Pistoye et Duverdy, vol. 1, p. 484.)

In the cases of the *Elizabeth* (17 Pluviose, year VII) and of *Les Deux Amis* (3 Messidor, year VIII) it was held that even a failure to produce a proper passport or sea-letter did not warrant condemnation if the neutrality of the vessel sufficiently appeared from other papers or indicia on board. (*Id.,* pp. 439, 479.)

The commissioner of the French Government very thoroughly presented this whole question in the case of the *Pegou,* on trial before the council of prizes. (*Traité des Prises maritimes,* Pistoye et Duverdy, vol. 2, pp. 51 *et seq.*)

Among other things, he said that certainly the regulations of 1744 and 1778 and the orders of the Directory required a *rôle d'équipage,* certified by public officers at the port of departure. Certainly, also, the *rôle d'équipage* is not set forth in the treaty of 1778 as among

the documents required to show neutrality. Whether the treaty or the French decrees should prevail he does not decide, but starting with the principle that all questions of neutrality are questions of good faith, in which actual facts, not simply appearances, must be examined, he holds that the absence of a required document or an irregularity in form does not authorize condemnation as prize. The truth must be sought, and that not by technical forms; simply omissions or irregularities should never obscure the truth if it be otherwise proved. The essential question is, whether the ship is or is not in fact neutral. It is not of importance that legislators have thought it their duty to require the presentation of particular papers; the severity of the legislators is always subordinate to the surrounding circumstances which alone lead to conviction. The neutrality should be proved, but this may be done notwithstanding the omission or irregularity of certain forms. On the other hand, fraud may be uncovered, though sought to be concealed under deceiving appearance. All thorns and all subtleties of law must be thrown aside "*il faut procéder par bonne et mûre délibération et y regarder par la conscience.*" And the court followed his advice thus officially given.

We are irresistibly forced to the conclusion that a condemnation based simply on the absence of a *rôle d'équipage* or upon its informality was illegal.

We do not, however, hold that the absence or informality of a ship's paper may not create a suspicion calling for explanation, or that its absence or informality may not, in connection with other evidence, give good ground for investigation and suitable punishment. The cases now before us do not present this issue. In the case of the *Industry,* Benjamin Hawkes, master, for example, there is no allegation in the decree of the tribunal, nor is there anything in the proceedings tending to show that she was not what she pretended to be, an American vessel owned by citizens of the United States, honestly pursuing a legitimate and peaceful voyage. The grounds of condemnation were solely that the *rôle d'équipage* which the vessel had on board was not in form, being signed only by one notary public "without the confirmation of witnesses," and there being written on the back of said *rôle* an unsigned certificate that a *rôle d'équipage* was not necessary.

It will probably become important to consider in the future the proposition of the defense that the captured vessel is required to prove

her innocence—that is, that the *onus probandi* rests upon her in prize proceedings. In this case, however, there is no allegation that the vessel was violating neutrality or violating any law of nations or any law of France, other than that which demanded a *rôle d'équipage* in a prescribed form. Consideration of this question is therefore reserved.

Some of the points presented in the argument we do not consider more in detail, as they have either been discussed by us before, or, in our judgment, are decided in the conclusions we have reached upon other contentions to which they are subordinate.

We thank counsel, both those representing the claimants and those who appeared in behalf of the Government, for the valuable assistance they have rendered the court by the thorough presentation of the many and complicated questions involved in these cases.

Motion denied.

WILLIAM R. HOOPER, Administrator, v. THE UNITED STATES, and Other Cases[1]

[No. 3694 French Spoliations. Decided November 14, 1887]

On the Proofs

This is the fourth decision in the French Spoliation Cases. See *Gray's Case* (21 C. Cls. 340); *Holbrook* (*ibid.* 434); *Cushing's* (22 *ibid.* 1). The important subjects considered are: The duration of the treaties with France; the right of uninsured owners to constructive insurance; the status of American vessels commissioned to attack French men-of-war and carrying armaments; the blockade of British ports in the West Indies; the liability of France for salvage on recapture; the measure of damages for freight earnings.

I. The treaties with France, 1778, constitute the rule by which all differences between the two nations are to be measured after February 6, 1778, and before July 7, 1798. Subsequent to the latter date they are governed by international law.

II. A treaty is in its nature a contract, and if the consideration fail or important provisions be broken by one party, the other may declare it terminated.

III. Abrogation of a treaty may be justified by a change of circumstances.

IV. The circumstances justified the United States in annulling the treaties of 1778; and the Act of July 7, 1798,[2] was effective as between nations. By the enactment the compacts ended.

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[1] Court of Claims Reports, vol. 22, page 408.

[2] *Supra*, p. 65.

V. The insurance to be allowed to owners in French Spoliation Cases is neither constructive insurance nor insurance "to cover," but premiums actually paid.

VI. A vessel fitted for the purpose of seizing French armed vessels under the Act of July 9, 1798, was legitimate prize in the limited war then defined by Congress; but the arming of a merchant vessel strictly for defense whose only object was trade did not authorize condemnation, even if a license under the *Act of June* 25, 1798,[1] or the *Act of July* 9, 1798[2] (1 Stat. L., pp. 512, 578), were found on board.

VII. A vessel may be subject to seizure though not liable to condemnation; and if there be probable cause, prize courts may award the captors costs though the vessel be not good prize.

VIII. No actual blockade was maintained by the French of any British port in the West Indies during the period of French spoliations. Therefore a provision-laden ship bound for a British port was not subject to condemnation while the treaties of 1778 remained in force.

IX. The burden of proof in prize proceedings is on the vessel; she must clear herself from suspicion; but no particular paper is indispensable; an honest, commercial, lawful voyage may be shown though no paper be produced.

X. The spoliations of France were illegal, and admitted by France; but by the treaty of 1800 were surrendered in consideration of a release from France of her claims against the United States.

XI. Salvage is remuneration for aid in case of danger. During the period of French spoliations the conduct of the French prize courts rendered recapture a rescue from actual danger, and the recaptors entitled to salvage.

XII. Freight earned is an element of value in property lost; full freight may be often recoverable although the vessel may not reach her destination; but in these cases the court adopts the general rule of commercial usage, two-thirds of the full freight as the measure of damages.

XIII. When a vessel is actually under contract for a voyage to one port, thence to proceed to another, she has a present existing title in the freight money of the entire voyage; but this does not extend to a mere expectancy of finding a cargo at her first port.

The Reporters' statement of the case:

The first report to Congress in these cases was made on the first day of the present term, December 6, 1886. The cases reported and the findings sent up will be found in the case of Cushing (22 C. Cls. 1). Those findings and the opinions of this court in Gray's Case, in Holbrook's Case, and in Cushing's Case were likewise published by Congress, and constitute Miscellaneous Document No. 6, H. R., Forty-ninth Congress, second session.

[1] *Supra*, p. 59. [2] *Supra*, p. 65.

The opinion in the present case of Hooper was delivered November 7, 1887. The findings will form a part of the second report to Congress.[1] They are as follows:

I. The schooner *John,* a duly registered vessel of the United States, of which John C. Blackler was master, sailed on a commercial voyage from the port of Salem, Mass., bound for Martinique with a cargo of codfish, hogshead bungs, and lumber, owned, one-half the vessel and the whole of the cargo, by William Gray, now deceased, of whom the claimant William Gray, of Boston, Mass., is the duly appointed administrator, and the other half of the vessel by William Blackler, now deceased, of whom the claimant William R. Hooper is the appointed administrator; all citizens of the United States.

She was of 111 tons, with seven men, had two guns, and carried a letter of marque.

II. Said vessel while lawfully pursuing her voyage was seized on the high seas, near Martinique, by the French frigate *La Syrène* (or *Cyren*) on the first day of February, 1800, and there burned, sunk, and destroyed. The captain was taken by said frigate into the French port L'Orient, where proceedings were instituted in a prize court, wherein claim was made in behalf of the owner, Gray, for payment for said vessel and cargo.

It appears that "the seizure was decided upon as much on account of default in the production of her crew list (*rôle d'équipage*) as that there was found on board a commission of war with instructions to attack French ships," elsewhere in the record called a letter of marque to attack *armed* French ships, and judgment was given against the claimant.

III. The case was taken to the council of prizes at Paris, where the captain alleged "that neither he nor his crew were allowed to take their baggage before the ship was set on fire, and that their captor took away the sails, provisions, and everything else which they thought proper." The French commissioner in his argument for the French Government before that tribunal, said, among other things, "I would argue willingly for the release of both (vessel and cargo) according to the provisions of articles of the agreement of the 8th Vendemiaire, year 9, if the property were still intact, without preliminary judgment, but this is not Mr. Gray's case, since the ship *John* was sunk and the owner had no profit from her." "I think that in the decision it

[1] See Mis. Doc. No. 5, Senate, Fiftieth Congress, first session.

is fair that the council should recommend Mr. Gray to have recourse to his minister to request him to cause the fact of this carrying away to be verified, and obtain from the justice of the Government the indemnification which may be due him."

The council decided and entered a decree that "the council declares the merchant, William Gray, Jr., not justified in his claim for the value of the ship *John* and cargo, but with liberty to appeal to the Government for justice in regard to the property which he proves to have been removed from said vessel by the crew of the frigate *Syrène*."

Mr. William E. Earle, Mr. William Gray, Mr. Edward Lander, Mr. George S. Boutwell, Mr. A. H. Cragin, Mr. Leonard Myers, Mr. Lawrence Lewis, Jr., Mr. James Lowndes, Mr. Augustine Chester, and *Mr. S. Prentiss Nutt* were heard for claimants.

Mr. Benjamin Wilson and *Mr. Charles S. Russell* (with whom was *Mr. Assistant Attorney-General Howard*) for the defendants.

DAVIS, J., delivered the opinion of the court:

The court has now delivered three opinions upon general issues raised in the French Spoliations Cases. The first related to the broad questions as to the validity, against France, of the claims as a class, and the resulting liability of the United States to the claimants; the second was directed more especially to forms of pleading, the value of evidence, and rights of insurers; while the third disposed of a motion made by the defendants for a rehearing of the general questions discussed in the first opinion. (*Gray, administrator,* v. *The United States,* 21 C. Cls. 340; *Holbrook, administrator,* v. *The United States,* 21 C. Cls. 334; *Cushing, administrator,* v. *The United States,* 22 C. Cls. 1.)

A large number of cases have since been argued and submitted to the court, and certain general questions are found raised in many of them. Those questions we shall now proceed to discuss, as well as two points which were sent back by the court for further argument.

It is urged by the claimants that the treaties of 1778 remained in force, notwithstanding the abrogating act of July 7, 1798, until the final ratification of the treaty of 1800, and that these treaties prescribe the rule by which all the spoliation claims are to be measured. This position is denied by the Government.

For the purpose of this branch of the case, the period of the spoliations may be divided into two parts: that prior to July 7, 1798, and that subsequent thereto and prior to the ratification of the treaty of 1800.

As to the first period, we find the position on both sides to have been consistent, which a few citations covering different years will clearly show.

In February, 1793, the National Convention granted substantial favors to the United States, among them opening the ports of the colonies to American ships, and granting to produce carried in American bottoms duties the same as those imposed upon French vessels (Senate, 19th Cong., 1st sess., Doc. 102, p. 35). This was followed by the decree of March 26, 1793, granting new favors to what the Convention called their "ally nation" (*ibid.*, p. 36). Soon after this M. Le Brun, the minister of foreign affairs, replying to a complaint from our minister, Mr. Morris, said that he had requested the minister of marine "to prevent in the future the vessels of our good allies from being exposed to the attacks of our ships of war and privateers" (*ibid.*, p. 38). Upon the 9th May, 1793 (*ibid.*, p. 42), the Convention passed a decree authorizing the arrest of neutral vessels laden wholly or in part with neutral property and bound to an enemy port, or laden with enemy merchandise. Mr. Morris immediately demanded that the United States be exempted from the operation of this decree as contrary to the terms of the treaty of commerce (*ibid.*, p. 44). His request was complied with, the Convention's action in this regard being based upon the sixteenth article of that treaty (*ibid.*, p. 46).

Now occurred a curious incident in legislative history. Five days after the passage of the exemption the Convention reversed its action. Mr. Morris protested (*ibid.*, p. 47), and the 1st July the Convention again decreed "that the vessels of the United States are not comprised in the dispositions of the decree of the 9th May, conformably to the sixteenth article of the treaty concluded the 6th of February, 1778." July 27th this exception was annulled and the United States were again thrown under the effect of the original decree of the preceding May (*ibid.*, p. 50). Morris wrote Jefferson, then Secretary of State: "The decree respecting neutral bottoms, so far as it respects the vessels of the United States, has, you will see, been bandied about in a shameful manner. I am told, from Havre, that it is by the force of money that the determinations which violate our rights have been

obtained; and, in comparing dates, events, and circumstances, this idea seems to be but too well supported" (*ibid.*, p. 52). Prior to this Mr. Morris had written the minister of foreign affairs asking that the matter be fixed definitely, otherwise "we must expect to see that species of dispute multiplied, in which cupidity on the one hand and fear on the other will give place to the calumnious insinuations, which lead uninformed persons to think that the interests of individuals might influence the national decisions (*ibid.*, p. 47). This note was followed by the exemption of July, soon after which Morris laid before the foreign office more specific charges (*ibid.*, p. 51), notwithstanding which the exemption was again reversed. In all this transaction the existing force of the treaties of 1778 was nowhere denied, and in the two exception was expressly admitted.

At this time Genet was carrying on his objectionable course in the United States under the shelter, as he contended, of the treaties, whose binding effect Mr. Jefferson did not deny, while he disputed Genet's construction of them (*ibid.*, pp. 53 *et seq.*).

Mr. Morris still endeavored to secure exemption from the May decree, but without success, and finally he wrote, during October, 1793, that in effect the minister of foreign affairs had acknowledged and lamented to him the impropriety of the decree, "but unable to prevail over the greater influence for the repeal of it, he is driven to the necessity of exercising a step which it is not possible to justify. There is no use in arguing with those who are already convinced, and where no good is to be expected some evil may follow. I have, therefore, only stated the question on its true ground, and leave to you in America to insist on a rigid performance of the treaty or slide back to the equal state of unfettered neutrality" (*ibid.*, p. 75).

Mr. Monroe now succeeded Mr. Morris in Paris, and writing home that he "felt extremely embarrassed how to touch again upon their [the French] infringement of the treaty of commerce whether to call on them to execute it, or leave that question on the ground I had first placed it. . . . Upon full consideration I concluded that it was the most safe and sound policy to leave this point where it was before" (*ibid.*, p. 85). He evidently made a distinction between "advising and pressing" the execution of the treaty and insisting upon its execution. Instead of demanding its execution as a right he advised it as a politic act on the part of France, fearing that a more decided course on his part would lead to a counter demand for the execution

by the United States of the guaranty clause. To this communication Monroe received from the Secretary of State a rather tart response, of which this is the important paragraph (*ibid.*, p. 87):

> The fourth head of inquiry stated in your letter shows that you were possessed of cases which turned entirely upon the impropriety of the decree, and such, too, was certainly the fact. Now, without the abrogation of the decree, so far as it represented those cases, the redress which you were instructed to demand could not be obtained. In truth there was no cause or pretense for asking relief but upon the ground of that decree having violated the treaty. Does not this view lead to the inevitable conclusion that the decree, if operative in future instances, would be no less disagreeable, and consequently that its operation in future instances ought to be prevented, a circumstance which could be accomplished only by a total repeal?

Soon after this the Convention resolved to carry into strict execution the treaty of commerce of 1778 (*ibid.*, p. 88), so that the year 1795 opened with a similar understanding on each side as to the enduring force of the treaty.

At this time commenced to circulate in France reports as to what Mr. Jay had been doing in England. Mr. Monroe thought the utmost cordiality had been restored between the two Republics, and yet feared that the prospect had become clouded by the rumors from England. In August, 1795, newspapers reached Paris, which contained the text of the Jay treaty (*ibid.*, p. 127), and so much feeling was aroused that, after considerable delay, it was decided to send an envoy to the United States to declare to our Government the dissatisfaction of the French in "respect to our treaty with Great Britain and other acts which they deemed unfriendly to them" (*ibid.*, p. 129); a course which Monroe endeavored to prevent.

Thereupon followed, in March, 1796 (*ibid.*, p. 131), a "summary exposition of the complaints of the French Government against the Government of the United States," in which an infraction of the treaties is relied upon as a legitimate grievance, and in answering which Monroe (*ibid.*, p. 135) tacitly admits by his argument the enduring force of those treaties.

The Jay treaty was ratified, news thereof reached Paris (*ibid.*, p. 142), and the threatening cloud burst.

The minister of foreign affairs informed Mr. Monroe that the

Directory regarded the Jay treaty as a breach of friendship, and saw "in the stipulations which respect the neutrality of the flag an abandonment of the tacit engagement which subsisted between the two nations on this point since the treaty of commerce of 1778. . . . . After this, citizen minister, the Executive Directory thinks itself founded in regarding the stipulations of the treaty of 1778 which concern the neutrality of the flag as altered and suspended in their most essential parts by this act, and that it would fail in its duty if it did not modify a state of things which would never have been consented to but upon the condition of the most strict reciprocity" (*ibid.*, p. 143). Monroe argued in reply that the treaty of 1778 had not been violated, closing with a renewal of his complaints of French conduct in regard to American commerce.

Pinckney was now ordered out to succeed Monroe, but before he reached Paris France gave notice of intended reprisals (*ibid.*, p. 147), and in October (1796), Monroe received a copy of the Executive Directory's decree of July 2, 1796, with notice that it would be applied to the United States, and that his functions as minister were suspended (*ibid.*, p. 148). The decree provided that France should treat all "neutral vessels, either as to confiscations, as to searches or captures, in the same manner as they shall suffer the English to treat them." In communicating the decision of his Government, however, the French minister was careful to state that "the ordinary relations subsisting between the two people, in virtue of the conventions and treaties, shall not on this account be suspended." Pinckney arrived, but was not received, and Monroe was dismissed with language which Mr. Adams described as "studiously marked with indignities towards the Government of the United States."

This brings us to the close of 1796, and however strained the relations of the two countries had become, neither had yet endeavored to throw off the yoke of the treaties; on the contrary, all discussion was founded upon them as still in force.

In February, 1797, the French minister of foreign affairs claimed the benefit of the treaty in a fallacious argument as to the *rôle d'équipage,* suggesting incidentally that "the Federal Government doubtless had never ceased to look upon the treaty of 1778 as obligatory upon the two nations" (*ibid.*, p. 156).

The decree of the Executive Directory of March 2, 1797, which is very harsh upon neutrals, speaks of the treaties as existing in a shape

modified by the Jay treaty (*ibid.*, p. 160). In April succeeding, the condemnation of an American vessel is excused as in accordance with treaty; and this is again done in the following November. The instructions to Pinckney, Marshall, and Gerry (July 15, 1797), recognized the treaties as still in force (*ibid.*, p. 453); and the 18th March, 1798, Talleyrand based his complaints upon them (*ibid.*, p. 493). Finally Congress found it necessary by statute to declare the treaties abrogated; an action clearly useless if they were non-existent; an action which in effect admitted their continuing force to that day.

The treaties of 1778, particularly the treaty of commerce, which is the important one for our purposes, were in existence until the passage of the abrogating act. Whatever disputes occurred between this country and France during the disturbed period following the conclusion of the Jay treaty arose from differences of interpretation of various clauses of the Franco-American treaty, and on neither side do we find seriously advanced a contention that the treaties were not in existence and were not binding upon both nations. The United States distinctly urged their enduring force, while the French departed from this position only in this (if it be a departure), that the Jay treaty introduced a modification into their treaty with us, of which they were entitled to the benefit.

We are of opinion that the treaties of 1778, so far as they modified the law of nations, constituted the rule by which all differences between the two nations were to be measured after February 6, 1778, and before July 7, 1798.

As to the period after July 7, 1798:

On that date the abrogating act passed by the Congress was approved by the President and became a law within the jurisdiction of the Constitution; a law replacing to that extent the treaties, and binding upon all subordinate agents of the nation, including its courts, but not necessarily final as the annulment of an existing contract between two sovereign powers.

A treaty which on its face is of indefinite duration and which contains no clause providing for its termination may be annulled by one of the parties under certain circumstances. As between the nations it is in its nature a contract, and if the consideration fail, for example, or if its important provisions be broken by one party, the other may, at its option, declare it terminated. The United States have so held

in regard to the Clayton-Bulwer treaty, as to which Mr. Frelinghuysen, then Secretary of State, wrote Mr. Hall, minister in Central America (July 19, 1884):

> The Clayton-Bulwer treaty was voidable at the option of the United States. This, I think, has been demonstrated fully on two grounds. First, that the consideration of the treaty having failed, its object never having been accomplished, the United States did not receive that for which they covenanted; and, second, that Great Britain has persistently violated her agreement not to colonize the Central American coast.

Here concur two clear reasons for annulment, failure of consideration and an active breach of contract.

Abrogation of a treaty may occur by change of circumstances, as:

> When a state of things which was the basis of the treaty, and one of its tacit conditions, no longer exists. In most of the old treaties were inserted the *clausula rebus sic stantibus,* by which the treaty might be construed as abrogated when material circumstances on which it rested changed. To work this effect it is not necessary that the facts alleged to have changed should be material conditions. It is enough if they were strong inducements to the party asking abrogation.
>
> The maxim *"Conventio omnis intelligitur rebus sic stantibus"* is held to apply to all cases in which the reason for a treaty has failed, or there has been such a change of circumstances as to make its performance impracticable except at an unreasonable sacrifice. (Wharton's Com. Am. Law., § 161.)
>
> Treaties, like other contracts, are violated when one party neglects or refuses to do that which moved the other party to engage in the transaction. . . . When a treaty is violated by one party in one or more of its articles, the other can regard it as broken and demand redress, or can still require its observance. (Woolsey, § 112.)

The United States annulled, or at least attempted to annul, the treaties with France upon the grounds, stated in the preamble of the statute, that the treaties had been repeatedly violated by France, that the claims of the United States for reparation of the injuries committed against them had been refused, that attempts to negotiate had been repelled with indignity and that there was still being pursued against this country a system of "predatory violence infracting the said treaties and hostile to the rights of a free and independent nation." Such

were the charges upon which was based the enactment that "the United States are of right freed and exonerated from the stipulations of the treaty and of the consular convention heretofore concluded between the United States and France, and that the same shall not henceforth be regarded as legally obligatory on the Government or citizens of the United States."

The treaties therefore ceased to be a part of the supreme law of the land, and when Chief-Justice Marshall stated, in July, 1799 (*Chirac* v. *Chirac*, 2 Wheaton, 272), that there was no treaty in existence between the two nations, he meant only that within the jurisdiction of the Constitution the treaties had ceased to exist, and did not mean to decide, what it was exclusively within the power of the political branch of the Government to decide, that, as a contract between two nations, the treaties had ceased to exist by the act of one party, a result which the French ministers afterwards said could be reached only by a successful war.

The only question we have now to consider is that of the international relation. The annulling act issued from competent authority and was the official act of the Government of the United States. So far as it was within the power of one party to abrogate these treaties it was indisputably done by the act of July 7, 1798. Notwithstanding this statute, did not the treaties remain in effect to this extent, if no further, that they furnish a scale by which the acts of France, which we are charged to examine, are to be weighed; and in considering the legality of those acts are we not to follow the treaties where they vary the law of nations? The claimants in very learned and philosophical arguments contend for the affirmative.

In the first place we are referred by them to the course of the Executive; this, it is said, is binding upon the judiciary, and is favorable to their contention. This position we will first examine.

In 1829 the Supreme Court had occasion to construe the treaties relating to the purchase of Louisiana, particularly that of San Ildefonso. The Executive had already given an interpretation to that instrument, and Marshall, Ch. J., who delivered the opinion of the court, said on this point (*Foster et al.* v. *Neilson*, 2 Peters, 253):

> In a controversy between two nations concerning national boundary, it is scarcely possible that the courts of either should refuse to abide by the measures adopted by its own Government. There being no common tribunal to decide between them, each deter-

> mines for itself on its own rights, and if they can not adjust their differences peaceably, the right remains with the strongest. The judiciary is not that department of the Government to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous. We think, then, however individual judges might construe the treaty of San Ildefonso, it is the province of the court to conform its decisions to the will of the legislature if that will has been clearly expressed (p. 307).

In *United States* v. *Arredondo* (6 Peters, 711), and in *Garcia* v. *Lee* (12 Peters, 511), this principle was acknowledged and affirmed, while later in *Williams* v. *Suffolk Insurance Company* (13 Peters, 415), the court said as to the recognition of Buenos Ayres (p. 420):

> And can there be any doubt that when the Executive branch of the Government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view it is not material to inquire, nor is it the province of the court to determine, whether the Executive be right or wrong. It is enough to know that in the exercise of his constitutional functions he has decided the question. Having done this under the responsibilities which belong to him it is obligatory on the people and Government of the Union. . . . In the cases of *Foster* v. *Neilson* (2 Peters, 253, 307), and *Garcia* v. *Lee* (12 Peters, 511), this court have laid down the rule that the action of the political branches of the Government in a matter that belongs to them is conclusive.

We find in *Phillips* v. *Payne* an even stronger affirmance of this position when the court say that in cases like it "the judicial is bound to follow the action of the political department of the Government and is concluded by it" (92 U. S. 130).

The action of the Executive is, then, conclusive upon the judiciary when that action is taken within the jurisdiction given by the Constitution. That instrument marks out with marvelous clearness and foresight the duties assigned to each of the three branches of Government therein created; within its own domain each of these branches is supreme, the executive no less than the legislative, the legislative no

less than the judiciary, and the judiciary no less than either of the other two. How does this rule apply to the cases now before us? The legislature, with the President who approved the bill, have annulled the treaties to the extent of whatever power they may have had in the premises, which is all the power possessed by the United States over the subject-matter. Do subsequent acts of the Executive alone under these circumstances, acts done in an effort to procure compensation for injured citizens, statements made in positions assumed in a negotiation, many of them perhaps taken argumentatively, others perhaps advanced in an effort to reach a middle ground upon which both parties could stand and which would result in substantial advantage to the nation and its individual citizens; do such acts, statements, or positions necessarily bind us here?

The statute which gives us all the jurisdiction we have over these claims requires us to examine, not those claims which the United States advanced, but those claims of specified classes which were "valid" "upon the French Government." It can not be seriously contended that because the Executive pressed a claim that the claim was therefore "valid" as between the nations. The Act clears any doubt on this point, if there could be any, by prescribing the test we are to apply in ascertaining the validity of a claim; that test is "the rules of law municipal and international and the treaties of the United States applicable to the same."

The distinction we have heretofore made must be emphasized between the position and jurisdiction of this court under this very exceptional statute, and their position and jurisdiction, or those of any other court of the United States, when acting under general laws, whether statutory or unwritten.

Because the President urged a claim upon France it did not necessarily become as between France and the United States a "valid" claim. The rule as to the effect of Executive decision applies as well in France as in the United States; France resisting the claim may contend with equal force that her position is correct, and yet one of the parties to the dispute must be wrong. This *reductio ad absurdum* seems hardly necessary, and yet it serves to illustrate the distinction we seek to make clear as to this court's peculiar jurisdiction. Suppose the decision of the Executive, even in the case assumed, be binding upon the judiciary administering the law within the United States, and the authorities do not go to this extent, still it does not follow that

such a decision upon any of these claims is binding upon us now. We are instructed to discover, not what the Executive believed or contended for or argued, but what claims were in fact and in law "valid" as against France, and valid by the rules of law, municipal and international, and the treaties.

The contention has, however, other aspects, which must have serious examination; and it therefore becomes necessary to see what was the contention of this Government as to the treaty rules after the passage of the annulling statute. For this purpose we must again turn to the correspondence.

It is well to bear in mind that the question of the guaranty had well nigh been eliminated from discussion. France had never formally asked its enforcement; on the contrary, had preferred that we should remain at least nominally neutral that she might reap the benefit of our food supply. Monroe had feared that too strong a position on our part might bring about a demand for the aid pledged; but Pickering had no apprehension, and clearly regarded the obligation as without practical danger. Fear of the guaranty hampered our officers; but the real practical difficulty on the French side was the Jay treaty; on ours, the spoliations.

Monroe was dismissed; Pinckney was not received; the Pinckney, Marshall, Gerry mission was not officially recognized, and they had returned home, when, in October, 1799, Mr. Pickering, Secretary of State, addressed to Messrs. Ellsworth, Davie, and Vans Murray, the newly appointed ministers to France, their instructions, in which under thirty different heads, concluding with seven *ultimata* he set forth the position of the United States. He told them that the conduct of France would well have justified an immediate declaration of war, but desirous of maintaining peace and being willing to leave open the door of reconciliation, the "United States contented themselves with preparations for defense, and measures calculated to protect their commerce" (Doc. 102, p. 561). The claims for "spoliation" are to be advanced immediately as an indispensable condition of a treaty, and all captures and condemnations are to be deemed "irregular or illegal when contrary to the law of nations generally received and acknowledged in Europe, and to the stipulations in the treaty of amity and commerce of the 6th of February, 1778, fairly and ingenuously interpreted, while that treaty remained in force, especially when made and pronounced."

In this instruction, then, Mr. Pickering draws the line very distinctly between the standard of demand as to claims arising prior to the annulling statute and those founded upon acts committed subsequent thereto. Further on he says (*ibid.*, p. 570):

> The seventeenth and twenty-second articles of the commercial treaty between the United States and France of February 6, 1778, have been the source of much altercation between the two nations during the present war. The dissolution of that and our other treaties with France leaves us at liberty with respect to future arrangements; with the exception of the now preferable right secured to Great Britain by the twenty-fifth article of the treaty of amity and commerce. In that article we promise mutually that while we continue in amity, neither party will in future make any treaty that shall be inconsistent with that article or the one preceding it. We can not, therefore, renew with France the seventeenth and twenty-second articles of the treaty of 1778. Her aggressions, which occasioned the dissolution of that treaty have deprived her of the priority of rights and advantages therein stipulated.

He speaks of the "dissolution" of the treaties as of an existing fact, says the United States can make no treaty, that is, no new treaty inconsistent with the Jay treaty, that therefore they can not "renew"—note the word—certain articles of the French treaty; in short, the whole instruction is founded upon an admission at least, if not an assertion, that the treaties no longer were in force.

The newly-appointed ministers, acting under these instructions, opened negotiations by proposing to arrange, first, claims of citizens of either nation, whether founded on contract, treaty, or the law of nations, and then, to stipulate for reciprocity and freedom of commercial intercourse (*ibid.*, p. 580). The French, however, thought the first object of negotiation should be "the determination of the regulations and the steps to be followed for the estimation and indemnification of injuries for which either nation may make claim for itself, or for any of its citizens. And the second object is to assure the execution of treaties of friendship and commerce made between the two nations" (*ibid.*, p. 581). We have already so fully considered the details of this long negotiation (21 C. Cls. 340 *et seq.*) that they need not now be repeated. A careful rereading of all the correspondence which we have been able to obtain on this subject but confirms our previous conclusion that—

> Starting under their instructions, events had forced the ministers to offer unlimited recognition of the treaties of 1778, coupled with a pecuniary equivalent to extinguish in the future their most onerous provisions; even this was not accepted, and the French, returning to their original ground, said that no indemnity could be granted unless the treaties were recognized without qualification as to the future, and this they said with the avowed object of avoiding the payment of indemnity.

The American ministers recognized that the French contention had substantial value, so much so that they offered 8,000,000 francs to settle it; but they did not recognize that it was correct in fact or law, or that the annulling act was without effect. On the contrary they argued:

> A treaty being a mutual compact, a palpable violation of it by one party did, by the law of nature and of nations, leave it optional with the other to renounce and declare the same to be no longer obligatory. . . . For a wrong decision it would doubtless be responsible to the injured party, and might give cause for war; but even in such case, its act of public renunciation being an act within its competence would not be a void but a valid act, and other nations whose rights might thereby be beneficially affected would so regard it. (Doc. 102, p. 612.)

Finally, the second article of the treaty of 1800, as signed in Paris, expressly stated that the ministers plenipotentiary of the two parties were not able to agree respecting either the treaties or indemnities. These points then remained as they were at the opening of the negotiation.

We fail to find that the Executive did, after the passage of the annulling statute, recognize the existing force of the treaties as an international obligation, whatever value may have been accorded to the claim of France that one party was without power to abrogate them.

The course of the Executive in the long contentions with France is not binding upon us now under the jurisdiction given by the statute of January, 1885. That statute grants a very peculiar power, imposes upon us a very original duty—that of examining in the light of law, municipal and international, and in the light of the treaties, the validity of the claims of this Government against that of France. Such a grant of jurisdictional power necessarily negatives any binding pre-

sumption founded upon Executive action. The President, individually and through the Secretary of State, expressly and repeatedly demanded satisfaction of the spoliation claims. This was of course known to the legislature which directed us to investigate these very claims. The Congress does not do a vain act, and to require us to examine the validity of claims under a rule of law which presupposes them to be valid because the Executive urged them in diplomatic negotiation would be vain. The intention of the statute is that we shall not be concluded by the President's position in these negotiations, but shall, under the standard set for us, inquire afresh as to the claims' "validity" against France. Even if this were not so, still there is nothing in the action of the Executive, after the act of 1798, tending to show an intention to recognize the continuing existence of the treaties. On the contrary, the whole argument proceeded upon the opposite hypothesis.

Claimants contend that not the act of 1798 but the agreement to expunge the second article of the treaty of 1800 terminated the treaties of 1778. The rescission of that article undoubtedly terminated the dispute as to the existence of these treaties and removed that dispute from the forum of international discussion. We are not prepared to admit that it recognized as valid the contention of France as to the treaties, although it recognized that the contention had substantial value. A claim may be admitted to have value for purposes of negotiation or compromise without an admission of its validity in fact or law. This is true in private affairs, and is especially true in diplomacy where questions of national pride, tradition, custom, and pique have to be considered most carefully and often are of most serious importance.

Counsel urge that France insisting the treaties remained in force should be bound by them, and they make the apt illustration that if the two nations had agreed at the time upon mutual indemnities France would have been held to the treaty rules. This assumption is probably correct. France having obtained the benefit she desired would in justice be bound by the corresponding obligation. *"Qui sentit commodum sentire debet et onus."* But that is not this case, for France entirely failed to secure a recognition of the continuing force of the treaty.

The treaty of 1800 contained a provision that "property captured and not yet definitively condemned" should be restored upon produc-

tion alone of the passport of 1778. These captures must, in almost all instances if not in all, have taken place subsequent to the annulling statute, and it is urged with much force that if the treaties were non-existent France was entitled to demand the proofs required by the general law of nations; as she expressly yielded this point and, as to these cases, agreed to abide by the treaty rule, therefore it can not be doubted (urge counsel) that had these claims now before us been taken into the treaty of 1800 they would have been subjected to the same standard.

Perhaps they would have been. France, obtaining treaty recognition, would have been bound by treaty rules; but this did not occur, and as France failed to obtain treaty recognition is she therefore to be bound by treaty rules because in one instance she made a special exception in specific terms? We think not. A treaty changes the law of nations only in so far as it contains provisions to that effect. The parties may covenant that as between themselves the law of nations shall not apply in particular instances; except in those instances that law remains in force.

The treaties had served their purpose; the conditions which they contemplated had changed. Whatever may have been the justice of French complaints of our course with Great Britain, and whatever may have been her rights under the circumstances, still she had so invaded the rights of the United States to free commerce in innocent cargoes upon the high seas, that a case was presented of such failure of consideration, and of such active infraction of the treaties, that this country was in a position to proclaim them ended.

Free ships, free goods, had become a dead letter. The passport which the treaty prescribed as a sufficient protection was disregarded, and various other aggressions upon the shipping of the United States were committed; aggressions admittedly forbidden by the treaty provisions.

We are of opinion that the circumstances justified the United States in annulling the treaties of 1778; that the act was a valid one, not only as a municipal statute, but as between the nations; and that thereafter the compacts were ended. We fail to find any agreement by France as to these claims to submit to the treaty rules after July 7, 1798, the treaties not being recognized by us, and we conclude that the validity of claims not expressly mentioned in the treaty of 1800, which arose after July 7, 1798, is to be ascertained by the principles of the law of

nations recognized at that time, and not by exceptional provisions found in the treaties of 1778.

Insurance to cover is that amount of insurance which in case of accident will entirely reimburse the insured for his loss. It includes not only the value of the property, but also the cost of the insurance procured to protect it.

Phillips in his work on insurance thus states the question argued here (§ 1221):

> The premium on the premium is to be included in computing the amount to be insured in order to cover the interest and replace the exact value of the subject in case of total loss.

Some of the claimants ask that they be allowed unpaid premiums of insurance as an element of the value of property lost, and if so that such premium be allowed upon the theory of insurance to cover.

The able arguments and briefs of counsel for claimants on these questions have been listened to and examined with great care. Whatever difficulty we might find were the matter here presented for the first time is removed by the precedents established by the Supreme Court. In the *Anna Maria* (2 Wharton, 325), the court allowed "the value of the vessel and the prime cost of the cargo with all charges, and the premium of insurance, where it has been paid, with interest." In *Malley* v. *Shattuck* (2 Cranch, 458), the court said (citing *The Charming Betsy*):

> In pursuance of that rule the rejection of the premium for insurance, that premium not having been paid, is approved; but the rejection of the claim for outfits of the vessel and the necessary advance to the crew is disapproved. Although the general terms used in the case of *The Charming Betsy* would seem to exclude this item from the account, yet the particular question was not under the consideration of the court, and it is conceived to stand on the same principle with the premium of the insurance, if actually paid, which was expressly allowed.

Following the Supreme Court we shall allow premiums of insurance when actually paid, and not otherwise.

In cases heretofore submitted a question arose as to the effect upon claimants' rights of the following facts, or either of them, should they or either of them be found to exist:

A. That the vessel acted as a privateer.

B. That the vessel possessed the license or authority described in either the Act of June 25, 1798, or in the Act of July 9, 1798, authorizing the class of seizure described in those acts or in the Act of May 28, 1798.

These questions were ordered to be and have been reargued.

The provisions of the three laws above recited are very different in effect, that of the latest date being the one most important in the consideration of these cases. The *Act of May* 28 (1 Stat. L. 561), "to more effectually protect the commerce and coasts of the United States" empowered the President to give certain orders to the armed vessels of the nation and contained no allusion to vessels owned by individuals. The *Act of June* 25 (*ibid.*, p. 572) authorized "the defense of the merchant vessels of the United States against French depredations," and to that end allowed the commanders and crews of such vessels to "oppose and defend against any search, restraint, or seizure" attempted by a French vessel, to "repel by force any assault or hostility" on the part of such French vessel, to "subdue and capture the same" and to retake any American vessel captured by the French.

The *Act of July* 9 (*ibid.*, p. 578) gave to private armed vessels specially commissioned the same license and authority "for the subduing, seizing, and capturing any armed French vessel, and for the recapture of the vessels, goods, and effects of the people of the United States, as the public armed vessels of the United States may by law have" (§ 2). This statute, therefore, authorized private armed vessels to take any armed French vessel "found within the jurisdictional limits of the United States or elsewhere on the high seas" (§ 1), and to recapture American vessels taken by the French. (See Acts of May 28 and June 25, 1798.)

Many of the vessels whose cases are before us carried armament of some kind, and several are shown to have had a special license, commission, or authority issued probably by virtue of the power given the President in the last two acts of Congress.

The marked distinction between the act of June and that of July is in this: The former permitted defense only, except in the matter of recapture, while the latter authorized attack, but attack only on armed vessels. Nowhere in the statutes is there any permission given to molest French merchantmen, although France was then engaged in the acts of illegal seizure and condemnation from which the spoliation claims arose. Defendants urge that the arming of a merchantman

and the presence on board of a special license under the acts cited destroyed any right of recovery as against France and consequently as against the United States.

We have held (*Gray's Case,* 21 C. Cls. 375) as to the relations between the two countries during the period in question that "no such war existed as operated to abrogate treaties, to suspend private rights, or to authorize indiscriminate seizures and condemnations; that, in short, there was no public general war, but limited war, in its nature similar to a prolonged series of reprisals." There was not what Wheaton calls "a perfect war," but a war "limited as to places, persons, and things"; the Congress authorized hostilities, but only on the high seas or within the jurisdictional limits of the United States, and then only by certain specified vessels upon certain specified vessels. As far as Congress authorized and tolerated it so far might we proceed in hostile operations, and the word "enemy" goes the full length of this qualified war and no further (21 C. Cls. 371). The hostilities were confined on the side of the United States to attack on French armed ships and to recapture of our own. The capture of enemy mercantile shipping is an important mark of a state of war, one of its principal incidents, and it is significant of the relations between the two Governments that not a movement was made by Congress or the Executive in this direction.

A privateer is an armed vessel belonging to one or more private individuals, licensed by Government to take prizes from an enemy; its authority in this regard must depend altogether upon the extent of the commission issued to it, and is qualified and limited by the laws under which the commission is issued. (*The Thomas Gibbons,* 8 Cranch, 421.)

Letters of marque and reprisal may theoretically issue in time of peace (articles of Confederation signed 1778, art. 9), as they form a "mode of redress for some specific injury which is considered to be compatible with a state of peace and permitted by the law of nations" (Kent, vol. 1, p. 61). The commission authorizes "the seizure of the property of the subjects as well as of the sovereign of the offending nation and to bring it in to be detained as a pledge, or disposed of under judicial sanction in like manner as if it were a process of distress under national authority for some debt or duty withheld" (*ibid.*). Speaking very technically, a letter of marque is merely a permission to pass the frontier, while a letter of reprisal authorizes a "taking in

return," a taking by way of retaliation, a *captio rei unius in alterius satisfactionem.* The colloquial use together of the two names, letter of marque and letter of reprisals, leads sometimes to misunderstanding as to the differing effect of each, one being a simple authority to depart, the other an authority to seize property in compensation for an injury committed.

The licenses or commissions of 1798 contained no hint of intended reprisals, for no authority to seize a French merchantman is contained in them, although the French had long been capturing our commercial marine. There was, however, express authority to seize armed vessels and to recapture American vessels; that is, in its essence, authority to defend, not to attack.

Within the limits prescribed by the Congress there was war; limited, imperfect war, not general public war, but war complete as to the vessels engaged in it to the extent only of the powers given by the Congress. Following in the path marked out by the Supreme Court in the prize cases which came before them during this period, and of which *Bas* v. *Tingy* is a fair example, we are led to the conclusion that where a private vessel was fitted for the purpose of attacking armed French vessels, and of recapturing American vessels seized, she fell within the rules of war, and if captured, became legitimate prize. The relations of the two nations being strained to hostilities within certain distinctly defined bounds, within those bounds the active agents of either Government were subject to the rules of war, and vessels intending to seize must submit to seizure.

It does not, however, follow that every vessel having a special license under the acts of 1798, or every vessel having some armament on board, falls within this rule. Long within the memory of men now living, many portions of the ocean since freely opened to commerce were infested by pirates who boarded peaceful merchantmen, plundered the vessels, and murdered the crews, or dragged them to the horrors of slavery. The literature relating to the early part of the century is filled with anecdotes based upon the outrages of such freebooters, and the heroic deeds of those sent out by the different Governments to capture or destroy them. Vessels tempting these waters found it advisable to carry some armament, so that failing efficient convoy, or in case of other accident, they might be prepared to cope on comparatively equal terms with these robbers of the sea.

At the particular period we now are considering, to the danger from

pirates in some parts of the world was added the danger from French privateers who acted in so illegal and unjustifiable manner as to call from Lord Stowell this opinion:

> It has certainly been the practice of this court, lately, to grant salvage on recapture of neutral property out of the hands of the French, and I see no reason at the present moment to depart from it. I know perfectly well that it is not the modern practice of the law of nations to grant salvage on recapture of neutral vessels, and upon this plain principle, that the liberation of a clear neutral from the hand of the enemy is no essential service rendered to him, inasmuch as that same enemy would be compelled by the tribunals of his own country, after he had carried the neutral into port, to release him, with costs and damages for the injurious seizure and detention. This proceeds upon the supposition that those tribunals would duly respect the obligations of the law of nations; a presumption which, in the wars of civilized nations, each belligerent is bound to entertain in their respective dealings with neutrals. But it being notorious to all Europe, in the present war, that there has been a constant struggle maintained between the governing powers of France, for the time being, and its maritime tribunals, which should most outrage the rights of neutral property—the one by its decrees, or the other by its decisions—the liberation of neutral property out of their possession has been deemed, not only in the judgment of our courts, but in that of neutrals themselves, a most substantial benefit conferred upon them, in a delivery from danger against which no clearness and innocence of conduct could afford any protection. And a salvage for such service has not only been decreed, but thankfully paid, ever since these wild hostilities have been declared and practiced by France, against all acknowledged principles of the law of nations and of natural justice. When these lawless and irregular practices are shown to have ceased, the rule of paying salvage for the liberation of neutral property must cease likewise.
>
> . . . . . .
>
> No proof is offered that the maritime tribunals of France have, in any degree, corrected either the spirit or the form of their proceedings respecting neutral property generally; and, therefore, I shall not think myself authorized to depart from the practice that has been pursued, of awarding a salvage to the captors. (*The Onskan,* 2 Robinson, pp. 300, 301.)

And later he said:

> It is certainly true that the standing doctrine of the court has been that neutral property, taken out of the possession of the

> enemy, is not liable to salvage. It is the doctrine to which the court has invariably adhered till it was forced out of its course by the notorious irregularities of the French cruisers and of the French Government, which proceeded without any pretense of sanction from the law of nations, to condemn neutral property. On these grounds it was deemed not unreasonable by neutrals themselves that salvage should be paid for a deliverance from French capture. The rule obtained early in the war, and has continued to the present time. It is said that a great alteration has taken place in the French proceedings, and that we are now to acknowledge a sort of return of *"Saturnia regna."* This court is not informed, in a satisfactory manner, that any such beneficial change has taken place in the administration of prize law in the tribunals of France; and, therefore, it will continue to make the same decree till the instructions of the superior court shall establish a different rule. (*Eleonora Catharina,* 4 Rob. 157. See also *Talbot* v. *Seeman,* 1 Cranch, 1.)

In the Gulf of Mexico the danger of seizure by small vessels, technically French privateers, but actually so irresponsible to governing power as to be in form only superior to freebooters, made the possession of some armament by an innocent trader a matter of wise precaution, if not of necessity, especially as in some instances the danger from the French tribunals was nearly as great as from the privateers. We are told, for example, that vessels were condemned by such tribunals because the ship's compass had an English brand, because the cooking utensils were of English manufacture, or because the vessel was destined to an English port. The Secretary of State thus characterized the situation:

> American property had even been taken when in their own ports, without any pretense, or no other than that they wanted it. At the same time their cruisers are guilty of wanton and barbarous excesses, by detaining, plundering, firing at, burning, and distressing American vessels.

The acts of the French privateers were so illegal as to be stigmatized as "piracies" both by Mr. Pickering and in the two Legislative Councils of France (Doc. 102, p. 410).

As early as June, 1793, Morris complains "of the plundering of our ships, of which complaints are daily made to me and which the present Government of the country is too feeble to prevent" (*ibid.,* p. 48), and he writes to the French minister "that it will be very difficult, and

perhaps impossible, to prevent your privateers from committing illegal and outrageous acts as long as they are permitted to bring into your ports all the American vessels laden with articles of food for countries at war with France" (*ibid.*, p. 49). Later he informs the Secretary of State that "in the present state of the country the laws are but little respected; and it would seem as if pompous declarations of the rights of man were reiterated only to render the daily violation of them more shocking" (*ibid.*, p. 52). In October he says "the courts chicane very much here," and he speaks of their proceedings as "iniquitous" (*ibid.*, p. 67). In December, 1796 (*ibid.*, p. 151), Major Mountflorence, in his general report as to American commercial interests in France, says that on the 27th of the preceding April power had been given to the tribunals of commerce in every port of France to take cognizance in the first instance of every matter relative to captures at sea, with an appeal to the civil tribunals of the different departments, and with a reference in certain instances to the minister of justice.

He adds:

> The tribunals of commerce are chiefly composed of merchants, and most of them are directly or indirectly more or less interested in the fitting out of privateers, and, therefore, are often parties concerned in the controversies they are to determine upon.

In illustration he cites the condemnation of the *Royal Captain,* saying that most of the "judges were concerned in the capturing privateer."

In January, 1797, Mr. Pickering wrote to Mr. Pinckney as follows:

> The commissioners and special agents of the French Republic in the West Indies are destroying our commerce in the most wanton manner. They have issued orders for taking all American vessels bound to or from English ports—not those only which the English occupy in St. Domingo, but those of their own islands. They condemn without the formality of a trial. These orders appear from the information I have received to have been issued in consequence of letters from Mr. Adet, who, you will see in his note of November 15, said the French armed vessels were not merely to capture American vessels, but to practice vexations towards them; and who, I am further informed, wrote to the commissioners that they could not treat the American vessels too badly. This state of things can not continue long. It makes little difference whether our vessels go voluntarily to French ports or are carried in as prizes. In the latter case they condemn without

> ceremony, and, in the former, they forcibly take the cargoes, heretofore with promises of payment, which they generally broke; and now, I am told, without even deigning to give their faithless promises (*ibid.*, p. 154).

In the following February he writes again to Pinckney, saying (*ibid.*, p. 154):

> The spoliations on our commerce by French privateers are daily increasing in a manner to set every just principle at defiance. If their acts were simply the violation of our treaty with France the injuries would be comparatively trifling, but their outrages extend to the capture of our vessels merely because going to or from a British port. Nay, more, they take them when going from a neutral to a French port. In truth, there is, in a multitude of cases, little difference whether our vessels are carried in as prizes or go voluntarily to the French ports in the islands for the purposes of traffic; the public agents take the cargoes by force and fix their own terms, giving promises of distant payment, which are seldom duly performed. With regard to the vessels carried in as prizes, the agents and tribunals of the French Government act in concert with the privateers. The captured are not admitted to defend their property before the tribunals; the proceedings are wholly *ex parte*. We can account for such conduct only on the principle of plunder, and were not the privateers acting under the protection of commissions from the French Government, they would be pronounced pirates. Britain has furnished no precedents of such abominable rapine.

In April, he writes again (*ibid.*, p. 164) that "the depredations of the French in the West Indies are continued with increased outrage, and we have advices of captures and condemnations in Europe which apply to no principle heretofore known and acknowledged in the civilized world." (See also *ibid.*, pp. 166, 171, 173, 174, 177.)

Citations of this kind might be multiplied, but it seems useless to do so, as the situation is familiar history. Certainly, under these circumstances, some attempt at defense was natural and excusable, if not justifiable.

Judges "are not to shut their eyes to what is generally passing in the world" (Blatchford's Prize Cases, p. 448), nor as to what has already taken place. In danger from native pirates, in danger from French privateers often as irresponsible (*Cushing's Administrator*, 22 C. Cls. 1), the mere possession of some armament by a merchantman is devoid of marked significance. It is improbable that any important

venture was sent to sea without an effort on the part of the shipowner to protect his property and that laden on his vessel; cannon enough or muskets enough he would put on board to give his crew a fair chance of escape from a small force. The statute, however, said that no armed merchantman should receive a clearance or permit, or be suffered to depart unless the owners and the master gave bond conditioned, among other things, that the vessel should not commit any depredation, outrage, unlawful assault, or unprovoked violence upon the high seas against the vessel of any nation in amity with the United States (1 Stat. L., p. 573). Under this act no vessel having any armament could proceed to sea without bond first given, and this bond, being coupled in the acts with the issuance of special orders or license, what more natural than for the innocent merchantman, desiring only safe transit of a commercial venture, to receive in return the commission which the act provided should be given him. The *Act of July 9* (*ibid.*, p. 578) contains a similar provision, and the result of both statutes is that no private vessel carrying armament could proceed to sea without bond filed in return for which a commission might be issued.

In our view of the case it is vital to note the distinction between armament for protection simply and armament for attack upon armed vessels or for attack upon captured American vessels necessarily in charge of prize crews. A privateer is maintained for profit; the venture is most speculative in its nature, bringing large returns for great risk. Given the right to prey upon the mercantile marine, great armament is not necessary, as combat may be avoided by speed and quickness in manœuvre. The privateering authorized by the acts of 1798 was of no such nature; not a prize could be taken without conflict, for only armed vessels, or vessels in charge of prize crews, could be seized; not a merchantman was allowed to be molested. A vessel, then, fitting out under the acts of 1798 for the purpose of waging the limited hostility therein permitted, must have been prepared for battle; must have been ready to wage war. She could not mount a few guns and carry a few dozen muskets, with a small crew, when the success of her voyage depended upon the number of well-defended vessels she should send into port for condemnation. A vessel intended to act aggressively under the laws of 1798 would have to fight for every dollar brought into the pockets of the owners, master, and crew, and, knowing this, would proceed to sea with an equipment sufficient for the very serious work contemplated.

One of the vessels holding a commission under the acts of 1798 was a schooner of about 111 tons, old measurement. She had a crew of seven men, carried what was called a letter of marque, two guns, and a cargo of merchandise; she was duly cleared on a trading voyage, with instructions to the master as to the sale of the cargo and the purchase of a return venture. Such a vessel as this could not have been seriously intended to seize French armed vessels or captured American vessels defended by French prize crews. Seven men, all told, were barely enough to navigate the schooner; aside from the master, there were but three to a watch, and on an emergency it is extremely doubtful whether the total force was sufficient to handle the two guns and the vessel at the same time. Possibly some defense might have been made against a boat-load of pirates putting off from the shore while the schooner lay becalmed near it, but it is not within the bounds of possibility that such a vessel, with so slight a crew and so insignificant an armament, should contemplate attack upon a well-defended vessel.

We are told that 365 vessels, of 66,691 tonnage, carrying 6,847 men and 2,723 guns, received commissions under the acts of 1798, prior to March 2, 1799. The average tonnage per vessel was then 185 tons, the average crew 16, and the average armament 7 guns. On the other hand, one Government armed vessel (taken for illustration) of 190 tons burthen carried 18 guns and 140 men, while another of 200 tons carried the same armament and crew. So far as has yet appeared to us, no private armed merchantman made a single capture from the French, and we are assured that no such capture was made. So far as concerns the cases now before us, it would be practically impossible for such a capture to be made, for most of the vessels were small, and they were manned only for ordinary navigation and not for war, with an armament insufficient to cope with organized military force. Neither seven nor even sixteen men is a crew for a vessel intended to attack French armed ships or to recapture those manned by prize crews, and no merchantman with so small a crew and laden with valuable cargo would undergo such risk.

That Congress did not contemplate the employment in attack of small or undermanned vessels is shown by the proviso in the act of July 9, 1798, that the bond should be doubled in case "the vessel be provided with more than one hundred and fifty men," from which an inference may not unfairly be drawn that not far from one hundred and fifty was considered a fair equipment for a vessel designed to

fight. We have seen that the Government war vessels about equivalent in tonnage to the average licensed merchantman carried about one hundred and forty men, and coupling this fact with the act of Congress we reach the result already indicated by common sense, that Congress had in mind, so far as privateers were concerned, fighting ships—those able to attack a French privateer with reasonable hope of success, and not vessels with insignificant crew and armament, bound on a trading voyage, and provided with those slight means of defense which were at the time ordinarily carried by merchantmen for protection.

That armament, when carried by strictly commercial vessels bound upon trading voyages, was intended for defense is shown by the report of the House Committee, made January 17, 1799 (American State Papers, Naval Affairs, vol. 1, p. 69). They said:

> Your committee begs leave to report further, that about the time of the sailing of our ships of war, and before the merchant ships were permitted to arm for their defense, our trade was in such jeopardy at sea and on the coast from French privateers, that but few vessels escaped them; that ruin stared in the face all concerned in shipping, and that it was difficult to get property insured.

Hamilton, then Secretary of the Treasury, officially expressed the opinion of his Government as to armed merchantmen in his circular of August 4, 1793, as follows:

> The term privateer is understood not to extend to vessels armed for merchandise and war, commonly called with us letters of marque, nor, of course, to vessels of war in the immediate service of the Government of either of the powers at war.

Twelve days later Jefferson, in an instruction to Morris as to the English ship *Jane*, which Genet had requested might be ordered to sail, a request authorized, Genet contended, by the twenty-second article of the treaty of commerce, said (Doc. 102, p. 58):

> The ship *Jane* is an English merchant vessel, employed in the commerce between Jamaica and these States. She brought here a cargo of produce from that island, and was to take away a cargo of flour. Knowing of the war when she left Jamaica, and that our coast was lined with small French privateers, she armed for her defense, and took one of those commissions usually called

letters of marque. She arrived here safely without having had any rencontre of any sort. Can it be necessary to say that a merchant vessel is not a privateer? That though she has arms to defend herself in time of war, in the course of her regular commerce, this no more makes her a privateer than a husbandman following his plow in time of war with a knife or pistol in his pocket is thereby made a soldier. The occupation of a privateer is to attack and plunder; that of a merchant vessel is commerce and self-preservation. The article excludes the former from our ports, and from selling what she has taken; that is, what she has acquired by war, to show it did not mean the merchant vessel and what she had acquired by commerce. Were the merchant vessels coming for our produce forbidden to have any arms for their defense, every adventurer who has a boat, or money enough to buy one, would make her a privateer; our coasts would swarm with them, foreign vessels must cease to come, our commerce must be suppressed, our produce remain on our hands, or at least that great portion of it which we have not vessels to carry away; our plows must be laid aside, and agriculture suspended. This is a sacrifice no treaty could ever contemplate, and which we are not disposed to make out of mere complaisance to a false definition of the term privateers.

This matter has also been specifically passed upon by the French courts. The ship *Fame,* Rust, master, was, in June, 1799, tried by the tribunal of commerce sitting at Bayonne. Several grounds were relied upon by the captors as authorizing condemnation, all of which were overruled by the tribunal. Among them was the following:

> Is the letter of marque, of which the vessel was the bearer, sufficient to cause it to be considered as an enemy?

This question was thus answered:

> Considering the point relative to the letter of marque of which the ship was the bearer. That the French Government without doubt is not ignorant of the delivery of like letters by the Government of the United States to the vessels of the said United States nor of the terms in which these letters are conceived. That now and up to the present time it has not been manifested that it regarded this circumstance and the act of Congress of the United States of the month of July, 1798, either as a declaration of war, or as hostilities against France, since it has not asked of the legislative body a law declaring the French nation to be in a state of war with the United States of North America. That a state of war can not be established or declared without a law of the legis-

> lative body. That it does not belong to the tribunals to take notice of any step that a foreign power may take as constituting a state of war between France and itself.
>
> That the condemnation demanded, of the said ship *Fame* and of her cargo because of the said letter of marque, can not be founded upon any law, and can not and ought not to be pronounced. The said ship besides, not having opposed any resistance, suffered itself to be visited at the summons which was made to it by the said privateer. There is, then, no occasion to accede to the demand of the captors upon this point. (See Record in case *Nathaniel Richardson, executor of Joshua Richardson et al.* v. *The United States,* No. 5343.)

This case was appealed to the civil tribunal of the department, and thence to the council of prizes, which latter tribunal, on the 13th December, 1800, released the vessel and cargo in accordance with the judgment of the two lower tribunals.

The *Pegou* carried ten cannon. She was provided with muskets and munitions of war.

The law officer of the French Government having charge of the case made the following points among others (see Pistoye et Duverdy, *Prises Maritimes,* vol. 2, p. 51):

> It is not enough to have or carry arms to deserve the reproach of being armed for war (p. 52).
>
> War armament is for purely offensive use. This is shown when there is no object in the armament but attack, or at least when everything tends to prove that such is the principal object of the enterprise. . . . But defense is a natural right, and means of defense are legitimate in sea-voyages as in all other occurrences perilous to life. A vessel having but a small crew, whose cargo was considerable, was evidently intended for commerce, not for war. The arms found in this vessel were not intended for violence or hostility, but to prevent them; not to attack, but to defend. The point as to war armament, then, seems to me unfounded.

The *Pegou* was discharged with damages to her captain.

In the case of the *Friend,* of Boston, a letter of marque had been found on board; the vessel was armed for defense; there was no resistance; summons from the privateer was obeyed, and the master's instructions directed him to avoid acts of offense and to be prudent. The commissaire of the Government urged that these were not reasons for capture. The vessel was condemned on other grounds. (Pistoye et Duverdy, vol. 1, p. 501.)

Further, Article IV of the treaty of 1800, which relates to "armed" and "unarmed" merchantmen, shows that France did not stand upon the point urged here by the defense, but admitted the right of armament to the extent at least of the cases now before us, as its courts did in the cases cited above.

It is worthy of remark that two classes of license or commission were allowed by the acts of Congress. The first act authorized instructions from the President as to defense only, except that the recapture of American vessels was permitted. The second act allowed capture of armed Frenchmen. In the absence of proof as to which document a vessel possessed there can be no presumption that it was issued under the latter rather than under the former statute; in fact, the presumption, which always favors what is natural, might lean towards the possession of instructions under the first act when it appears that the crew was small, the armament light, and the object of the voyage commercial in its nature.

The distinction must not be forgotten between a legal and justifiable seizure and an illegal and unjustifiable condemnation. The seizure of a vessel may be successfully defended upon grounds which would not support a subsequent condemnation, and "prize courts deny damages when there was probable cause for the seizure, and are often justified in awarding to the captors their costs and expenses," even when the vessel and cargo are decided not good prize and are returned to their owners. (*The Thompson,* 3 Wall. 155; *Jecker* v. *Montgomery,* 13 How. 498; *Murray* v. *The Charming Betsy,* 2 Cr. 64.)

We conclude that a vessel fitted for the purpose of seizing French armed vessels and of recapturing American vessels was, when taken, legitimate prize as an actor in the limited war defined by Congress; but that the mere arming of a merchantman whose object was trade, subordinate to which was the provision for protection, did not authorize seizure and condemnation even if an instruction or license under either of the acts of 1798 were found on board. In these cases, as in every case arising between nations, technicalities must be thrown aside, and the very essence and spirit of the transaction must be discovered by the light of the facts peculiar to each case.

It is urged by the defendants that the British possessions in the West Indies were in a state of blockade and occupied in such manner as properly to be regarded in a state of siege. That, therefore, the con-

demnations of vessels bound for those ports with cargoes otherwise innocent were legal and justifiable. The argument has turned more particularly upon vessels bound for Martinique, so that for purpose of illustration we will consider the case of that island, formerly a French possession and captured by England during the war.

The defendants' argument assumes that Martinique was blockaded; that it was practically in a state of siege; that its predominant character was that of a port of military naval equipment; and therefore the seizure of neutral vessels bound to that port was justified, although the cargo was otherwise innocent.

The law of blockade is so clear that while a few citations may be given for the sake of illustration, they seem to us hardly necessary.

Kent says:

> The law of blockade is, however, so harsh and severe in its operation, that in order to apply it, the fact of the actual blockade must be established by clear and unequivocal evidence; and the neutral must have had due previous notice of its existence; and the squadron allotted for the purpose of its execution must be competent to cut off all communication with the interdicted place or port; and the neutral must have been guilty of some act of violation, either by going in or attempting to enter, or by coming out with a cargo laden after the commencement of the blockade. The failure of either of the points requisite to establish the existence of a legal blockade amounts to an entire defeasance of the measure, even though the notification of the blockade has issued from the authority of the Government itself. A blockade must be existing in point of fact, and in order to constitute that existence, there must be a power present to enforce it. All decrees and orders declaring extensive coasts and whole countries in a state of blockade, without the presence of an adequate naval force to support it, are manifestly illegal and void, and have no sanction in public law. The ancient authorities all referred to a strict and actual siege and blockade. The language of Grotius is *oppidum obsessum vel portus clausus,* and the investing power must be able to apply its force to every point of the blockaded place, so as to render it dangerous to attempt to enter, and there is no blockade of that part where its power can not be brought to bear. (Vol. 1, pp. 144–5.)

The United States have contended that a blockade must be effective to be valid (note b. to Kent, vol. 1, p. 145), and admitted the principle even as to its own ports during the late war. This question has been very ably discussed in a late note from the Secretary of State, Mr.

Bayard, to the minister representing the United States of Colombia, in which, after citing authorities, the Secretary reaches the following conclusions:

> After careful examination of the authorities and precedents bearing upon this important question, I am bound to conclude as a general principle that a decree by a sovereign power closing to neutral commerce ports held by its enemies, whether foreign or domestic, can have no international validity and no extraterritorial effect in the direction of imposing any obligation upon the Governments of neutral powers to recognize it or to contribute toward its enforcement by any domestic action on their part. Such a decree may indeed be necessary as a municipal enactment of the state which proclaims it, in order to clothe the executive with authority to proceed to the institution of a formal and effective blockade but when that purpose is attained its power is exhausted. If the sovereign decreeing such closure have a naval force sufficient to maintain a blockade, and if he duly proclaims such a blockade, then he may seize, and subject to the adjudication of a prize court, vessels which may attempt to run the blockade. If he lay an embargo, then vessels attempting to evade such embargo may be forcibly repelled by him if he be in possession of the port so closed. But his decree closing ports which are held adversely to him is, by itself, entitled to no international respect. Were it otherwise, the *de facto* and titular sovereigns of any determinate country or region might between them exclude all merchant ships whatever from their ports, and in this way not only ruin those engaged in trade with such states, but cause much discomfort to the nations of the world by the exclusion of necessary products found in no other market. (Note, dated April 24, 1885. See also Hall, *International Law*, §§ 257 and 260; 3 Phillimore, 311 and 516; case of *The Sarah Star*, Blatchford's Prize Cases, 69–87; Lawrence's Wheaton, pp. 575 *et seq.*)

Sir William Scott thus laid down the rule:

> To constitute a violation of blockade three things must be proved: First, the existence of an actual blockade; second, the knowledge of the party supposed to have offended; and, third, some act of violation, either by going in or coming out with a cargo laden after the commencement of blockade. (*The Betsey*, 1 Rob. Adm., p. 92. As to Berlin and Milan decrees see Woolsey, § 206.)

Therefore to justify seizure the blockade must be effective, notice must have been given, and there must be an attempt to violate it.

Was Martinique effectively blockaded?

Defendants have referred us to no authority to show that it was, and we have made such examination as the sources of historical investigation on this subject afforded without finding any statement to that effect. The records of the numerous spoliation cases in this court which have been brought to our attention throw no light on the subject, as they proceed upon the fact that the condemned vessel was bound to an enemy port or laden with enemy produce and the condemnations rest upon French decrees.

An examination of the history of Anglo-French naval operations directly affecting the West Indies discloses the following events:

February 2d, 1794, an English expedition sailed from the Barbadoes to attempt the capture of Martinique, then under the command of General Rochambeau. This expedition consisted of three ships of the line, eight frigates, four sloops, two store-ships, and one bomb, under command of Vice-Admiral Sir John Jervis, carrying something less than 6,100 troops, commanded by Lieutenant-General Sir Charles Grey. The French garrison was insignificant in number, consisting only of some 600 men, including 400 militia, while at Fort Royal was a 28-gun frigate, and at St. Pierre an 18-gun corvette. Possibly a privateer or two was also available. The British arrived off the island the 5th of February, and some idea may be gained of the heroic defense of the French from the fact that with the overwhelming force at their command the British did not obtain a surrender until the 22d of March. The forts were garrisoned, Lieutenant-General Prescott was given command, a small squadron, under Commodore Thompson, was left to cooperate with him in case of attack, and the rest of the expedition embarked the 31st March to attack St. Lucie (James' Naval History, vol. 1, pp. 217 *et seq.*), which surrendered without the loss of a life upon the 4th of April. Then followed the conquest of Grande-Terre, another expedition having taken the three small islands adjacent to Guadeloupe, called the "Saintes," and on the 20th April all Guadeloupe and its dependencies surrendered, comprising the islands of Marie Galante, Désirade, and the Saintes, at an expense of two British rank and file killed, four rank and file wounded, and five missing. A French 16-gun corvette was captured in this expedition, but was not deemed fit for service.

Early in June a French squadron of two frigates, one corvette, two large ships armed *en flûte,* and five transports anchored off the village

of Gosier, Guadeloupe, and began disembarking troops commanded by Victor Hugues, bearing the title of *commissaire civil*. After skirmishes with the British garrison and French royalists, in which Hugues's troops were successful, a considerable force of vessels and men were sent by the British to dislodge them. The result was the withdrawal of the British from Grande-Terre the 3d July, just one month after Hugues's arrival. In October the French received reinforcements, took Basse-Terre, and the 6th October, 1794, were again masters of Guadeloupe, except a small port called Fort Matilda, which, so tenacious was the resistance, they did not capture until December 10. At the close of the preceding year the British had obtained possession of Cape Nicolas Mole, Jérémie, and other French villages in San Domingo, and in February, 1794, other places on the island fell into their hands after trifling resistance. In May a strong force was sent by the British against Port au Prince, which surrendered June 4. In December the British post at Cape Tiburon was attacked and captured by French troops, assisted by three armed vessels (*ibid.*). As soon as news of Hugues's victory reached France there were dispatched to his assistance a 50-gun frigate, a 36-gun frigate, two corvettes, an armed ship or two, and eight or ten transports with 3,000 troops and suitable stores.

> The arrival of this important reinforcement inspired Victor Hugues with designs against the other ceded islands. Having not only troops, but transports to convey and ships of war to protect them, this demon of republicanism, whose barbarity, as fully accredited on several occasions, was of the most revolting description, readily contrived to land soldiers at Sainte Lucie, St. Vincent, Grenada, and Dominique. Artful emissaries accompanied the troops, and soon succeeded in raising a ferment in the islands which they visited. The negroes, Caribs, and many of the old French inhabitants revolted; and dreadful were the atrocities perpetrated upon the well affected. . . . The British troops, thinly distributed from the first and since reduced by fatigue and sickness, could offer in general but a feeble resistance to the numbers of different enemies opposed to them. The garrison at Sainte Lucie, numbering 2,000 men, evacuated the island on the 19th of June (1795). By the 27th of June the "rebellion" in Dominique had been quelled "by the few British troops stationed there, assisted by the bulk of the inhabitants," St. Vincent and a part of Grenada remaining in a revolted state. (*Ibid.* 298 *et seq.*)

In April and May, 1796, the English took, without conflict, the Dutch settlements of Demerara, Essequibo, and Berbice. On the 24th May, after a stubborn combat of over a month, Sainte Lucie was captured by the British troops and vessels. June 11 St. Vincent surrendered, as a few days later did Grenada. So far as appears the French had no armed ships at either of these islands. In the preceding March the British made an unsuccessful attack upon the town and fort of Léogane, San Domingo, and a successful one upon the fort and parish of Bombarde. No French ships appear in these actions, but a squadron arrived at Cape François May 12, but returned immediately to France. (*Ibid.* 367 *et seq.*)

February, 1797, a British squadron left Port Royal, Martinique, for the purpose of attacking the Spanish colonies. Trinidad soon fell into their hands, and, touching at Martinique on the way, the squadron proceeded to Porto Rico, the attack upon which was unsuccessful. In April the French 36-gun frigate *Harmonie* was destroyed by the English near Jean Babel, while sailing under orders to convoy to Cape François, from Port au Prince and Jean Babel, a number of provision-laden American vessels captured by French privateers. An action between three of the British fleet, a French privateer, and a French battery in Carcasse Bay, is the only other engagement noted as having taken place in the West Indies during this year. (*Ibid.*, vol. II, pp. 97 *et seq.*)

The year 1798 opened with the evacuation by the British in April of Port au Prince, St. Marc, and Arcahaye, all in San Domingo, shortly after which three French 36-gun frigates landed supplies at Cape François and returned home. An engagement between the British and Spanish was the only other important naval event of this year in the Gulf. In August, 1799, the British took the Dutch island of Surinam, finding in the river a French corvette, the *Hussar,* which was added to the British navy. (*Ibid.*, p. 373.) September 13, 1800, the island of Curaçao surrendered to the British, and forty-four vessels were found lying in the harbor, but no warships. (*Ibid.*, vol. III, p. 59.)

In May, 1793, the *Hyena,* of 24 guns, and *La Concorde,* of 40 guns (the advance frigate of a French squadron of some six vessels), had an engagement off Cape Tiburon, which resulted in the defeat of the former. In July the English frigate *Boston,* after capturing the first lieutenant of the French frigate *Embuscade,* then lying in the harbor of New York, challenged the Frenchman to battle, a challenge

which was accepted; the battle took place without decided result, and during it what was supposed to be a large French squadron appeared in the offing, while two French frigates were afterwards found by the *Boston* lying in the mouth of the Delaware, where she sought refuge. In November a combat took place between *Penelope* and *Iphigenia* on the one side and the *Insurgente* on the other, in the bight of Léogane, island of San Domingo, resulting in the defeat of the French frigate. (*Ibid.*, vol. I, pp. 88 *et seq.*)

In December, 1794, the British frigate *Blanche,* cruising off the island of Désirade, a dependency of Guadeloupe, then in French possession, cut out a government armed schooner of 8 guns, which, to escape, had anchored in the bottom of the bay of Désirade. Later the *Blanche* had an encounter with the French 36-gun frigate *Pique* off Point-à-Pitre, in which, after a battle most gallant on both sides, the *Pique* was captured. In May there was a battle in Chesapeake Bay between two English frigates and five lightly armed Frenchmen, most of them store-ships. (*Ibid.* 277 *et seq.*)

On the 4th of May, 1796, the *Spencer* engaged and captured the French gun-brig *Vulcan* in latitude 28° north, longitude 69° west.

In July, 1796, a combat without definite result took place between the frigates *Aimable* (English) and *Pensée* (French), beginning off "Englishman's Head," Guadeloupe, while in August the *Mermaid* attacked the *Vengeance* within gun fire from Guadeloupe batteries, and in July the *Quebec* was chased by two French frigates when not far from Port au Prince.

August 25, 1796, the British 20-gun ship *Raison* engaged the *Vengeance,* the *Mermaid's* former opponent, in latitude 41° 39′ north and longitude 66° 24′ west, without definite result. Later in the same month an English squadron captured the French frigate *Elizabeth* off Cape Henry. In September the *Médée* engaged the *Pelican* off Guadeloupe. The action had no definite result, and it appears that at this time the *Thetis* (French) and either the *Pensée* or the *Concorde* were at anchor in Guadeloupe. The *Pelican* was so much inferior to the *Médée* in armament that Hugues sent an aide-de-camp under a flag of truce to the Saintes to inspect her as she lay there at anchor.

On the 10th August, 1797, the 38-gun British frigate *Arethusa,* captured, after stern resistance, the French corvette *Gaieté,* sighting at about the same time the brig-corvette *Espoir,* of 14 guns, and a third vessel supposed to be a small French war vessel. Five days later the

Alexandrian, schooner of 6 guns, acting as tender to the flag-ship at Martinique and engaged in quest of French privateers, captured a privateer schooner and chased another, which escaped. September 17 the *Pelican* destroyed the French privateer *Trompeuse* off Cape St. Nicolas Mole. On the 4th October the *Alexandrian* captured the French privateer *Epicharis.* January 3, 1798, the British armed sloop *George,* of 6 guns, while on a passage from Demerara to Martinique, was captured by two Spanish privateers. Thirteen days later boats from the 20-gun ship *Babet,* then cruising between Martinique and Dominique, captured the French armed schooner *Desirée.* April 17 the British schooner *Recovery,* cruising in the West Indies, fell in with the privateer *Revanche* and compelled her to surrender. May 7 the British brig sloop *Victorieuse,* while passing to leeward of Guadeloupe, was attacked without success by two French privateers. The same vessel during the following December, aided by the 14-gun brig-sloop *Zephyr* and some troops, after an attack upon the Spanish in the island of Margarita, took out the privateer *Couleuvre,* of 6 guns and 80 men, from the port of Gurupano. July 11 boats from the British 44-gun ship *Regulus* cut out three vessels at anchor in Aquada Bay, Porto Rico. December 11 the British 22-gun ship *Perdrix* captured the French privateer *Armée d'Italie* not far from St. Thomas.

March 30, 1799, boats from the British frigate *Trent* and cutter *Sparrow* cut out a Spanish merchant ship and schooner which they found in a bay of Porto Rico, at the same time storming and carrying a small Spanish battery. April 13, the *Amaranthe,* a British 14-gun brig-sloop, captured the French letter-of-marque schooner *Vengeur* after the latter had made a noble resistance.

The officers and crew of the *Abergavenny,* stationary flag-ship at Port Royal, tired of inaction during the whole of 1797 and part of 1798, fitted out on their own account a frigate launch which was so successful in prize-taking that its proprietors were enabled to purchase with their prize money a small schooner named the *Ferret,* which became the tender of the *Abergavenny.* The *Ferret* early in October, 1799, had a very sharp encounter with a Spanish privateer without decisive result. Later in the same month the British brig-sloop *Echo* cruising off Porto Rico, chased a French letter-of-marque into Laguadille bay and cut her out, and not long after occurred the daring capture of the *Hermione* in the harbor of Puerto Cabello. In November the *Crescent* and *Calypso* adroitly saved their convoy from

a Spanish squadron. Still later in that month the *Solebay,* cruising off San Domingo, encountered a French squadron recently arrived at Cape François from France and bound to Jacmel. Strange to say, this 32-gun frigate captured all the French vessels without casualty on either side. The squadron consisted of four vessels mounting 58 guns, manned with 431 men, while the frigate carried 38 guns and about 212 men. In December an indecisive conflict took place off the island of Porto Santo between the *Glenmore* and *Amiable* in charge of an outward bound British West India convoy, and the *Sirene* and *Bergère* bound from Rochelle to Cayenne with 450 troops and Victor Hugues on board. (James, Vol. II, pp. 79 *et seq.;* 198 *et seq.;* 313 *et seq.*) Early in April, 1800, boats from the sloop *Calypso* off Cape Tiburon, carried the French privateer *Diligente.* In August the British 38-gun frigate *Seine,* cruising in the Mona passage, sighted the *Vengeance,* bound from Curaçao to France, which, after a sharp combat, surrendered. In October the schooner *Gypsie* (British) cruising off Guadeloupe, captured the *Quidproquo* of 8 guns. (James, Vol. III, pp. 27 *et seq.*)[1]

We have now set forth in this catalogue at somewhat tedious but necessary length every naval action (except some few unimportant combats with privateers) of which we can find record, which took place from 1793 to 1800, both years inclusive, between British and French or Spanish naval forces, on or near the eastern coast of America, between the latitude of Boston and the northern coast of South America. The reason for so voluminous a list, which, while probably not without omissions, we believe to be sufficiently correct, is that from it alone can any conclusion be drawn as to the amount of the French naval force and its uses during the period in dispute. For convenience to those whose interest or duty it may be to investigate this question we have cited but from one authority, and one which, while not without fault of national prejudice, is carefully and conveniently compiled. Other authorities examined by the court reinforce the conclusions we draw from the citations already made.

Martinique it is alleged was effectively blockaded. This is not affirmatively shown, and perhaps we might rest here, but in this class of cases we have thought it right to go further and to endeavor to throw all the light in our power upon the exact situation.

[1] Consult also Life of Decatur, Sparks' series of Biography, 31; Copper's Naval History United States, Vol. I.

From the citations made and also from the history of the American Navy certain facts clearly appear as worthy of notice.

First, the very small number of encounters between vessels of the English navy and French vessels of war.

Second, that no such encounter took place near Martinique, the two captures of privateers by the *Alexandrian* being the only combats mentioned as occurring in the vicinity of that port after its occupation by the English.

Third, that not a word is said, or an allusion made, in any attainable authority as to a blockade or an attempted blockade (in fact) of any West Indian English port. It does not appear that any armed vessel, English or American, was ordered to, or attempted to, break any such blockade, although the English force was at times very large in the West Indies and was actively engaged. Neither in Cooper's Naval History nor in the Life of Decatur, nor in any other work relating either to the English or American Navy which we have been able to consult, nor in the diplomatic correspondence of the period, do we find any statement tending to show that there existed anything other than a paper blockade, a blockade useless and void in so far as neutral rights were affected.

Further proof of this absence of effective blockade is found in the large number of merchant vessels which safely traded with these ports during the period in question, and in the lack of contention on the part of France, notwithstanding Mr. Pickering's vigorous language (Doc. 102, pp. 408, 410), that they were maintaining or endeavoring to maintain an effective blockade.

We have already seen that the French Government did not desire the fulfillment of the treaty's guaranty clause, deeming it wiser on their own account that we should not embark in the war. Genet and the colonists complained of our course on this subject, but the home government did not agree with them. As late as March, 1798, Talleyrand wrote to Pinckney and his colleagues that "the Republic was hardly constituted when a minister was sent to Philadelphia, whose first act was to declare to the United States that they would not be pressed to execute the defensive clauses of the treaty of alliance, although the circumstance, in the least equivocal manner, exhibited the *casus fœderis*" (4 Wait's Am. State Papers, p. 97). We find no claim by France that the treaty was abrogated by a failure by the United States to fulfill the guaranty clause. During and soon after

1794 the West India Islands fell into the hands of Great Britain, yet in 1795 (January 3) a French decree reciting the law of December, 1794, ordering the treaties of 1778 to be respected as in force, declared, in favor of the United States, the principle of free ships, free goods, except as to ports actually blockaded. As against this position of his superiors, Hugues, in February, 1797, issued his order subjecting to capture and confiscation vessels and cargoes destined to the captured islands, giving as a reason the failure of the guaranty.

The fact, then, that some of the West India Islands had been taken from France does not seem to complicate the legal question.

It is urged that provisions bound for Martinique were properly condemned, on the ground, substantially, that as the port was in possession of an enemy force, it must be assumed they were intended to feed that force, and therefore were contraband by destination. (Citing *The Peterhof,* 5 Wall. 58; 2 Black, 671 and 672, "The Prize Cases"; Desty on Shipping, § 423; Tetens, *Droits Recip.,* p. 114; Blatchford's Prize Cases, p. 464.)

As far back as Grotius the distinction was made between things useful only for war, the carriage of which by neutrals is prohibited, things which serve merely for pleasure, the carriage of which is permitted, and things useful both in peace and war, as money or provisions, which are sometimes lawful articles of neutral commerce, and sometimes not, according to the circumstances existing at the time. Thus provisions would be contraband if bound to a besieged camp or port. Kent, who seems to be the most liberal of the writers towards defendants' position, thus lays down the rule:

> The modern established rule is, that provisions are not generally contraband, but may become so under circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it. Among the circumstances which tend to preserve provisions from being liable to be treated as contraband, one is that they are the growth of the country which produces them. Another circumstance to which some indulgence is shown by the practice of nations is when the articles are in their native and manufactured state. Thus iron is treated with indulgence, though anchors and other instruments fabricated out of it are directly contraband. Hemp is more favorably considered than cordage; and wheat is not considered as so objectionable a commodity, when going to an enemy's country, as any of the final preparations of it for human use. The most important distinction is, whether the articles were intended for the ordinary use

> of life or even for mercantile ships' use, or whether they were going with a highly probable destination to military use. The nature and quality of the port to which the articles are going is not an irrational test. If the port be a general commercial one, it is presumed the articles are going for civil use, though occasionally a ship of war may be constructed in that port. But if the great predominant character of that port, like Brest in France, or Portsmouth in England, be that of a port of military naval equipment it will be presumed that the articles were going for military use, although it is possible that the articles might have been applied to civil consumption. As it is impossible to ascertain positively the final use of an article *ancipitis usus,* it is not an injurious rule which deduces the final use from the immediate destination, and the presumption of a hostile use, founded on its destination to a military port, is very much inflamed, if, at the time when the articles were going, a considerable armament was notoriously preparing, to which a supply of those articles would be eminently useful. (Vol. I. p. 139.)

The Supreme Court has decided that provisions the growth of the enemy's country, but the property of a neutral, and carried in a neutral vessel, are good prize because destined to supply the enemy's forces; and the court added that provisions are not generally contraband, but may become so because of their destination or the particular situation of the war. If intended for the ordinary use of life, they are innocent; if intended for the enemy's forces or his ports of warlike equipment, then their seizure is justifiable. (*The Commercen,* 1 Wheaton, 382.)

Bluntschli thinks it against *"gute sitte"* to treat trade in provisions as contraband even if it serves the hostile army's use (*Mod. Völkerrecht,* § 807). Heffter (*Europäisches Völkerrecht,* § 160) holds that belligerents may take measures against the export by neutrals of doubtful articles, articles occasionally contraband, only when a destination for the enemy's Government and military forces can be shown on adequate grounds. Ortolan denies that provisions and objects of prime necessity may be considered contraband, except in cases not pertinent to this discussion (Vol. II, 179). Hautefeuille goes much further and admits as contraband only arms and munitions of war ready for immediate use, fit to be used as such and for no other purpose. (*Droits des Nations Neutres,* II, 419.)

Klüber leans the same way and holds that presumptions are in favor of freedom of trade (§ 288), and Martens states that the law in Eu-

rope prior to the first armed neutrality, 1780, considered as contraband only articles of direct use in war. Vattel sanctions the seizure of provisions "in certain junctures when we have hopes of reducing the enemy by famine" (Liv. III, ch. 7, sec. 112), but Wheaton believes he intended to carry the principle no further than to the case of a besieged city; and, commenting on Grotius, Wheaton reaches the conclusion that the latter sanctions the seizure of provisions, not bound to a port besieged or blockaded, only when made for preservation or defense "under the pressure of that imperious and unequivocal necessity which breaks down the distinctions of property," and this power should not be exercised until all other possible means have been used, then not if the right owner is under a like necessity, and even then restitution shall be made as soon as possible. Bynkershoek and Rutherforth concur in this view. (Wheaton, pp. 556 to 558.)

Wheaton expresses no definite opinion for himself, but clearly leans to the side of freedom towards the neutral.

In 1793 (May 7), Mr. Jefferson instructed Mr. Pinckney in relation to a fear expressed by the latter that the belligerent powers might stop our vessels going with grain to enemy ports, that "such a stoppage to an unblockaded port would be so unequivocal an infringement of the neutral rights that we can not conceive it will be attempted." This instruction was followed by another dated September 7, 1793, in which Mr. Jefferson, after stating that in time of war neutrals are free to pursue their ordinary avocations of agriculture, manufacture, and commerce, with the exception of not furnishing to either belligerent "implements merely of war for the annoyance of the other, nor anything whatever to a place blockaded by its enemy," proceeds to define these "implements" as follows:

> There does not exist perhaps a nation, in our common hemisphere, which has not made a particular enumeration of them in some or all of their treaties under the name of contraband. It suffices for the present occasion to say that corn, flour, and meal are not of the class of contraband, and consequently remain articles of free commerce. A culture which, like that of the soil, gives employment to such a proportion of mankind, could never be suspended by the whole earth, or interrupted for them, whenever any two nations should think it proper to go to war. . . . If any nation whatever has a right to shut up to our produce all the ports of the earth except her own and those of her friends, she may shut up these also, and so confine us within our own limits. No nation can subscribe to such pretensions; no nation can agree,

> at the mere will or interest of another, to have its peaceable industry suspended and its citizens reduced to idleness and want. . . . It is not enough for a nation to say we and our friends will buy your produce. We have a right to answer that it suits us better to sell to their enemies as well as their friends. Our ships do not go to France to return empty. They go to exchange the surplus of one product which we can spare for surpluses of other kinds which they can spare and we want; which they can furnish on better terms and more to our mind than Great Britain or her friends. We have a right to judge for ourselves what market best suits us, and they have none to forbid us the enjoyment of the necessaries and comforts which we may obtain from any other independent country.

Mr. Randolph, denying that food can be universally ranked "among military engines," admitted that corn, meal, and flour are so in case of "blockade, siege, or investment." In the late Franco-Chinese war France endeavored to make "rice" contraband, and, referring to this contention, Mr. Kasson, our minister in Berlin, wrote as follows to the Secretary of State:

> . . . But more especially I beg your attention to the importance of the principle involved in this declaration, as it concerns our American interests. We are neutrals in European wars. Food constitutes an immense portion of our exports. Every European war produces an increased demand for these supplies from neutral countries. The French doctrine declares them contraband, not only when destined directly for military consumption, but when going in the ordinary course of trade as food for the civil population of the belligerent government. If food can be thus excluded and captured, still more can clothing, the instruments of industry, and all less vital supplies be cut off on the ground that they tend to support the efforts of the belligerent nation. Indeed, the real principle involved goes to this extent, that everything the want of which will increase the distress of the civil population of the belligerent country may be declared contraband of war. The entire trade of neutrals with belligerents may thus be destroyed, irrespective of an effective blockade of ports. War itself would become more fatal to neutral States than to belligerent interests.
>
> The rule of feudal times, the starvation of beleaguered and fortified towns, might be extended to an entire population of an open country. It is a return to barbaric habits of war. It might equally be claimed that all peaceful men of arms-bearing age could be deported, because otherwise they might be added to the military forces of the country.

Martinique was neither blockaded nor besieged. It undoubtedly had a British garrison and was a refuge and sometimes a rendezvous for British armed vessels; at the same time it had a large civil population to be fed then, as it is now, largely by the products of the temperate zone. Its predominant character was not that of a port of naval or military equipment.

We do not consider that a provision-laden ship bound for Martinique was properly condemned on the ground alone that she was bound to a British port, nor do we consider the fact that the port had once been French complicates the situation. There is nothing in the law of nations which justifies or makes valid as against neutrals such decrees as those issued during this war by the French and English. Russia admitted these decrees were contrary to the law of nations. France promised to pay for captures made under them. England and Spain did pay the United States. (See authorities cited in *Gray, Adm'r,* v. *U. S.,* 21 C. Cls. 340.) If either party desired to reduce the other by starvation there was a plain and acknowledged legal method to obtain that end; that is, by the establishment of an effective blockade. That neither was able to take this course, is not a reason that the commerce of neutrals should be suspended on the penalty of having their merchant vessels and cargoes confiscated. To admit such a doctrine would be to impose in time of war a worse burden upon the neutral than that borne by either belligerent, and would shut it up in its own ports, or oblige it to furnish, in protection of its commerce, a naval force competent to compete with the belligerent, which by paper decrees unsupported by effective acts, by its municipal law attempts to interfere with the recognized and natural rights of neutral trade.

We do not understand that in the negotiations of 1800 the French denied the justice of claims similar in principle to the one now suggested, and the treaty of 1778 in terms conceded the right to trade with the enemy. The commerce of the United States was principally in agricultural products, certainly not in munitions of war. A most important complaint was as to that part of the belligerent decrees which directed seizure of neutral property on the sole ground of destination to an enemy port without regard to the character of the cargo. (See Treaty Commerce 1778, Articles XII, XIII, XXIII, XXIV.)

It seems to us clear that this class of claims was contemplated by the treaty of 1800 and the act of 1885.

The burden of proof in prize proceedings is on the seized vessel. The authorities concur in this general statement, but the principle is not technical and is not to be pushed beyond its proper natural intent. Seized vessels always appear before the court under the taint of suspicion; that taint it is incumbent upon them to remove, as it is in their power alone to do so. What the court looks for is the fact. If it appear that the vessel was innocently pursuing an honest and legal voyage, whether that appear by papers or otherwise, then the vessel should be released. No particular papers, no specified character of evidence is marked out and defined as indispensable to attain this end. A case is easily supposable in which a merchant vessel has lost its papers by an accident, or by theft, or by robbery committed by a pirate or privateer, or through suppression by the captor, and it would not be admitted—the fact of their non-production being explained, and the vessel's honest character being shown—that because some particular document was not on board she therefore should be condemned and confiscated. The *onus probandi* is on the captured vessel; which means no more than that she must explain away suspicious circumstances.

The learned counsel for the defense contend that the United States first violated the treaties of 1778 by the proclamation of neutrality of 1793, by refusing to guarantee the French possessions, by refusing to grant the promised harbor privileges, and by concluding the Jay treaty. Therefore "it was the right of France to retaliate upon the United States for these violations; and whatever she did, or whatever was done by her authority in such retaliation prior to and during the limited war existing between the two countries, whether by captures, seizures, condemnations, or confiscations of American property, vessels or cargoes, was justifiably done."

In another form substantially the same contention is made, defendants claiming that the acts of France complained of by the United States were authorized by the law of nations; that whether reparation was to be made by France depended upon compliance with her demands; that as the United States did not acquiesce in those demands, but by the annulling act of July, 1798, practically notified France that they would not do so, "from that moment France owed no compensation for those confiscations and the matter was *res judicata.*"

In considering these propositions it will strike any one who has studied the correspondence or will refer to the extracts made from

it by us in this and our previous opinions on the spoliations question, that France never took this point. It will be remembered that the decrees at the outset were admitted by all parties to be illegal, and excusable only on the ground of necessity; that while this admission was not by any means consistently adhered to, still England and Spain came back to it in effect when they compensated the United States for losses—England through a commission organized under the provision of the Jay treaty, Spain in the treaties relative to the Florida purchase.

France did not seriously ask us to enforce the guaranty and apparently did not wish us to do so, however much we may have feared such a demand on her part, and however much some of her agents and her colonists may have desired it. The vital point of difference was the Jay treaty. We have already discussed that instrument and stated that it was in conflict with the provisions in the Franco-American treaties of 1778. France did not contend that the Jay treaty abrogated the treaties of 1778; on the contrary, her whole argument, down to the ratification of the treaty of 1800, was based upon the premise that these treaties were of enduring force. The decree itself which ordered seizure of neutral property bound in United States vessels to enemy ports, set forth as a reason for its enactment that the Jay treaty modified, not annulled, the treaties with France, and that France was entitled under the treaties to any benefit this modification might give her.

France did not deny at any point of the negotiations which led to the treaty of 1800 her liability for claims known by the generic name of "spoliations," but claimed in return for payment recognition of treaties, a demand which was not granted, and the contention remained embodied in the second article, which was stricken out. Thus was completed what Madison called the "bargain" by which we released "spoliations" in consideration of release from all obligations founded upon the treaties of 1778. A striking illustration of the French position, if any is needed after the detailed statement of the negotiations which has heretofore been made, is found in Article IV of the treaty of 1800, which agrees to return prizes captured under the decrees, now termed by the defense decrees of retaliation, when those prizes had not been already definitively condemned.

Acts of retaliation are admitted to be justifiable under certain circumstances. They may exist when the two nations are otherwise at

peace, but they are in their nature acts of warfare. They depart from the field of negotiation into that of force, and, as is war, are justified by a successful result. To term the decrees of France and the acts of their privateers under them "acts of reprisal" does not alter the facts or the legal position. That position has been defined by the Supreme Court of the United States as limited partial war. We, following the path indicated by that tribunal, have defined it as "limited war in its nature similar to a prolonged series of reprisals." The result of that partial limited war, the result of the negotiations for settlement, the agreement reached by the two parties which made the Government of the United States liable over to its citizens, we have heretofore considered so much in detail that we shall not now repeat it, and we need only state briefly the result heretofore reached by us, and in which we, after reexamination, are confirmed, that the acts of France, now in question, whether called "reprisals" or acts of limited warfare, were contended by the United States to be illegal, were admitted so to be by France; that France stood ready to make the compensation made by England and Spain for similar acts on their part, provided we would admit certain claims of her own, which we declined to do; and finally, by the substitution of the existing second article of the treaty for that agreed upon by the negotiators, these claims were surrendered in consideration of a release from the French demand.

The case of the *Two Brothers* presents a claim for salvage paid an American man-of-war for rescue from a French privateer.

The broad principle of prize law forbids an allowance by way of salvage to the captor of a neutral in possession of a belligerent. The reason of the rule is plain: salvage is remuneration for aid in case of danger, and a neutral vessel in the hands of a civilized belligerent is not in danger, for it is to be presumed that, if innocent, she will be discharged by the prize-court with damages for detention. Some of the prize-courts in France were at certain times during the disturbed period between 1792 and 1801 very fair and just in their treatment of neutral property. We have in our opinions on the spoliations cited instances of a reasonable judicial application of the law. Unfortunately, however, the fair administration of justice, which before the Revolution and since has characterized the learned and able officials who have there filled the offices of the magistrature, was interrupted during the period now under consideration. Setting aside the charges made of ulterior and improper motives on the part of individual magis-

trates of which illustrations are found in the letters of Monroe, Mountflorence, and Pickering (*supra*), we need only to recall that the decrees of the French or colonial governments were binding upon the prize tribunals, and those tribunals were obliged to enforce them. Many of the decrees were in conflict with the law of nations and were an invasion of the rights of neutrals. The position assumed by the French authorities placed neutrals prosecuting innocent voyages in a most dangerous position. If taken by a French privateer they were not to expect a trial under the recognized law of nations, but a trial under arbitrary and illegal municipal enactments; a trial which would necessarily result in condemnation, even if the local tribunal were above suspicion of improper prejudice.

Under these circumstances the reason fails for the rule as to salvage in case of recapture of a neutral from a belligerent. As the neutral was in danger of condemnation, so the recapturing vessel was entitled to salvage. We have already cited the opinion of Lord Stowell, who, at the time of the occurrences from which these claims arose, found it just and necessary to adopt this rule.

The Supreme Court of the United States have declared that to support a demand for salvage two circumstances must concur—the taking must be lawful, and there must be a meritorious service rendered to the recaptured. Commenting on Lord Stowell's opinion as to the necessity for meritorious service, the court say:

> The principle is that without benefit salvage is not payable; and it is merely a consequence from this principle which exempts recaptured neutrals from its payment. But let a nation change its laws and its practice on this subject; let its legislation be such as to subject to condemnation all neutrals captured by its cruisers, and who will say that no benefit is conferred by a recapture. In such a course of things the state of the neutral is completely changed. So far from being safe, he is in as much danger of condemnation as if captured by his own declared enemy. A series of decisions, then, and of rules founded on his supposed safety, no longer apply. Only those rules are applicable which regulate a situation of actual danger. This is not as it has been termed, a change of principle, but a preservation of principle by a practical application of it according to the original substantial good sense of the rule.

The court then inquire whether the laws of France were such as to have rendered the condemnation of a neutral in possession of a French

prize crew so probable as to create a case of such real danger that her recapture must be considered as a meritorious service authorizing allowance as salvage. On this point the conclusion is reached that the danger of loss was real and imminent.

> The captured vessel was of such description that the law by which she was to be tried condemned her as good prize to the captor. Her danger then was real and imminent. The service rendered her was an essential service, and the court is therefore of opinion that the recaptor is entitled to salvage. (*Talbot* v. *Seeman,* case of the *Amelia,* 1 Cr. 1.)

We see no reason why a rule laid down by such eminent authority, so just in principle, and the result of such sound judicial reasoning, should not be applied to the cases now before us.

The *Nancy* was under charter to sail from Baltimore to Jamaica, there to discharge cargo, reload, and return to Baltimore. While on her way to Jamaica under this charter-party she was seized on the high seas by a French privateer and lost to her owners. The question is now presented as to the basis upon which an allowance for freight should be computed.

It is evident that freight earned is an element of value in the property lost. The ship-owner has a right to expect a reasonable return upon his venture, and this return he finds only in the freight money. As between the vessel and the cargo-owner the freight is regarded as an entirety due in no part until the arrival of the vessel at the port of destination. Between these two alone does this rule prevail—as to them the law has placed a certain construction upon the contract of affreightment to which they are parties—a construction well understood, admitted, and certain. As to third parties no such rule prevails, and as against them freight is often recoverable, even when the vessel does not reach her destination. In cases of tort, such as collision, Dr. Lushington says: "The party who had suffered the injury is clearly entitled to an adequate compensation for any loss he may sustain for the detention of the vessel during the period which is necessary for the completion of the repairs, and furnishing the new articles (2 W. Robinson, 279), and he allowed gross freight, less the ordinary ship's expenses necessary to earn it. As a broad rule this is well enough, but it is not without possible exception, for we may imagine an injury at a time when the vessel is not engaged in freight

earning, although even then we probably look to the market for a proper measure of damages.

The case of *The Amiable Nancy* (3 Wheaton, 560), and *Smith* v. *Condry* (1 How. 35), allowed only the "actual damage sustained by the party at the time and place of injury" without allowance for detention. In *Williamson* v. *Barrett* (13 Howard, 101), a collision case, the court allowed damages for demurrage, adopting the rate of freight, less expenses, as a proper measure, three justices dissenting on the ground that the majority rule introduced too much uncertainty into the case and tended to increase the "stringency, tediousness, and charges of litigation in collision cases." They therefore preferred a rule granting full damages at the time and place of collision, with legal interest on the amount thus ascertained.

The case of the *Baltimore,* arising from collision, was decided in 1869 (8 Wall. 377), the court holding that the suffering party is not limited to compensation for the immediate effects of the injury inflicted, but the claim for compensation may extend to loss of freight, necessary expense incurred in making repairs, and unavoidable detention. *Restitutio in integrum* is the leading maxim in such cases, say the court, and in respect to materials for repairs where repairs are practicable there shall not, as in insurance cases, be any deduction for new materials in place of old, for this reason that "the claim of the injured party arises by reason of the wrongful act of the party by whom the damage was occasioned, and the measure of the indemnity is not limited by any contract, but is coextensive with the amount of damage. . . . Allowance for freight is made in such a case reckoning the gross freight less the charges which would necessarily have been incurred in earning the same, and which were saved to the owner by the accident, together with interest on the same from the date of the probable termination of the voyage."

In case of capture the general rule is that the neutral carrier of enemy's property is entitled to his freight (Story, J., in *The Commercen,* 1 Gallison, 264). Sir William Scott held very firmly by this rule in the case of *Der Mohr* (3 C. Rob. 129, and 4 C. Rob. 315), a case of great hardship, appealing strongly to the sympathy of the court. In that case, he said:

> In an unfortunate case like the present, the court would certainly be disposed to give the captor all possible relief. I need not add that no relief is possible which can not be given consist-

> ently with the justice due to the claimant. The demand of freight is, I apprehend, an absolute demand, in cases where the ship is pronounced to be innocently employed. . . . The freight is as much a part of the loss as the ship, for he (the captor) was bound to answer equally for both. The captor has, by taking possession of the whole cargo, deprived the claimant of the fund to which his security was fixed. He was bound to bring in that cargo subject to the demand for freight. He was just as answerable for the freight of the voyage as for the ship which was to earn it, or which was rather to be considered as having already earned it. In the room of this fund the captor has substituted his own personal responsibility, for loss accrues by the fault of his agent. I see no distinction under which I can pronounce that the claimant is not as much entitled to the freight as to the vessel. (See also 1 Gallison, 274, the *Anna Green.*)

Upon an open insurance policy gross freight is recoverable (2 Phillips, Ins., § 1238). As to insurance, the inchoate right to freight vests directly "the ship has broken ground on the voyage described in the charter-party," and there is an insurable interest "where there is an expectancy coupled with a present existing title" (*Lucena* v. *Crawford,* 2 Bos. and Pull. N. R. 269; 1 Phillips, Ins., § 334, p. 192.)

Freight, then, is property insurable and collectible. It has value although the right as against the freighter may be inchoate until delivery. As to the freighter the ship-owner is without redress, unless there be delivery in accordance with the contract, but as to an insurer or a tort-feasor, there is a right to redress upon the happening of an interruption of the voyage. The amount of that redress and the method of computing it in the cases now submitted to us of illegal capture are now to be decided. The ship-owner has a right to a reasonable return upon his investment, for the risk to which his property is subjected, for its depreciation while engaged in the undertaking, and for the expenses to which he is subjected in carrying it out. The measure of that return, based upon the theory of a completed voyage, he has himself fixed in his contract of affreightment. If his voyage be not completed, but be interrupted and his property lost by the act of a wrong-doer, then, as against that wrong-doer, the maxim *restitutio in integrum* applies. If the voyage were completed the difficulty would not be serious, for as a guide we should have a contract made by parties opposed in interest and familiar with the business. As the voyage has not been completed, an allowance of gross freight would be more than a *restitutio in integrum,* and would neglect a deduction

for expenses necessarily to be incurred in completing the contract and in conveying the cargo to the point of delivery. To allow gross freight under these circumstances would in effect not merely reimburse the owner, but render the seizure a matter of profit to him, and we do not understand that punitive damages should be recovered in the cases now before us. The vessel having been destroyed before the completion of the voyage, has not been so long employed as the contract contemplated, her crew have received less wages, and her hull and outfit have received less deterioration. She has only earned freight *pro tanto*. On the other hand, the expenses of freight earning are much greater at the beginning of the voyage than at any other period, for then advances are made seamen, stores are shipped, port charges and the cost of loading have to be met. Therefore, to divide the total freight by the number of days out of port would not be fair to the ship-owner; to deduct from the total freight the cost of the voyage from the place of destruction to port of destination would be a fairer rule, could those expenses be ascertained.

To compute the amount of this freight in each instance is practically impossible, so that the court is forced to the adoption of some general rule which in our opinion is fair in result. The difficulty is not a novel one, and the method of solution not without precedent. Those familiar with the proceedings of prize courts know that a substantially arbitrary rule is there often adopted in practice to enforce justice, and now, nearly a hundred years after the events from which these claims arise, when all witnesses are dead and many records destroyed, we are forced to this course, as it is evidently impossible to estimate in every instance precisely the proportion of freight earned. Where such an estimate can be made we shall make it, in other cases we shall adopt a general rule.

In seeking for such a rule, we learn that in commercial cities, in the adjustment of average losses, there is a practice to award arbitrarily two-thirds of the full freight on the immediate voyage. This course was in effect followed by the commissioners under the treaty of 1831 with France, who made a similar allowance as a fair measure of the increase in value of the cargo by reason of the distance to which it had been transported at the time of capture; and the award was made to the shipper if he had paid freight; to the ship-owner if the freight had not been paid.

After carefully examining the cases before us we conclude that this rule is substantially just, and we adopt it.

This brings us to another point. The *Nancy* was under charter for a round voyage—Baltimore to Jamaica and return. She was destroyed on the outward voyage. Is she entitled to an allowance for freight based upon the entire contract contained in the charter-party?

As against an insurer or tort-feasor the inchoate right to freight vests when the vessel breaks ground "on the voyage described in the charter-party" (*supra*). An insurable interest in freight can not spring from a mere "expectancy," but may spring from an "expectancy" when this is coupled with "a present existing title." (*Lucena* v. *Crawford, supra.*)

In cases of general average for jettison, Lowndes states the rule to be that "when a ship is chartered to fetch or carry a cargo belonging to the charterer, the freight under the charter must contribute to the general average, whether or not the cargo is on board the ship at the time of the general average act, since the loss of the chartered ship, whether laden or not, would deprive the ship-owner of his expected freight." (Lowndes on General Average, 236.)

It has been held in this country that where a gross sum was to be paid as freight for a voyage out and return, the principal object of the voyage being to obtain a return cargo, the freight for the whole trip must contribute to general average on the outward voyage. (*The Mary,* 1 Sprague's Decisions, 17.) The same rule has been adopted in cases of salvage. (*The Nathanial Hooper,* 3 Sumner, 542; *The Progress,* Edwards, 210; *The Dorothy Foster,* 6 C. Rob. 88; see also *Livingston* v. *Columbia Insurance Company,* 3 Johns, N. Y. 49; *Hart* v. *Delaware Insurance Company,* 2 Wash. C. C. 346.)

The decisions on this question in the United States do not go so far as those in England, but we lean to the doctrine of Sir William Scott and Dr. Lushington, as better applicable to the cases now before us, that when a vessel is actually under contract for a voyage from one port to another, thence to proceed to a third, she has such "a present existing title" in the freight money of the entire voyage as to authorize a recovery based upon the total freight money for the round trip.

Of course she is not entitled to gross freight, and we must not be understood as intending any application of this principle to a vessel proceeding under a mere "expectancy" of finding cargo at her first port of call. The principle only covers those cases where there is an assurance of freight from her first port of call to her second, and a price stipulated to be paid therefor.

We have discussed and ruled upon as many of the general questions submitted in the argument as it seems to us wise now to decide, either for counsel's convenience or in justice to the Government or the claimants. Other points which have arisen in the long argument we shall consider as they are brought before us in specific cases. The object of obtaining from the court a ruling upon general principles is in our opinion now sufficiently attained.

We file herewith, that they may be reported to Congress, our conclusions of fact and law in many cases. This opinion, with those already delivered, contain the conclusions which in our judgment affect the liability of the United States therefor.

THE SHIP *CONCORD*[1] [AND OTHER CASES]

[French Spoliations 1589, 490, 507, 1587, 2556, 5361, 4037, 600. Decided April 30, 1900]

On the Proofs

The ship *Concord*, on a voyage from Canton to Philadelphia, is seized February 6, 1799, by a French privateer and carried into the Isle of France, where the vessel and cargo are *"confiscated"* on the ground that the Governor-General of the Isle of France has proclaimed that *"France and the United States are in a state of hostilities from the month of July, 1798, and that tribunals are required to decree the confiscation of all American vessels brought into this port with the cargoes on board."*

I. At various times between 1793 and 1800 there was much that looked like war between France and the United States, but the United States never ceased to hold France pecuniarily responsible for the acts of her cruisers and privateers, and France never denied her responsibility for unjustifiable seizures and condemnations. A defense which France could not now set up the United States can not. Where France claimed no exemption the United States can claim none for her, and where they can claim none for her they can set up none for themselves. Liability is determined by the liability of France.

II. Between 1793 and 1800 the assertion in French courts of belligerent rights was in remote places. The tribunals in the immediate presence of the French Government held of the *Act of July 9, 1798*[2] (Stat. L. 578), that *"it does not belong to the tribunals to take notice of any step that a foreign power may take as constituting a state of war between France and itself."*

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[1] Court of Claims Reports, vol. 35, page 432.

[2] *Supra*, p. 65.

III. Under the French spoliation act an indebtedness on the part of original claimants to the United States is not strictly a set-off, as no judgment can be rendered in these cases; but it is an equity which Congress may well consider, inasmuch as the relief to be afforded is a matter of conscience and equity.[1]

. . . . . .

NOTT, Ch. J., delivered the opinion of the court:

On the 28th of November, 1798, the American ship *Concord* sailed from Canton bound for Philadelphia.

On the 6th of February, 1799, she was stopped on the high seas by the French frigate *La Prudente*. The captain of the frigate found nothing in the ship's papers to justify detention, and accordingly allowed her to proceed. But upon further reflection, after an interval of several hours, he reconsidered his determination and resolved to take the responsibility of seizing the *Concord* and of sending her in to the Isle of France for a further examination by the authorities.

The story of her seizure is best told by her captain in his protest:

> She proved to be the French frigate or corsair *La Prudente*, Cap. Joliff, from the Isle of France, on a cruise, who, after strictly examining my ship's papers, bills of lading, etc., ordered his interpreter to inform me it was not in his power to detain me, as my papers showed the ship and cargo to be neutral property; at same time returned me my papers with orders to proceed on my voyage. Accordingly I returned on board the *Concord;* at 2 p.m. made sail on our course, the frigate doing the same, but standing about two points more north; at half past 3 p.m. hoisted colors on board the frigate; we hoisted ours also; the frigate came up; the captain ordered us to heave to until he sent his boat on board, which came with three officers, and orders for me or the supercargo to repair on board the *Prudente,* with all letters, papers, invoices, etc., relating to ship or cargo. Accordingly Mr. Dobell, supercargo of the *Concord,* took the papers and went on board the frigate. Soon after the boat returned for Mr. Dobell's desk and small box, containing sundry orders, invoices, etc., respecting the outward cargo. The 2d officer and 2d boy were also taken on board with Mr. Dobell, and all detained during the night. At 8 p.m. the frigate hailed and ordered the

[1] Pages 433 to 441 of this case are omitted, as being merely lists of claimants and amounts claimed. They contain nothing of importance for the purposes of this volume.

> officers to make sail after her, and steer W. b. N. during the night. At 6 a.m. the frigate's boat came for me. I went on board. The captain demanded my former bills of lading for outward cargo, for which I went on board the *Concord* and returned again on board the frigate. After a long and tedious examination of all trivial papers the captain determined to send us to the Isle of France. At 4 p.m. on the eighth began to shift crews. Cap. Joliff took my chief mate, seventeen of the *Concord's* crew on board the frigate, sent some Frenchmen on board, sealed up all the *Concord's* papers, and dispatched us with prize master for the Isle of France, where we arrived on the 10th day of March, as aforesaid.

On a subsequent day the prize court in the Isle of France rendered a decree "confiscating" the ship and cargo. The decree recites that the ship *Concord* sailed under the American flag and an American passport; that the captain, officers, and crew were all subjects of that nation, and that her cargo belonged to American subjects residing in Philadelphia. In other words, the *Concord* was one of the very few of the American vessels whose conduct, ownership, and the character of whose cargo were, in the opinion of French tribunals, each and all absolutely unexceptionable.

Nevertheless, the tribunal pronounced a decree of confiscation (not condemnation) upon the sole ground that the Governor-General of the Isle of France had on the 23d day of June, 1799, published a proclamation declaring that France and the United States were and had been in a state of hostility from the 9th day of July, 1798, and requiring all tribunals to confiscate all American vessels which had been or should be brought into French ports, with the cargoes on board.

The distinction between "confiscated" and "condemned" rested on certain French decrees. If a vessel was sailing under a neutral flag, she or her cargo might be condemned for cause; if she were an enemy, she and her cargo would thereby be liable to confiscation.

It is apparent that some unfortunate American vessel whose master carried a commission under the *Act of July 9, 1798* (1 Stat. L. 578), had fallen into the hands of the French governor, and that he had thereupon, without instructions from his own Government, proclaimed war as existing between the two countries. It is a general principle that while a nation is enjoying the advantages of peace she must be held to the obligations of peace and be responsible, among other things, for the acts of her officers and agents, but that when

war comes and those responsibilities cease, she, while encountering the pains and penalties of war, may exercise the belligerent right of capture. At various times between 1793 and 1800 there was much which looked like war between the two countries. But notwithstanding the act of the 9th of July, 1798, and the decision of the Supreme Court in *Bas* v. *Tingy* (4 Dall. 37), and the historic battle of the *Constellation* with *La Vengeance,* wherein each ship nearly destroyed the other and the French frigate came into Curaçao dismasted and sinking, with 50 killed and 110 wounded, it has been held, and it must be held again, that no war existed which released France from her international responsibilities, or which authorized her to destroy American commerce. The question has been exhaustively argued and exhaustively examined, and all the information and learning which it is susceptible of receiving will be found embodied in the opinions in the cases of *Gray* (21 C. Cls. 340), *Cushing* (22 *id.* 1), and the *John* (22 *id.* 408). In a few words it may be said that the United States never ceased to hold France pecuniarily responsible for the acts of her cruisers and privateers, and that France never denied her liability for unjustifiable seizures and condemnations. Moreover, France never interposed the defense of belligerent rights, but, on the contrary, again and again reiterated her willingness to discharge her treaty and international obligations whenever the United States would discharge theirs. A defense which France could not now and did not then set up, the United States can not set up. Where France claimed no exemption the United States can claim none for her; where they can claim no exemption for France, they can set up none for themselves. The question of liability to be determined is the liability of France.

Another fact to be considered is that this warfare, such as it was, existed only in what were then remote parts of the earth, the West India Islands, the Straits of Sunda, the Chinese Seas, etc. At the time when the governor of the Isle of France was proclaiming war and confiscating American vessels for no fault of their own, the Tribunal of Commerce in Bayonne, in the immediate presence of the French Government, was proceeding upon the basis of peace, and administering justice according to the accepted principles of international law, except, of course, where those principles were varied by French decrees. Thus in the case of the ship *Victory,* Hatton, master (not reported), captured October 6, 1799, while on her voyage from

Norfolk to London, the tribunal held that some of the property on board, being English, was subject to capture; that, inasmuch as the captors "could not, while at sea, take out the goods which were enemy's property found on the ship, they were authorized to bring the ship into a port for its discharge"; that hence there was no reason for decreeing damages to the American ship. But the court then decrees "the surrender of Captain Hatton of the said ship *Victory* with her rigging, apparel, appurtenances, and dependencies, to be restored to him in the condition she was at the time of the seizure; also that like surrender shall be made to him of the papers and documents relative to said ship, and, finally, the surrender of the portions of the goods which were not British property." And the court then proceeds to decree the condemnation of the English property found on the ship, with the proviso "that they, the captors, pay the freight thereon to the said Captain Hatton, stipulated and borne in the bills of lading, which will be reduced to French money according to French exchange on Hamburg and that of Hamburg on London by persons skilled and upon whom the parties shall agree or, in default of agreeing, by persons named by the court."

This certainly was all that any neutral could ask.

Again, and at about the same time, in the case of the ship *Fame*, Rust, master, the same tribunal considered the very point now under consideration, and its decision was all that this Government could demand:

> Considering the point relative to the letter of marque of which the ship was the bearer. That the French Government without doubt is not ignorant of the delivery of like letters by the Government of the United States to the vessels of the said United States nor of the terms in which these letters are conceived. That now and up to the present time it has not been manifested that it regarded this circumstance and the act of Congress of the United States of the month of July, 1798, either as a declaration of war or as hostilities against France, since it has not asked of the legislative body a law declaring the French nation to be in a state of war with the United States of North America. That a state of war can not be established or declared without a law of the legislative body. That it does not belong to the tribunals to take notice of any step that a foreign power may take as constituting a state of war between France and itself.
>
> That the condemnation demanded of the said ship *Fame* and of her cargo, because of the said letter of marque, can not be

> founded upon any law, and can not and ought not to be pronounced. The said ship besides, not having opposed any resistance, suffered itself to be visited at the summons which was made to it by the said privateer. There is, then, no occasion to accede to the demand of the captors upon this point.

This case was appealed to the civil tribunal of the department, and thence to the Council of Prizes, which latter tribunal, on the 13th December, 1800, released the vessel and cargo, in accordance with the judgment of the two lower tribunals. (Schooner *John,* Blackler, master, 22 C. Cls. 408.)

The counsel for the United States has argued with great ingenuity and learning that these decrees were rendered at the time when the treaty of September 30, 1800, was a matter of negotiation; that the French Government then desired to retain America as a friend and not to drive her over to the enemies of France, who then numbered nearly all of the sovereignties of Europe; and that France in effect waived her legal and maritime rights so that she might smooth the way to an adjustment of all differences with the American Government. This might be so held if it were a defense which the United States could properly set up—if the question of liability were not always the question, "What was the liability of France before the claims were relinquished to her?" It seems undeniable that if this court were an international tribunal and France were an actual defendant in court, no one would think it possible for her to say today what she did not say through her own tribunals just one hundred years ago, when the matter was in litigation and the rights of the American owners a matter of contemporaneous adjudication. Accordingly it must be held now, as it has been held before, that there was no war which accorded to France general belligerent rights or which subjected an American vessel to capture and condemnation if she were at the time without fault.

It is to be noted in this case that the *Concord* was not subject to condemnation or confiscation because of any act or paper of her own. She did not resist search; she did not attempt flight; no objection was raised by the French tribunal to any want of papers or to the character of any paper which she carried. The decree narrates that she had an American passport; but commissions under the act of July 9, 1798, were generally styled by the French tribunals letters of marque. She does not appear to have had any armament whatever,

and her crew, as far as appears, consisted of only 18 men. The question, therefore, whether the carrying of a commission under the act of July 9, 1798, was evidence of aggressive intent which would render her liable to capture and condemnation is not presented by the evidence in this case.

The counsel for the Government has filed a motion to reopen some of the cases against this vessel so as to enable the defendants to plead an indebtedness on the part of the original claimants to the United States. Such a cross demand is not strictly a set-off, inasmuch as the court does not render judgments in these cases, but nevertheless it is an equity which Congress may properly consider in cases where the relief to be afforded by Congress is a matter of conscience and equity. (Ship *Parkman,* present term.)

All of these motions, with one exception, have been withdrawn or abandoned.

In the case of Peter Blight, No. 1589, it is found that $1,752.32 became due to the United States on a custom-house bond, and there is no evidence to establish payment. Whether this apparent indebtedness of Peter Blight, the original claimant, should be deducted from the award in favor of his administrator is a question resting exclusively in the discretion of Congress, and in regard to it the court reports no conclusion and expresses no opinion.

The order of the court is that the findings and conclusions now filed be reported to Congress, together with a copy of this opinion.

THE SHIP *ROSE*[1] [AND OTHER CASES]

[French Spoliations, 120, 422, 1056, 2720, 2842, 4318, 3875, 4484, 4320, 4351. Decided April 22, 1901]

On the Proofs

The American ship *Rose* resists search, in an action lasting 2½ hours, in which she loses 3 killed and 14 wounded, and the French privateer 25 killed and 21 wounded.

I. Grave apprehension of illegal condemnation will not justify a neutral vessel in resisting the right of search by a belligerent.

II. Forcible resistance is good ground for condemnation, except in cases where a neutral is justified in defending against extreme violence threatened by a cruiser grossly abusing his commission.

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[1] Court of Claims Reports, vol. 36, page 290.

III. The *Act of June 25, 1798*[1] (1 Stat. L. 522), authorizing American merchant vessels to defend against French depredations, could not change the law of nations or impose a new international obligation upon France.

IV. The French spoliation act refers to municipal and international law and to treaties. The court must apply each only where it is properly applicable.

V. Where no wrong was done according to international law or treaty stipulations, a case did not come within the terms of the treaty of 1800[2] (Art. II), and no liability was assumed by the United States.

VI. The jurisdictional act contemplates this court as sitting in the character of an international tribunal to determine the diplomatic rights of the United States against France.

The Reporters' statement of the case:

The following are the facts of this case as found by the court:

I. The ship *Rose,* William Chase, master, sailed on a commercial voyage from Newburyport, Mass., on the 20th of March, 1799, bound for Surinam, and from thence sailed on the 23d day of July, 1799, bound home for Newburyport.

While pursuing said voyage she was captured on the high seas, on the 31st day of July, 1799, by the French cruiser *Conquest of Egypt,* mounting 14 guns and 120 men, after an action of two hours and a half, in which the master of the *Rose* lost his mate and 2 men killed and 14 wounded, and the Frenchman had 25 killed and 21 wounded, after which the *Rose* was carried into Guadeloupe, where, on the 18th Thermidor, year 7 (August 6, 1799), said vessel and her cargo were condemned by the tribunal of commerce sitting at Basse-Terre, Guadeloupe, under the following decree:

> Judgment and condemnation of the American ship *Rose,* Capt. W. Chase, captured by the privateer *Egypt Conquered.*
>
> 18 Thermidor, 7th year. Extract from the rolls of the royal court of Guadeloupe and its dependencies.
>
> In the name of the French people.
>
> The court of commerce and prizes, established on the isle of Guadeloupe, sitting at the Basse-Terre of the said isle, at its usual session, on the 18th of the month Thermidor and the 7th year of the French Republic, which is one and indivisible.
>
> Preamble. In view of information communicated the 14th and 15th of the present month, Thermidor, by the justice of peace stationed at Liberty Port, which information relates to the cap-

[1] *Supra,* p. 59. [2] *Infra,* p. 487.

ture of the American ship *Rose,* of Newburyport, Capt. William Chase, by the privateer called *Egypt Conquered,* Capt. Lyklama. The examination of the papers of the said ship by citizen Magne, sworn interpreter of the English language, at Liberty Port, which papers, as well as the translation of them, have been lodged in the office. The associate sworn interpreter of the English language in this city and citizen Minard being present at the reading of them. In view of these documents, the president in his report and the overseer of the directory in his suit present the following as the result of their deliberations:

Considering (according to the above-mentioned documents and information) that it is evident that the captain of the said ship has neither knowledge nor invoice of his cargo taken at Surinam, which circumstance makes it impossible to know the real owner of the said cargo.

Considering that his shipping paper (*rôle d'équipage*) is not such as is prescribed by the model annexed to the treaty of the 6th February, 1778.

Considering, finally, that the said captain was bearer of a commission from the President of the United States, which authorized him to capture French armed vessels and to carry them into any port of the United States; a commission in virtue of which the captain of the said vessel not only did not obey the summons of the French privateer, but attacked it and defended himself till he was subdued by force of arms. In view of these facts we shall refer to the following articles in justification of our proceedings:

In the first place the 3d article of the judgment of the Executive Directory reminds all French citizens that the treaty, passed the 6th February, '78, has been, according to the terms of its 12th article, legally modified by that passed at London the 19th November, 1794, between the United States of America and England. Consequently, there is substituted for it the 17th article of the treaty of London, dated 19th November, 1794, which reads as follows: All enemies' merchandise, or that which is not satisfactorily proved neutral, and which is shipped under American colors, shall be confiscated, but the vessel on board of which it shall have been found shall be set at liberty and returned to the owner. In the second place, the 4th article of the same judgment is expressed in these terms: "In conformity with the law of the 14th February, 1793, the rules and regulations adopted the 21st October, 1744, and the 26th July, 1778, respecting the mode of proving the ownership of vessels and neutral merchandise, shall be executed according to their form and tenor. Consequently every American ship shall be declared a prize which shall not have on board a shipping paper in good form, such as is

prescribed by the model annexed to the treaty of the 6th February, 1778, and the execution of which is ordered by the 25th and 27th articles of the same treaty. In the third place, the 12th article of the ninth record of prizes, contained in the statutes of the month of August, 1681, runs thus: Every vessel which shall refuse to strike its colours after the summons made by our vessels to those of our subjects armed for war shall be obliged to do it by means of artillery or otherwise, and in case of resistance and contest shall be declared a prize. The court authorizing the suit of the Executive Directory declares a prize the said American ship *Rose,* her apparel and cargo, and orders the sale of them, in the customary forms, for the benefit of the captors, and those who armed and were interested in the privateer *Egypt Conquered,* an inventory being previously made of the whole, in presence of the constituted authorities. Made and executed at the court in its said sitting, at which were present citizens Anthony John Bonnet, president; Anthony Cloder and Gabriel Capoul, judges, and Lewis Christopher Blin Herminier, registers, the said day, month, and year.

Signed at the registry.

BONNET, *President,* and
BLIN HERMINIER, *Register.*

II. The ship *Rose* was a duly registered vessel of the United States, of 250 36/95 tons burthen, was built at Amesbury, Mass., in the year 1797, and was owned by William Bartlett, a citizen of the United States.

III. The cargo of the *Rose* consisted of coffee, cotton, cocoa, and sugar, and was principally owned by William Bartlett, the owner of the vessel. William Chase and Edmund Bartlett, citizens of the United States, owned small portions of the cargo, and Samuel Hopkinson, Enoch Hale, Jr., Smith Adams, and Abel Hale had adventures on board said vessel.

IV. The losses by reason of the capture and condemnation of the *Rose,* so far as claims have been filed in this court, were as follows:

The value of the vessel	$10,640.00
The freight earnings for the voyage	4,173.00
The value of the cargo owned by William Bartlett	66,336.98
The value of the cargo owned by William Chase	4,959.54
The value of the cargo owned by Edmund Bartlett	3,820.00
The premium of insurance paid by Edmund Bartlett	200.00
Amounting in all to	$90,129.52

SPECIAL FINDINGS RELATING TO THE SEVERAL CASES

V. Case No. 120. William Bartlett was the sole owner of the vessel and a part of the cargo, upon which it does not appear that there was any insurance.

His losses were as follows:

The value of the vessel	$10,640.00
The freight earnings for the voyage	4,173.00
The value of the cargo owned by him	66,336.98
Amounting in all to	$81,149.98

VI. Case No. 1056. William Chase was the owner of a portion of the cargo, upon which there does not appear to have been any insurance.

His loss was as follows:

The value of his portion of the cargo	$4,959.54

VII. Case No. 2720. Edmund Bartlett was the owner of a part of the cargo. He insured his portion of the cargo on the 6th day of June, 1799, in the office of John Pearson, in the sum of $2,500, paying therefor a premium amounting to $200.

Thereafter the said John Pearson, as agent for the underwriters, paid to the said Edmund Bartlett the sum of $2,500 as and for a total loss.

His losses were as follows:

The value of his portion of the cargo		$3,820.00
The premium of insurance paid		200.00
Total		$4,020.00
Less insurance received	$2,500.00	
Less two boxes hats sold	120.00	
		$2,620.00
Leaving a net loss to Edmund Bartlett of		$1,400.00

VIII. Case No. 4318. John Wells, James Prince, and Zebedee Cook, all of whom were citizens of the United States, and others who have not appeared in this court, as underwriters in the office of John

Pearson, insured Edmund Bartlett on the 6th of June, 1799, on his portion of the cargo in the sum of $2,500.

Thereafter the said John Pearson paid for said underwriters to said Edmund Bartlett the sum of $2,500, as and for a total loss.

The underwriters on said policy who have appeared in this court by legal representatives and the loss sustained by each are as follows:

John Wells	$300.00
James Prince	500.00
Zebedee Cook	200.00

IX. Case No. 4320. Edmund Kimball and Zebedee Cook, citizens of the United States, as underwriters in the office of John Pearson, on the 18th day March, 1799, insured Smith Adams and Abel Hale on their adventure in the sum of $350.

Thereafter the said John Pearson, as agent for the said underwriters, paid, on the 18th of January, 1800, to the said Smith Adams and Abel Hale the sum of $350 as and for a total loss. It does not appear that the said Adams and Hale were citizens of the United States. The underwriters upon said policy have appeared in this case by their legal representatives and the loss sustained by each is as follows:

Edmund Kimball	$175.00
Zebedee Cook	175.00

X. Case No. 4351. John Pearson, a citizen of the United States, as an underwriter in his own office, on the 20th of January, 1799, insured Samuel Hopkinson and Enoch Hale, Jr., on their adventure in the sum of $100.

Thereafter the said John Pearson, on the 28th of January, 1800, paid to the said Samuel Hopkinson and Enoch Hale, Jr., the sum of $100 as and for a total loss. It does not appear that said Hopkinson and Hale were citizens of the United States.

The underwriter upon said policy has appeared in this case by his legal representative and the loss sustained by him is as follows

John Pearson	$100.00

XI. The claimants have produced letters of administration upon the estate represented by them and have proved to the satisfaction of the

court that the persons whose estates they represent are the same persons who suffered loss through the capture and condemnation of the *Rose*.

Said claims were not embraced in the convention between the United States and the Republic of France concluded on the 30th of April, 1803. They were not claims growing out of the acts of France allowed and paid in whole or in part under the provisions of the treaty between the United States and Spain concluded on the 22d day of February, 1819, and were not allowed in whole or in part under the provisions of the treaty between the United States and France of the 4th of July, 1831.

The claimants in their representative capacity are the owners of said claims, which have never been assigned; nor does it appear that any of said claims are owned by an insurance company.

Argument for the Claimants

Mr. C. W. Clagett for the claimants:

(*Mr. John Paul Jones, Mr. R. H. Voorhees, Mr. Edward Lander, Curtis & Pickett,* and *Mr. John W. Butterfield* represented different claimants.)

If a vessel and cargo prove to be neutral and in no way transgress the rights of belligerents, the right of search is exhausted and the vessel must be permitted to proceed. (Lawrence's Wheaton, 846; Woolsey's International Law, sec. 10; Hall's International Law, sec. 275.)

It was well known at the time of the French spoliations that the French tribunals condemned nearly all American vessels, irrespective of the fact that they had complied with all the requirements of international law. (*Hooper* v. *U. S.*, 22 C. Cls. 416; *Cushing* v. *U. S.*, 22 C. Cls. 1.)

If search is made, not to protect belligerent rights, but to harass a neutral which has complied with all the requirements of international law for non-compliance with the regulations of the country to which the searching vessel belongs, the attempt to search is a wrong which may be resisted without subjecting the vessel to condemnation. (1 Kent. 154; Lawrence's Wheaton, 866.)

The principle applied to neutral vessels captured by the French at this time, and recaptured, should be applied to cases in which search was resisted.

It is a settled rule that neutral vessels recaptured from a belligerent are to be restored without payment of salvage, on the ground that the vessel would have been restored by the court of the belligerent country; but when France condemned neutral vessels on grounds not justified by international law the rule ceased, and salvage was allowed in cases of recapture. (*The Onskan,* 2 Rob. 300; *Talbot* v. *Seeman,* 1 Cranch, 1; *Hooper* v. *U. S., 22* C. Cls. 416.)

By the act of June 25, 1798, Congress authorized American vessels to resist visitation and search by the French.

A court of the United States has no authority to declare tortious acts which Congress has declared lawful. (*The Chinese Exclusion Act,* 130 U. S. 581–601.)

Mr. Charles W. Russell (with whom was *Mr. Assistant Attorney-General Pradt*) for the defendants.

Opinion of the Court

Weldon, J., delivered the opinion of the court:

The facts show that the ship *Rose,* William Chase, master, sailed on a commercial voyage from Newburyport, Mass., on the 20th of March, 1799, bound for Surinam, and thence sailed on the 23d of July, 1799, bound home to Newburyport.

While pursuing the last voyage she was captured on the high seas on the 21st of July, 1799, by the French cruiser *L'Egypt Conquise,* mounting 14 guns and 120 men; after an action of two and one-half hours, in which the master of the *Rose* lost three men killed and 14 wounded, and the French lost 25 killed and 21 wounded, the *Rose* was captured and taken into Guadeloupe, where, on the 6th day of August, 1799, the vessel and cargo were condemned by the tribunal of commerce, sitting at Basse-Terre, Guadeloupe, under a decree in which it is alleged that "the captain of said ship was the bearer of a commission from the President of the United States which authorized him to capture French armed vessels and carry them into any port of the United States, and that the captain of the vessel resisted until he was subdued by force of arms. In view of these facts, the court makes reference to articles in justification of said proceedings." The findings establish the fact that the American ship resisted most vigorously the attempted right of search upon the part of the French ship, and we are to determine from that condition as an incident of the seizure whether such seizure and condemnation were illegal.

The legal effect of resisting search on the part of the American ship, when it was sought to be exercised on the part of the French ship, has not been determined by any adjudication of this court in the various cases tried under the Act of Congress, giving this court jurisdiction to determine the claims of American citizens for alleged spoliations committed by the French prior to the 1st day of July, 1801.

The nearest approach that the court has made to the subject of the right of search is in the case of the *Nancy* (27 C. Cls. 99). In that case the ship sailed from Baltimore in 1797; was captured by an English ship and sent to St. Nicolas Mole, and there the master was ordered not to depart without a convoy. She sailed under the escort of a privateer for Jerome and returned to the Mole under escort. On the return voyage the *Nancy* was captured by a French privateer. It is said in that case that "the question whether a neutral vessel laden with neutral cargo is liable to condemnation if captured under enemy convoy has never been directly determined; but on a review of the cases and elementary writers it is now held that if captured when actually and voluntarily under the protection of an enemy, she is liable." Sailing under the convoy of an enemy is the exercise of the same power which is brought into requisition on the part of a neutral vessel when it resists the right of search by actual force.

If sailing under a convoy of an enemy of the belligerent is a just ground for seizure and condemnation, it must follow that resisting the exercise of search, as it was in this case, involves as serious consequences to the neutral vessel as where the right was denied by the presence and use of a convoy.

It is not necessary to multiply authorities to establish the right of search. It is said by Chancellor Kent (1 Kent's Commentaries, p. 155) that "in order to enforce the rights of belligerent nations against the delinquencies of neutrals, and to ascertain the real as well as the assumed character of all vessels on the high seas, the law of nations arms them with the practical power of visitation and search. The duty of self-preservation gives to belligerent nations this right. It is founded upon necessity, and is strictly and exclusively a war right, and does not rightfully exist in time of peace, unless conceded by treaty. All writers upon the law of nations, and the highest authorities, acknowledge the right in time of war as resting on sound principles of public jurisprudence and upon the institutes and practice of all great maritime powers." It is said by the same authority, page

154: "The whole doctrine was ably discussed in the English high court of admiralty in the case of the *Maria,* and it was adjudged that the right was incontestable, and that a neutral sovereign could not, by the interposition of force, vary that right."

In that case it is said by Sir William Scott, in stating the principles of international law upon the subject of search and of the right of a belligerent to search neutral vessels engaged in commerce on the high seas, "that the right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargo, whatever be the destination, is an incontestable right of lawfully commissioned cruisers of a belligerent nation. I say, be the ships, the cargoes, and destinations what they may, because till they are visited and searched it does not appear what the ships, the cargo, or the destinations are, and it is for the purpose of ascertaining these points that the necessity of this right of search exists."

Chancellor Kent, page 155, in further elaboration of the doctrine of the right of search, states the circumstances which might constitute an exception to that general rule, which makes it the duty of the neutral to subject himself to the jurisdiction of the belligerent in the exercise of the right of search. He says:

> There may be cases in which the master of a neutral ship may be authorized by the natural right of self-preservation to defend himself against extreme violence threatened by a cruiser grossly abusing his commission; but except in extreme cases a merchant vessel has no right to say for itself, and an armed vessel has no right to say for it, that it will not submit to visitation and search or be carried into a proximate port for judicial inquiry.

The circumstances of this capture do not indicate that the condition cited by Chancellor Kent (which may be regarded as an exception to the general rule) existed in this case. While there might have been in the minds of the crew of the neutral vessel grave apprehensions of ultimate condemnation, even with reference to the legitimate defenses, that condition of apprehension upon the part of the resisting neutral did not justify him in denying the right of search to the belligerent. The circumstances of this case disclose a most vigorous assault and defense, there being twenty-four men killed and thirty-six wounded during the encounter between the respective vessels. This was actual resistance, and was only overcome by the most determined effort upon the part of the capturing vessel.

The right of search is so sacred in the view of international law that it is protected by enforcing the consequences of resistance where no actual resistance is made. As in the case of a convoy, it has been held by this court in the case of the *Nancy* (27 C. Cls. 99) that the presence of a convoy is constructive resistance and a denial of the right of search, which authorizes seizure and consequent condemnation.

It is most strenuously and ably argued by counsel that at the date of capture there was in existence the statute of June 25, 1798, entitled "An Act to authorize the defense of merchant vessels of the United States against French depredations" (1 Stat. L. 572), and that by virtue of the provisions of that act the commander and crew of a vessel had a right to resist by all means in their power an attempt upon the part of a French commander and crew to search the American vessel. It is provided in that statute—

> That the commander and crew of any merchant vessel of the United States, owned wholly by a citizen or citizens thereof, may oppose and defend against any search, restraint, or seizure which shall be attempted upon such vessel or upon any other vessel owned, as aforesaid, by the commander or crew of any armed vessel sailing under French colors, or acting or pretending to act by or under the authority of the French Republic; and may repel by force any assault or hostility which shall be made or committed on the part of such French or pretended French vessel pursuing such attempt, and may subdue and capture the same, and may also retake any vessel owned as aforesaid which may have been captured by any vessel sailing under French colors, or acting or pretending to act by or under authority from the French Republic.

Whatever may be said as to the condition or status of the legal rights and obligations of the French and American Governments before the act of July 9, 1798 (1 Stat. L. 578), it must be assumed that after that period the principles and rules of international law determined and controlled the parties with reference to their rights on the high seas.

It is said, in the case of the *Nancy* (*supra*), "it has been urged that the statute of the United States authorizes resistance by our merchantmen to French visitation and search, to which there is the simple answer that no single State can change the law of nations by its municipal regulations."

The contention of claimants' counsel with reference to the rights guaranteed to American merchantmen under and by virtue of the pro-

visions of the act of 1798 is fully answered by the decision of this court in the above case. If, therefore, at the time of this seizure there was any conflict between the municipal law of the United States, as exemplified in the statute, and the well-recognized principles of international law, the latter must prevail in the determination of the rights of the parties.

By the provisions of the act giving this court jurisdiction to ascertain the claims of American citizens for spoliations committed by the French prior to the 31st of July, 1801, it is, in substance, provided that the validity of said claims shall be determined according to the rules of law, municipal and international, and the treaties of the United States applicable to the same. In order to perform the duties consistent with the requirements of the statute, the court must give each department of the law full recognition and force when properly applicable to the facts and circumstances of the controversy involved in the litigation.

The rights of the claimant are to be measured by the unlawful acts of France, and unless a wrong exists under the rules of international law, no liability can attach to the United States; because, by the treaty of 1800, it was only the claims growing out of the wrongful act of France for which the United States had a diplomatic claim and which were assumed to be paid to the citizen whose individual right was violated in that wrong.

This court in making the investigation contemplated by the act of our jurisdiction is sitting in the character of an international tribunal, to determine the diplomatic rights of the United States as they existed against France prior to the ratification of the treaty of September 30, 1800.

The municipal law in the absence of a treaty must be subordinated to international law when they come in antagonism, as that is the law common to both parties.

Where the question is not exclusively within the domain of international law then the municipal law may be invoked to determine the proper solution of the question. The rules of property by which the citizen owned the subject-matter of the seizure and condemnation may be properly applied in ascertainment of his rights, and so may many questions of the law of evidence be decided in accordance with the municipal law of the party whose rights have been violated. Congress, in the enactment of the law of our jurisdiction, must be presumed as

having recognized many of the principles of municipal law incident to our forms of judicial procedure and determination.

It has been argued that the belligerent, in making the attack on the vessel of the claimant, was not in the exercise of the legal right of search as incident to him as a belligerent, but that it was an assault, the object and purpose of which was the seizure and condemnation without reference to the fact or condition of being a neutral vessel of the United States engaged in the peaceful and lawful commerce of the sea; that the condition existing between the two governments and peoples was such that all respect of neutral rights had ceased, and that force, fraud, and violence prevailed, and in that connection much is said as to the right of self-defense.

The claimants are treading on very dangerous ground when they urge the higher law of self-preservation. Self-defense is founded on the theory that it is the only remedy, and that, being the only remedy, it presupposes the absence of all law protecting the rights of him who asserts the prerogative of self-defense. If the right of self-defense prevailed to the extent of repelling force by force, and was incident to the crew of the ship captured, then all other law was silent and war prevailed, which condition would be most disastrous to the case of the claimants.

As we have quoted in another case, decided at the present term of court, from the opinion delivered by Sir William Scott in the case of the *Maria,* in 1 C. Rob. 340, so we quote upon the subject of the right of self-defense in this case:

> How stands it by the general law? I do not say that cases may not occur in which a ship may be authorized by the natural rights of self-preservation to defend itself against extreme violence threatened by a cruiser grossly abusing his commission; but where the utmost injury threatened is the being carried in for inquiry into the nearest port, subject to a full responsibility in costs and damages, if this is done vexatiously and without just cause, a merchant vessel has not a right to say for itself (and an armed vessel has not a right to say for it), "I will submit to no such inquiry, but I will take the law into my own hands by force." What is to be the issue, if each neutral vessel has a right to judge for itself in the first instance whether it is rightly detained, and to act upon that judgment to the extent of using force? Surely nothing but battle and bloodshed, as often as there is anything like an equality of force or an equality of spirit.

For the reasons above stated the court decides, as a conclusion of law, that the seizure and condemnation were lawful, and that the owners and insurers had no valid claim of indemnity therefor upon the French Government prior to the ratification of the convention between the United States and the French Republic, concluded on the 30th day of September, 1800, and that the claims were not relinquished to France by the Government of the United States by said treaty in part consideration of the relinquishment of certain national claims of France against the United States, and that the claimants are not entitled to recover from the United States.

The facts in detail, with a copy of this opinion, will be certified to Congress in accordance with the statute.

The Schooner *JANE*[1] [and Other Cases]

[French Spoliations, 848, 5446, 5455. Decided December 2, 1901]

On the Proofs

The *Jane,* being on the high seas, descries a sail, which immediately gives chase. The *Jane* makes all sail to get away, but the other vessel comes up and fires a gun at her, when it is discovered that she is a cruiser. The *Jane* immediately heaves to; the cruiser fires another gun with ball, and also musketry. The *Jane* returns the fire with one gun. The cruiser continues to fire and the *Jane* hauls down her colors. The French prize court condemns the vessel on other grounds than that of resistance to search.

I. The visitation and search of neutral vessels at sea is a belligerent right.

II. It was in 1799 an undisputed rule of international law that deliberate and continued resistance to search on the part of a neutral to a lawful cruiser should be followed by the legal consequence of confiscation.

III. The object of search is to get evidence of the fact of neutrality of vessel and cargo.

IV. The *Act of July 9, 1798*[2] (1 Stat. L. 578), which authorized merchant vessels to carry arms for protection, could not change the rule of international law which gave a belligerent a right of search.

V. A court can not differentiate degrees of resistence which will render a vessel liable or not liable to condemnation for resisting search.

VI. Where an American vessel attempted flight from an unknown vessel, but on discovering that she was a French cruiser, hove to, and after being then fired into with ball and musketry returned the fire, it was resistance to search.

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[1] Court of Claims Reports, vol. 37, page 24.

[2] *Supra,* p. 65.

The Reporter's statement of the case:

The following are the facts of the case as found by the court:

I. The schooner *Jane,* Peter Sorensen, master, sailed from Baltimore, Md., on the 15th day of July, 1799, bound for Curaçao.

While peacefully pursuing her said voyage, on the 27th day of July, 1799, she was captured on the high seas by the French privateer *Alliance,* Captain Dupuy, armed with twelve guns, and taken to Porto Rico, where both vessel and cargo were condemned by the decree of the French prize tribunal sitting at Basse-Terre, Guadeloupe, on the 13th day of September, 1799, whereby both vessel and cargo became a total loss to the owners.

The grounds of condemnation, as set forth in the decree of condemnation, are (1) that said schooner had a letter of marque; (2) that said vessel had no *rôle d'équipage*; (3) that one of the invoices, shipped on board, proved to be two trunks of English ginghams.

The facts as to the capture of the *Jane* are set forth in the protest of the master, which is as follows:

> In the city of St. John, of Puerto Rico, on the 27th July, 1799, at ab't 4 p.m., appeared in my office Peter Sorensen, mast'r of the sch. *Jane,* and Jeffrey Dulano, mate, and said that having sailed f'm Baltimore on the 15th inst., bound to Curaçao, belonging to the Batavian Republic, with a cargo of flour, raisins, brandy, and other articles, they proceeded without accident until the 27th of said month, when they made this is'd of P'to Rico, bearing SE. by S., distant 6 leagues, at break of day, and running before the wind to leeward of s'd is'd, at 9 a.m., they descried a sail to windward, which immediately gave chace to us, while we made all sail to get away from her; but she soon came up with and fired a gun at us, when we discovered to be a cruizer, and imme diately hove too, while she fired another gun with ball and some musketry at us, which we returned with one gun, and the privateer continuing to fire her great guns and small arms, w'h damaged our sails, we were obliged, for the safety of our lives, to haul down our colors. Immediately a prize-master and 12 men were sent on board the schooner, and we were carried on board the privateer, with all the ship's paper, which we found she was called the *Alliance,* Capt. Dupuy, mounting 12 guns, w'h a crew of 90 men. And the captain, after examining the papers, ordered to steer for this port, where we arrived on the same day. the 27th inst. They therefor protest, etc., etc., against l'citizen Dupuy, his owner, and all others whom it may concern, for all

damages, etc., etc., to reclaim the same when and where opportunity may serve.

II. The *Jane* was a duly registered vessel of the United States, of 90 69/95 tons burden; was built at Norfolk, Va., in the year 1798, and was owned by David Stewart, David C. Stewart, and John Stewart, composing the firm of David Stewart & Sons, merchants of Baltimore and citizens of the United States.

III. The cargo of the *Jane* consisted of brandy, raisins, and flour, and was owned by said David Stewart & Sons, the owners of the vessel. Edward Courtney had also on board an invoice of dry goods. for which no claim is made.

IV. The losses by reason of the capture and condemnation of the *Jane* are as follows:

Value of the vessel	$3,630.00
The freight earnings	1,510.00
Cargo owned by David Stewart & Sons	4,860.00
Cargo owned by Edward Courtney	1,214.31
Premium on insurance paid by David Stewart & Sons on vessel	625.00
Premium of insurance paid by David Stewart & Sons on cargo	625.00
Premium of insurance paid by Edward Courtney on cargo	125.00
Amounting in all to	$12,589.31

V. On September 2, 1799, said David Stewart & Sons insured the vessel and cargo with the Marine Insurance Office, of Baltimore, in the sum of $10,000, being $5,000 on the vessel and $5,000 on the cargo, paying therefor a premium of 12½ per cent, or $1,250.

Thereafter said insurance office paid to said David Stewart & Sons the sum of $10,000, as and for a total loss thereon.

On August 23, 1799, Edward Courtney insured his interest in said cargo with the Marine Insurance Office, of Baltimore, in the sum of $1,000, paying therefor a premium of 12½ per cent, or $125.

Thereafter said insurance office paid to said Courtney the sum of $1,000, as and for a total loss thereon.

VI. The losses to the different claimants by reason of said capture and condemnation were as follows:

David Stewart & Sons:

The value of the vessel	$3,630.00
The freight earnings	1,510.00
The value of their cargo	4,860.00
Premiums of insurance paid	1,250.00
Total	$11,250.00
Less insurance received	10,000.00
Leaving a net loss to them of	$1,250.00

VII. Ferdinand C. Latrobe is the receiver duly appointed by the circuit court of Baltimore City, Md., of the estates of Aquilla Brown, John Sherlock, and George Grundy, representing all the partners underwriting in the Marine Insurance Office.

VIII. The said administrator and receiver have been duly appointed and represent the parties interested in the estate of the said decedents.

Mr. W. T. S. Curtis for the claimants. *Mr. Frank P. Clark* was on the brief.

Mr. Charles W. Russell for the defendants.

Howry, J., delivered the opinion of the court:

The schooner *Jane,* Sorensen, master, sailed from Baltimore, Md., on July 15, 1799, bound for Curaçao. While peacefully pursuing her voyage July 27, 1799, the schooner was captured on the high seas by the French privateer *Alliance* and taken to Porto Rico, where both vessel and cargo were condemned by decree of the French prize tribunal sitting at Basse-Terre, Guadeloupe, on September 13, 1799. The vessel and cargo became a total loss to the owners by virtue of the condemnation. The grounds set forth in the decree of condemnation were that the schooner had a letter of marque, that she was without any *rôle d'équipage,* and that one of the invoices shipped on board proved to be two trunks of English ginghams.

The master's protest details the capture of his schooner in the following language:

> They descried a sail to windward, which immediately gave chase to us, while we made all sail to get away from her; but she soon came up with and fired a gun at us, when we discovered

> her to be a cruiser, and immediately hove to, while she (the cruiser) fired another gun with ball and some musketry at us, which we returned with one gun, and the privateer continuing to fire her great guns and small arms, which damaged our sails, we were obliged, for the safety of our lives, to haul down our colors.

It is not necessary, in the view of the court, to notice the grounds of decision by the prize tribunal, except as it relates to the matter of search.

The right of visitation and search of neutral vessels at sea is a belligerent right, essential to the exercise of the right of capturing enemy's property, contraband of war, and vessels committing a breach of blockade. It is essential, in order to determine whether the ships themselves are neutral and documented as such, according to the law of nations and treaties, even if the right of capturing enemy's property be ever so strictly limited.

The practice of maritime captures could not exist without the privilege, and accordingly the leading sea powers of the world framed their regulations in assertion of the right. It was the undisputed rule of the British Admiralty, according to an order of the council (1664, art. 12, and affirmed by proclamation in 1672) which directed that when any ship met withal by the royal navy shall fight or make resistance the ship and goods should be adjudged lawful prize. The French had previously (1681) set the example by a declaration in their celebrated ordinance of marine that every vessel should be good prize in case of resistance and combat. Resistance alone under this ordinance was deemed sufficient by Valin in his Commentary (81), but the Spanish ordinance of 1718, which, the authorities say, was copied from the French ordinance, expressed it in the disjunctive, "in case of resistance *or* combat." (Dana's Wheat. Inter. L., 8th ed., sec. 526.)

Three principles were established in the high court of admiralty in the memorable case of *The Maria* (1 C. Rob. 340). These were that the right of visiting and searching merchant ships on the high seas was an incontestable right of the lawfully mentioned cruisers of a belligerent nation, that the authority of a neutral sovereign being interposed could not legally vary the right of a lawfully mentioned belligerent cruiser, and that the penalty for the violent contravention of the belligerent right was confiscation of the property so withheld from visitation and search. In that decision, delivered in June, 1799, the

vessel was condemned for sailing under convoy of an armed ship for the purpose of resisting visitation and search. The international rule on the subject is conceded by text writers to have been most ably summed up by the judgment in that case, and decisions since then have mainly followed in approval of the reasons there given for the judgment of the court. So that it has come to be accepted as a settled rule (stated by Sir William Scott, upon the authority of Vattel, the institutions of his own and other maritime countries) that the deliberate and continued resistance of search on the part of a neutral vessel to a lawful cruiser will always be followed by the legal consequence of confiscation.

The detention of a neutral vessel is to ascertain, not by the flag merely, which may be fraudulently assumed, but by the documents themselves on board, whether she is really neutral. The object of searching ostensible neutrals is to get evidence as to the fact of neutrality and if the cargo be not enemy's property; or if neutral, whether they are carrying contraband; or whether the vessels are in the service of the enemy in the way of carrying military persons or dispatches or sailing in prosecution of an intent to break blockade. It is sometimes necessary to examine papers and inspect the vessels as well as the cargoes and persons on board, and the question as to the propriety of the capture of each vessel is a mixed question of law and fact.

This right of search is the right of force, though of lawful force, and "a lawful force can not be lawfully resisted." But the *Jane* undertook to resist. Before sailing she was provided with a commission. Presumptively she bore this commission to subdue and capture French vessels under the act of July 9, 1798, 1 Stat. L. 578 (which was enacted to further protect the commerce of the United States). True, this act had no international force. The powers not only did not recognize it as possessing any significance, but this court has since declared that no single State could change the law of nations by its municipal regulations. (*The Nancy*, 27 C. Cls. 99.) As the rules of international law determine and control parties with reference to their rights on the high seas (*The Ship Rose*, 36 C. Cls. 290), so it follows that the right given by the domestic statute to oppose and defend against any search, restraint, or seizure gave way to the international rule. The right of defense was subordinated to the right of search.

Whatever the purpose of the *Jane* in bearing a commission, the fact

remains she did resist. Her master was prevented from successfully acting upon his instructions only by an irresistible force. He did the best he could to resist by the fire of one gun and only struck his colors when there was no help for it. Under these circumstances his acts were acts of resistance and of combat, as far as he could resist and fight.

The attempt to avoid search failed because of the superior speed of the cruiser, which fired a gun at the fleeing vessel. The fire of that gun was intended to cause detention. The master of the vessel in flight hove to only when the cruiser came up; the latter firing another gun with ball and musketry. It does not appear that any damage was done or intended to be done by the second fire beyond an exercise of the force necessary on the part of the cruiser to compel obedience to search. The *Jane* returned the fire, and hauled down her colors, not from choice, but necessity. Can it be doubted from the master's statement that this case would not have arisen had the master been able to make a successful fight?

When, in the determination of these cases, this court undertakes to differentiate the degrees of resistance we tread upon uncertain ground. We invade the right of the belligerent to protect itself against the possible unlawful acts of a neutral, and this can not be safely done without running counter to those rules which every nation claims for itself to protect its authority and power against those seeking to destroy it and those aiding in the attempt.

For the reasons given the court decides, as a conclusion of law, that the seizure was lawful and that the owners and insurers had no valid claim of indemnity upon the French Government prior to the ratification of the convention between the United States and the French Republic, concluded on the 30th day of September, 1830, and that the claims were not relinquished to France by the Government of the United States by said treaty in part consideration of the relinquishment of certain national claims of France against the United States, and that the claimants are not entitled to recover from the United States.

The findings of fact, with a copy of this opinion, will be certified to Congress in accordance with the terms of the statute.

NOTT, Ch. J., dissenting:

In 1799, as at the present time, the usage of the sea which governed

the actions of a belligerent cruiser and a neutral merchantman was this:

On sighting a strange sail a neutral merchantman might, and ordinarily would, avoid the stranger by changing her course, if necessary, and crowding sail. It was then incumbent upon a belligerent cruiser, if she would exercise her right of search, to make chase and continue it until she got within gunshot distance, and to disclose her national character, and to fire a shot across the bow of the merchantman. Until the cruiser accomplished this, the merchantman was at liberty to continue her flight and was not regarded as constructively resisting search.

In the words of the leading naval writer of our time (Capt. Alfred T. Mahan), the "neutral is bound to submit to the right of search when overtaken, but is in no wise bound to facilitate it." On the shot being fired across her bow it was obligatory upon the merchantman to display her colors, if she had not already done so, and heave to and submit to visitation and search. On her heaving to and displaying her colors, it became the duty of the cruiser to immediately send an officer on board the merchantman to inspect her papers and, if he saw fit, exercise the right of search. The merchantman was not bound to haul down her flag, which was the badge both of her nationality and her neutrality.

In the present case all of these conditions were complied with. The *Jane* did display her colors and did heave to to await search as soon as she discovered that the pursuing vessel was a French cruiser, and she did not fire her solitary shot at the cruiser until, while awaiting search, the cruiser fired into her with cannon and musketry. In a word, she did not resist search, but exercised the inalienable right of self-defense.

The indisputable conditions of the parties render this clear, and, to my mind, also indisputable. The *Jane* was a little schooner which, at the present day, would be classed as a small coaster. Her length was 66 feet 5 inches, her breadth 19 feet 3 inches, her depth 8 feet 2 inches; she measured less than 91 tons; her crew could not have consisted of more than 6 or 8 men, and the total value of her cargo, as per manifest, was $6,074.31.

The *Alliance* was a cruiser carrying 12 guns, with a crew of 90 men. Relatively, for "she soon came up with" the *Jane,* she could take any position she chose, and could have sailed around the heavily laden

merchantman and raked her fore and aft. To suppose that against such overwhelming force a paltry little vessel like the *Jane* would heave to, lose her steerage way, and then resist search is to suppose that her master and crew suddenly went mad.

Probably the firing of the shotted gun into the *Jane* was one of those casualties which are classified as the playing with edged tools by children. The blunder of a gunner, a misunderstanding of some order, a spark falling from a heated firing iron, may have caused the shot. But, nevertheless, it was a shot fired, not at this merchantman, but on the American flag; and such shots continued until the schooner hauled down her colors, as enemies surrender in time of war. France owed an explanation of the act to the United States, but that was a matter which belonged and still belongs entirely to the diplomatic realm.

On the 22d June, 1807, a British admiral undertook to apply the British doctrine of the right of search to an American man-of-war, and out of it came what has been known as the affair of the *Chesapeake* and the *Leopard*. The *Chesapeake* had just left the navy-yard at Washington, and her armament was found to be in a disgraceful condition. For twenty minutes the *Leopard* fired into her without her being able to return a single shot. As her flag was coming down, one of her officers, Lieutenant Allen, seized a burning ember in his ungloved hand and fired the only shot fired at the *Leopard*. (2 Cooper Naval History, 104.) This act of Lieutenant Allen was supposed at that time to be for the honor of his flag; that it should not be said that an American man-of-war surrendered without firing a shot.

I do not know that a sense of honor required the master of this little schooner to fire his one shot before he hauled down his flag, but I think I may say with tolerable certainty that no case can be found in judicial decisions, or in elementary writers, or in diplomatic correspondence, where the right of search, even as defined by the two great maritime nations of the earth in the eighteenth century, is held to be or is claimed to be a doctrine so sacred as to obliterate the natural right of self-defense.

It remains to be noted that (as appears from the proceedings before the French prize court) the captain of the *Alliance* made no charge of resistance to search by his prize; that the tribunal of commerce and prizes made no condemnation upon that ground; that the

Jane was condemned because she had on board two trunks of English ginghams and her papers did not conform to French laws; and that it was not so much as heard of that the vessel resisted search until, more than one hundred years after the event, the counsel for the United States first formulated that defense. In the most of these French spoliation cases the illegality of the condemnation was in the fact that the French prize courts condemned vessels under French laws instead of releasing them under international law. In this case the illegality of the seizure was supplemented by an outrage upon the neutral flag which the vessel carried.

I regret that I must dissent from the majority of the court, but I can not regard that outrage as something which can render an illegal condemnation legal.

THE SHIP *JAMES AND WILLIAM*[1] [AND OTHER CASES]

[French Spoliations, 1197, 1089, 3817. Decided March 3, 1902]

On the Proofs

The *James and William* sails from Norfolk bound for London in January, 1798, laden with tar and turpentine. She is captured and condemned because the treaty 1795 with Great Britain declares tar and turpentine to be contraband.

I. By the treaty 1778 with France it was declared that tar and turpentine *"shall not be reputed contraband."* Until the abrogation of the treaty by the *Act of July 7, 1798*[2] (1 Stat. L. 578), French condemnations on the ground that tar and turpentine were contraband were illegal.

II. The treaty 1795 with Great Britain did not release France from any obligation of the treaty of 1778.

III. The decree of the French Government abrogating so much of the treaty of 1778 as related to contraband goods on neutral vessels justified its own cruisers in seizing and its own courts in condemning vessels, but did not abrogate any treaty right of the United States.

IV. The *"the most-favored nation"* clause in treaties relates to duties and rights and benefits in the ports of the parties. Provisions which declare what shall be regarded as contraband or non-contraband, relate to the procedure of the two nations in time of war, and are not affected by a treaty of either with another power.

V. Where an American vessel carried the passport or sea letter prescribed by the treaty of 1778 (Art. XXV) it was a case where free ships made free goods under Art. XXIII. The cargo could not be condemned for want of evidence of its neutrality.

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[1] Court of Claims Reports, vol. 37, page 303.

[2] *Supra*, p. 65.

The Reporters' statement of the case:

The following are the facts of the case as found by the court:

I. The *James and William* sailed from Norfolk, Va., on the 26th of January, 1798, bound for London. On the 22d of February, she was captured on the high seas by the French privateer *President Parker* and carried into the port of Roscoff. On the 5th of March, 1798, she was condemned by the French tribunal of commerce at Morlaix. The grounds of condemnation set forth in the decree were that the tar and turpentine which formed the chief part of her cargo were declared to be good contraband and subject to seizure by the treaty between the United States and Great Britain, bearing date November 19, 1794, article 18, and that the ship's papers were not in proper form.

But it likewise appears by the said decree that there was on board the vessel at the time of seizure a passport from the President of the United States to the master of the ship, dated the 20th of January, 1798, signed "John Adams," President, by Timothy Pickering, Secretary of State, such as was provided for by the treaty with France, February 6, 1778 (Public Treaties, p. 203, Art. XXV), and likewise an affidavit made by the master of the ship, showing that she was a vessel of the United States and that no citizen or subject of powers then at war had any part or interest, directly or indirectly, therein.

II. The *James and William* was a duly registered vessel of the United States; was built in Virginia in 1796, of 209 tons burden, and was owned by John Proudfit and the firm of David Stewart & Sons, citizens of the United States.

III. The cargo of the *James and William* consisted of 1,878 barrels of turpentine and 96 barrels of tar, the property of John Cowper & Co., citizens of the United States, and of a case of deer hides and 17 barrels of gentian, for which no claimant has appeared.

IV. The losses by reason of the capture and condemnation of the *James and William* were as follows:

The value of the vessel was	$ 9,405.00
The freight earnings of the voyage were	3,500.00
The value of the cargo belonging to Cowper & Co.	5,922.00
Amounting in all	$18,827.00

V. The loss sustained by John Cowper & Co. was $5,922.00.

VI. The loss sustained by John Proudfit was:

One-half the value of the vessel	$4,702.50
One-half freight earnings	1,750.00
Amounting to	$6,452.50

VII. The loss sustained by the firm of David Stewart & Sons was:

One-half the value of the vessel	$4,702.50
One-half the freight earnings of voyage	1,750.00
Amounting to	$6,452.50

VIII. The said firm of John Cowper & Co. was composed of John Cowper, Josiah Cowper, William Cowper, and Robert Cowper, of which John Cowper was the surviving partner.

The firm of David Stewart & Sons was composed of David Stewart, John Stewart, David C. Stewart, and William P. Stewart, of which said William P. Stewart was the surviving partner.

The claimants herein have produced letters of administration for the estates of the parties for whom they appear and have otherwise proved to the satisfaction of the court that they are the same persons who suffered loss by the seizure and condemnation of the *James and William,* as set forth in the preceding findings.

Mr. William E. Curtis and *Mr. Frank P. Clark* for the claimants.

Mr. Charles W. Russell (with whom was *Mr. Assistant Attorney-General Pradt*) for the defendants.

Nott, Ch. J., delivered the opinion of the court:

The vessel in this case sailed from Norfolk on the 26th of January, 1798, bound for a belligerent port, London, laden with tar and turpentine. Tar and turpentine, like horses, "belong to that disputable class of merchandise which may or may not be contraband, according to the circumstances of a case." (Brig *Lucy,* 37 C. Cls. 97.)

By the treaty with France, 1778 (Public Treaties, p. 210, Art. XXIV), horses were declared to be contraband, and tar and turpentine, it was declared, "shall not be reputed contraband." Such was the law between France and the United States. By the treaty of 1794 with Great Britain (Public Treaties, p. 278, Art. XVIII), this policy was in part reversed, and tar and turpentine were declared to be con-

traband and "just subjects of confiscation whenever they are attempted to be carried to an enemy."

The *James and William* was captured in February and condemned in March, 1798, on the ground that her cargo was contraband; that is to say, she was captured before the abrogation of the treaty with France, but after the ratification of the treaty with Great Britain. According to the terms of the two treaties, if an American vessel at that time, laden with tar and turpentine, was sailing for a French port, a British prize court was justified in condemning the cargo as contraband. If she was sailing for a British port, a French prize court was bound, according to the letter of the treaty, to pronounce the cargo non-contraband.

Grounding his argument upon this diversity, the counsel for the United States contends that the treaty with Great Britain was, in this particular, a rescission and abandonment of the treaty with France; or that under the most-favored-nation provision of the treaty (Art. II) France was entitled to the benefit of the treaty with Great Britain.

The counsel for the claimants contend that the treaty with France was still in force and that this provision of the treaty related to commerce and navigation, and not to any matter of neutral rights in time of war.

The court is of the opinion that the United States relinquished no obligation to France by their treaty with Great Britain. A nation may abrogate a treaty as it may make a treaty—on its own motion, upon its own responsibility. There is no international forum which can decree that it has no right to do so. What follows the abrogation of a treaty is a matter between the two nations. It may be followed by an interval in which they have no treaty relations, or it may be followed by war. But a nation can not at its pleasure abrogate one article of a treaty and leave all of the other obligations in effect, binding the other power. The decree of the French Government abrogating so much of the treaty of 1778 as related to contraband goods on neutral vessels justified its own cruisers in seizing vessels and its own prize courts in condemning them, but without notice to and acquiescence on the part of the United States the decree could not *ex proprio vigore* extend to the treaty rights of the United States. In July, 1798 (*Act of July 7, 1798*, 1 Stat. L. 578), the United States abrogated the treaty *in toto*, and thereby relieved France from all obligations under it. This court in these spoliation cases has always

recognized that release from treaty obligation, and has given to France the full benefits, whatever they may have been, of such exemption.

The most-favored-nation clause of the treaty of 1778 is in these words:

> The Most Christian King and the United States engage mutually not to grant any particular favor to other nations in respect of commerce and navigation which shall not immediately become common to the other party, who shall enjoy the same favor, freely, if the concession was freely made, or on allowing the same compensation if the concession was conditional.

It is well known that such provisions in a treaty relate to duties, rights, and benefits in the ports of either ally, and it has been so said of this provision in the treaty of 1778. (Wharton's Int. Law, vol. II, sec. 148.) The other provisions of this treaty (Art. XXIII) related strictly to the procedure between the two nations in time of war. What they agreed should be the rule between themselves concerning goods which might or might not be contraband concerned only themselves. No other nation was benefited or injured by their entering into that treaty obligation. Conversely, the rule which the United States might establish in conjunction with any other power did not concern France. The definition of what should be regarded as contraband or not contraband was not a favor, but a mutual and reciprocal obligation. It worked both ways. If the case had been reversed, and the United States had been the belligerent and France the neutral, the exemption would have operated against the United States. If American cruisers in these reversed conditions had seized French merchantmen, because France had made a different treaty with another power, it can not be supposed that France would have submitted to such seizures and condemnations.

It is also contended by the defendant's counsel that so much of the cargo as belonged to Cowper & Co., of Norfolk, Va., was liable to condemnation, because it did not appear by the ship's papers that it was neutral property. There was, indeed, an invoice on board averring it to be such, but the invoice was not signed. Without passing upon the question whether such an invoice should have been regarded as evidence by the prize court of the neutrality of the cargo—that is to say, that it was the property of Cowper & Co., citizens of the United States, doing business in Norfolk, Va.—the court is of the opinion

that the cargo was illegally condemned under other provisions of the treaty of 1778.

It appears that the vessel carried a passport or sea letter from the President of the United States, such as was provided for by the treaty, "to the end that all manner of dissensions and quarrels may be avoided and prevented on one side and the other." (Art. XXV.) The last clause of the article is in these words:

> And if anyone shall think it fit or advisable to express in the said certificate the person to whom the goods on board belong, he may freely do so.

A previous article (XXIII) declares that free ships make free goods, and that it shall be lawful for citizens, people, and inhabitants of the said United States to sail with their ships with all manner of liberty and security, "no distinction being made who are the proprietors of the merchandises laden thereon, from any port to the places of those who now are or hereafter shall be at enmity with the Most Christian King." It also provides:

> And it is hereby stipulated that free ships shall also give a freedom to goods, and that everything shall be deemed to be free and exempt which shall be found on board the ships belonging to the subject of either of the confederates, although the whole lading or any part thereof should appertain to the enemies of either, contraband goods being always excepted. It is also agreed in like manner that the same liberty be extended to persons who are on board a free ship, with this effect, that although they be enemies to both or either party, they are not to be taken out of that free ship, unless they are soldiers and in actual service of the enemies.

These provisions taken together clearly exempted the shipper and the ship from carrying evidence of neutrality or ownership of the cargo. The unquestionable intent of the treaty was to reduce the dangerous power of the right of search to a minimum, excepting only from its liberal provisions contraband goods.

The case will be reported to Congress, together with a copy of this opinion.

APPENDIX

TREATIES BETWEEN THE UNITED STATES AND FRANCE

Treaty of Amity and Commerce, February 6, 1778[1]

Concluded February 6, 1778; Ratified by the Continental Congress May 4, 1778; Ratifications exchanged at Paris July 17, 1778

The Most Christian King, and the thirteen United States of North America, to wit, New Hampshire, Massachusetts Bay, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, willing to fix in an equitable and permanent manner the rules which ought to be followed relative to the correspondence and commerce which the two parties desire to establish between their respective countries, States, and subjects, His Most Christian Majesty and the said United States have judged that the said end could not be better obtained than by taking for the basis of their agreement the most perfect equality and reciprocity, and by carefully avoiding all those burthensome preferences which are usually sources of debate, embarrassment and discontent; by leaving, also, each party

Le Roi très Chretien et les treize Etats Unis de l'Amérique Septentrionale, savoir, New Hampshire, la Baye de Massachusset, Rhode Island, Connecticut, New York, New Jersey, Pensylvanie, les comtés de Newcastle, de Kent et de Sussex sur la Delaware, Maryland, Virginie, Caroline, Septentrionale, Caroline Méridionale, et Georgie, voulant établir d'une maniere équitable et permanente les règles qui devront être suivies relativement à la correspondance et au commerce que les deux parties désirent d'établir entre leurs Païs Etats et sujets respectifs, sa Majesté très Chretienne et les dits Etats Unis ont jugé ne pouvoir mieux atteindre à ce but qu'en prenant pour base de leur arrangement l'égalité et la réciprocité la plus parfaite, et en observant d'éviter toutes les préférences onéreuses, source de discussions, d'embarras, et de mecontentemens, de laisser à chaque

[1] 8 Stat. L. 12; 18 Stat. L., pt. 2, p. 203; Treaties and Conventions, 1889, p. 296.

at liberty to make, respecting commerce and navigation, those interior regulations which it shall find most convenient to itself; and by founding the advantage of commerce solely upon reciprocal utility and the just rules of free intercourse; reserving withal to each party the liberty of admitting at its pleasure other nations to a participation of the same advantages. It is in the spirit of this intention, and to fulfil these views, that His said Majesty having named and appointed for his Plenipotentiary, Conrad Alexander Gerard, Royal Syndic of the city of Strasbourg, Secretary of His Majesty's Council of State; and the United States, on their part, having fully impowered Benjamin Franklin, Deputy from the State of Pennsylvania to the General Congress, and President of the Convention of said State, Silas Deane, late Deputy from the State of Connecticut, to the said Congress, and Arthur Lee, Councellor at Law; the said respective Plenipotentiaries, after exchanging their powers, and after mature deliberation, have concluded and agreed upon the following articles:

ARTICLE I

There shall be a firm, inviolable and universal peace, and a true and sincere friendship between

partie la liberté de faire, relativement au commerce et à la navigation des réglemens intérieurs qui seront à sa convenance, de ne fonder les avantages du commerce que sur son utilité reciproque et sur les loix d'une juste concurrence, et de conserver ainsi de part et d'autre la liberté de faire participer, chacun selon son gré, les autres nations, aux mêmes avantages. C'est dans cet esprit et pour remplir ces vües que sa d^e^. Majesté ayant nommé et constitué pour son plénipotentiaire le S. Conrad Alexandre Gerard, Sindic Roïal de la ville de Strasbourg, Secretaire du Conseil d'Etat de sa Majesté, et les Etats Unis aïant, de leur coté, munis de leurs pleins pouvoirs les S. Benjamin Franklin, Député au Congrès Général de la part de l'Etat de Pensylvanie, et Président de la Convention du d^e^. Etat, Silas Deane ci-devant Député de l'Etat de Connecticut, et Arthur Lée, *Conseiller ès Loix*, les d^e^. plénipotentiaires respectifs après l'échange de leurs pouvoirs et après mure déliberation ont conclu et arrêté les points et articles suivans.

ARTICLE I

Il y aura une paix ferme, inviolable et universelle et une amitié vraie et sincère entre Le Roi

the Most Christian King, his heirs and successors, and the United States of America; and the subjects of the Most Christian King and of the said States; and between the countries, islands, cities and towns situate under the jurisdiction of the Most Christian King and of the said United States, and the people and inhabitants of every degree, without exception of persons or places; and the terms hereinafter mentioned shall be perpetual between the Most Christian King, his heirs and successors, and the said United States.

très Chrétien ses héritiers et successeurs, et entre les Etats Unis de l'Amérique ainsi qu'entre les sujets de sa Majesté très Chretienne et ceux des dits Etats, comme aussi entre les peuples, isles, villes et places situés sous la jurisdiction du Roi très Chretien et des dits Etats Unis, et entre leurs peuples et habitans de toutes les classes, sans aucune exception de personnes et de lieux; les conditions mentionnées au present traité seront perpetuelles et permanentes entre Le Roi très Chretien, ses héritiers et successeurs, et les dits Etats Unis.

Article II

The Most Christian King and the United States engage mutually not to grant any particular favour to other nations, in respect of commerce and navigation, which shall not immediately become common to the other party, who shall enjoy the same favour, freely, if the concession was freely made, or on allowing the same compensation, if the concession was conditional.

Article II

Le Roi très Chretien et les Etats Unis s'engagent mutuellement à n'accorder aucune faveur particulierè à d'autres nations, en fait de commerce et de navigation, qui ne devienne ausitót commune à l'autre partie, et celle-ci jouira de cette faveur gratuitement, si la concession est gratuite, ou en accordant la même compensation, si la concession est conditionnelle.

Article III

The subjects of the Most Christian King shall pay in the ports, havens, roads, countries, islands, cities, or towns, of the United States, or any of them, no other

Article III

Les sujets du Roi très Chretien ne païeront dans les ports, havres, rades, contrées, isles, cités et lieux des Etats Unis ou d'aucun d'entrieux, d'autres ni plus grands

or greater duties or imposts, of what nature soever they may be, or by what name soever called, than those which the nations most favoured are or shall be obliged to pay; and they shall enjoy all the rights, liberties, privileges, immunities, and exemptions in trade, navigation and commerce, whether in passing from one port in the said States to another, or in going to and from the same, from and to any part of the world, which the said nations do or shall enjoy.

droits ou impôts, de quelque nature qu'ils puissent être, et quelque nom qu'ils puissent avoir que ceux que les nations les plus favorisées sont, ou seront tenües de païer; Et ils jouiront de tous les droits, libertés, priviléges, immunités et exemtions en fait de négoce, navigation et commerce, soit en passant d'un port des dits Etats à un autre; soit en y allant ou en revenant de quelque partie ou pour quelque partie du monde que ce soit, dont les d^e^. nations jouissent ou jouiront.

Article IV

The subjects, people and inhabitants of the said United States, and each of them, shall not pay in the ports, havens, roads, isles, cities and places under the domination of His Most Christian Majesty, in Europe, any other or greater duties or imposts, of what nature soever they may be, or by what name soever called, than those which the most favoured nations are or shall be obliged to pay; and they shall enjoy all the rights, liberties, privileges, immunities, and exemptions in trade, navigation and commerce, whether in passing from one port in the said dominions, in Europe, to another, or in going to and from the same, from and to any part of the world, which the said nations do or shall enjoy.

Article IV

Les sujets, peuples et habitans des d^e^. Etats Unis et de chacun d'iceux ne païeront dans les ports, havres, rades, isles, villes et places de la domination de sa Majesté très Chretienne en Europe d'autres ni plus grands droits ou impots de quelque nature qu'ils puissent être et quelque nom qu'ils puissent avoir que les nations les plus favorisées sont, ou seront tenües de païer, et ils jouiront de tous les droits, libertés, priviléges, immunités et exemtions en fait de négoce, navigation et commerce soit en passant d'un port à un autre des dits Etats du Roi très Chretien en Europe, soit en y allant ou en revenant de quelque partie ou pour quelque partie du monde que ce soit, dont les nations sus d^e^. jouissent ou jouiront.

ARTICLE V

In the above exemption is particularly comprised the imposition of 100 sols per ton, established in France on foreign ships; unless when the ships of the United States shall load with the merchandize of France for another port of the same dominion, in which case the said ships shall pay the duty above-mentioned so long as other nations the most favoured shall be obliged to pay it. But it is understood that the said United States, or any of them, are at liberty, when they shall judge it proper, to establish a duty equivalent in the same case.

ARTICLE V

Dans l'exemtion ci-dessus est nommément compris l'imposition de cent sous par tonneau établie en France sur les navires étrangers, si ce n'est lorsque les navires des Etats Unis chargeront des marchandises de France, dans un port de France, pour un autre port de la même domination, auquel cas les d^e^. navires des d^e^. Etats Unis acquiteront le droit dont il s'agit aussi long tems que les autres nations les plus favorisées seront obligées de l'acquiter. Bien entendu qu'il sera libre aux dits Etats Unis, ou à aucun d'iceux d'établir, quand ils le jugeront àpropos, un droit equivalent à celui dont il est question pour le même cas pour lequel il est établi dans les ports de sa Majesté très Chretienne.

ARTICLE VI

The Most Christian King shall endeavour by all the means in his power to protect and defend all vessels and the effects belonging to the subjects, people or inhabitants of the said United States, or any of them, being in his ports, havens, or roads, or on the seas near to his countries, islands, cities or towns, and to recover and restore to the right owners, their agent or attornies, all such vessels and effects which shall be

ARTICLE VI

Le Roi très Chretien fera usage de tous les moïens qui sont en son pouvoir, pour protéger et défendre tous les vaisseaux et effets apartenants, aux sujets, peuples et habitans des dits Etats Unis et de chacun d'iceux qui seront dans ses ports, havres, ou rades, ou dans les mers près de ses pays, contrées, isles, villes et places, et fera tous ses efforts pour recouvrer et faire restituer aux propriétaires légitimes, leurs agens ou

taken within his jurisdiction; and the ships of war of His Most Christian Majesty, or any convoy sailing under his authority, shall upon all occasions take under their protection all vessels belonging to the subjects, people or inhabitants of the said United States, or any of them, and holding the same course, or going the same way, and shall defend such vessels, as long as they hold the same course or go the same way, against all attacks, force and violence, in the same manner as they ought to protect and defend the vessels belonging to the subjects of the Most Christian King.

mandataires, tous les vaisseaux et effets qui leur seront pris dans l'étenduë de sa jurisdiction: Et les vaisseaux de guerre de sa Majesté très Chretienne ou les convois quelconques faisant voile sous son autorité, prendront, en toute occasion, sous leur protection tous les vaisseaux apartenants aux sujets, peuples et habitans des d^e^. Etats Unis ou d'aucun d'iceux, les quels tiendront le meme cours, et feront la même route, et ils défendront les dits vaisseaux aussi longtems qu'ils tiendront le même cours et suivront la meme route, contre toute attaque force ou violence de la même manière qu'ils sont tenus de défendre et de protéger les vaisseaux appartenans aux sujets de sa Majesté très Chretienne.

Article VII

In like manner the said United States and their ships of war, sailing under their authority, shall protect and defend, conformable to the tenor of the preceding article, all the vessels and effects belonging to the subjects of the Most Christian King, and use all their endeavours to recover and cause to be restored the said vessels and effects that shall have been taken within the jurisdiction of the said United States, or any of them.

Article VII

Pareillement les dits Etats Unis et leurs vaisseaux de guerre faisant voile sous leur autorité protégeront et défendront conformement au contenu de l'art^e^. précédent, tous les vaisseaux et effets apartenants aux sujets du Roi très Chretien, et feront tous leurs efforts pour recouvrer et faire restitüer les dits vaisseaux et effets qui auront été pris dans l'étendüe de la jurisdiction des dits Etats et de chacun d'iceux.

ARTICLE VIII

The Most Christian King will employ his good offices and interposition with the King or Emperor of Morocco or Fez, the regencies of Algier, Tunis, and Tripoli, or with any of them; and also with every other Prince, State or Power, of the coast of Barbary, in Africa, and the subjects of the said King, Emperor, States and Powers, and each of them, in order to provide as fully and efficaciously as possible for the benefit, conveniency and safety of the said United States, and each of them, their subjects, people and inhabitants, and their vessels and effects against all violence, insult, attacks, or depredations on the part of the said Princes and States of Barbary, or their subjects.

ARTICLE VIII

Le Roi très Chretien emploïera ses bons offices et son entremise auprès des Roi ou Empereur de Maroc ou Fez, des Regences d'Alger, Tunis et Tripoli, ou auprès aucune d'entr'elles ainsi qu'auprès de tout autre Prince, Etat, ou Puissance des côtes de Barbarie en Affrique et des sujets des d^e^. Roi, Empereur, Etats et Puissance et de chacun d'iceux à l'effet de pourvoir aussi pleinement et aussi efficacement qu'il sera possible à l'avantage commodité et sûreté des dits Etats Unis et de chacun d'iceux, ainsi que de leurs sujets, peuples et habitans leurs vaisseaux et effets contre toute violence, insulte, attaque ou déprédations de la part des d^e^. Princes et Etats Barbaresques ou de leurs sujets.

ARTICLE IX

The subjects, inhabitants, merchants, commanders of ships, masters and mariners of the States, provinces and dominions of each party respectively shall abstain and forbear to fish in all places possessed or which shall be possessed by the other party; the Most Christian King's subjects shall not fish in the havens, bays, creeks, roads, coasts or places which the said United States hold or shall hereafter hold; and in

ARTICLE IX

Les sujets, habitans, marchands, commandans des navires, maitres et gens de mer, des etats, provinces et domaines des deux parties, s'abstiendront et éviteront reciproquement de pêcher dans toutes les places possédées, ou qui seront possedées par l'autre partie. Les sujets de sa Majesté très Chretienne ne pêcheront pas dans les havres, bayes, criques, rades, côtes et places que les dits Etats Unis, possédent ou posséde-

like manner the subjects, people and inhabitants of the said United States shall not fish in the havens, bays, creeks, roads, coasts or places which the Most Christian King possesses or shall hereafter possess; and if any ship or vessel shall be found fishing contrary to the tenor of this treaty, the said ship or vessel, with its lading, proof being made thereof, shall be confiscated. It is, however, understood that the exclusion stipulated in the present article shall take place only so long and so far as the Most Christian King or the United States shall not in this respect have granted an exemption to some other nation.

ARTICLE X

The United States, their citizens and inhabitants, shall never disturb the subjects of the Most Christian King in the enjoyment and exercise of the right of fishing on the banks of Newfoundland, nor in the indefinite and exclusive right which belongs to them on that part of the coast of that island which is designed by the treaty of Utrecht; nor in the rights relative to all and each of the isles which belong to His Most Christian Majesty; the whole conformable to the true sense of the treaties of Utrecht and Paris.

ront à l'avenir; et de la même manière les sujets, peuples et habitans des d^e^. Etats Unis ne pêcheront pas dans les havres, bayes, criques, rades, côtes et places que sa Majesté très Chretienne posséde actuellement ou possédera à l'avenir, et si quelque navire ou batiment étoit surpris pêchant en violation du present traité, le dit navire ou batiment et sa cargaison seront confisqués après que la preuve en aura été faite düement. Bien entendu que l'exclusion stipulée dans le present article n'aura lieu qu'autant, et si longtems que le Roi et les Etats Unis n'auront point accordé à cet egard d'exception à quelque nation que ce puisse être.

ARTICLE X

Les Etats Unis, leurs citoïens et habitans ne troubleront jamais les sujets du Roi très Chretien dans la jouissance et exercice du droit de pêche sur les bancs de Terre neuve, non plus que dans la jouissance indéfinie et exclusive qui leur apartient sur la partie des côtes de cette isle, designée dans le traite d'Utrecht, ni dans les droits relatifs à toutes et chacune des isles qui appartiennent à sa Majesté très Chretienne; le tout conformement au véritable sens des traités d'Utrecht et de Paris.

ARTICLE XI

The subjects and inhabitants of the said United States, or any one of them, shall not be reputed *aubains* in France, and consequently shall be exempted from the *droit d'aubaine,* or other similar duty, under what name soever. They may by testament, donation, or otherwise, dispose of their goods, moveable and immoveable, in favour of such persons as to them shall seem good, and their heirs, subjects of the said United States, residing whether in France or elsewhere, may succeed them *ab intestat,* without being obliged to obtain letters of naturalization, and without having the effect of this concession contested or impeded under pretext of any rights or prerogative of provinces, cities, or private persons; and the said heirs, whether such by particular title, or *ab intestat,* shall be exempt from all duty called *droit de detraction,* or other duty of the same kind, saving nevertheless the local rights or duties as much and as long as similar ones are not established by the United States, or any of them. The subjects of the Most Christian King shall enjoy on their part, in all the dominions of the said States, an entire and perfect reciprocity relative to the stipulations contained in the present article, but it is at the

ARTICLE XI

Les sujets et habitans des dits Etats Unis ou de l'un d'eux ne seront point reputés aubains en France, et conséquemment seront exemts du droit d'aubaine ou autre droit semblable quelque nom qu'il puisse avoir; pourront disposer par testament, donation, ou autrement de leurs biens meubles et immeubles en faveur de telles personnes que bon leur semblera; et leurs héritiers, sujets des dits Etats Unis, residans soit en France soit ailleurs, pourront leur succéder *ab intestat,* sans qu'ils aïent besoin d'obtenir des lettres de naturalité, et sans que l'effet de cette concession leur puisse être contesté ou empêché sous pretexte de quelques droits ou prérogatives des provinces villes ou personnes privées. Et seront les dits héritiers soit à titre particulier soit *ab intestat* exemts de tout droit de détraction ou autre droit de ce genre; sauf néanmoins les droits locaux tant, et si longtems, qu'il n'en sera point etabli de pareils par les dits Etats Unis ou aucun d'iceux. Les sujets du Roi très Chretien jouiront de leur côté dans tous les domaines des dits Etats d'une entière et parfaite reciprocité relativement aux stipulations renfermées dans le present article. Mais il est convenu en même tems que son contenu ne portera aucune atteinte aux loix

same time agreed that its contents shall not affect the laws made, or that may be made hereafter in France against emigrations which shall remain in all their force and vigour, and the United States on their part, or any of them, shall be at liberty to enact such laws relative to that matter as to them shall seem proper.

promulguées en France contre les émigrations, ou qui pourront être promulguées dans la suite, les quelles demeureront dans toute leur force et vigueur. Les Etats Unis de leur côté ou aucun d'entr'eux, seront libres de statüer sur cette matière telle loi qu'ils jugeront àpropos.

Article XII

The merchant ships of either of the parties which shall be making into a port belonging to the enemy of the other ally, and concerning whose voyage and the species of goods on board her there shall be just grounds of suspicion, shall be obliged to exhibit, as well upon the high seas as in the ports and havens, not only her passports, but likewise certificates, expressly shewing that her goods are not of the number of those which have been prohibited as contraband.

Article XII

Les navires marchands des deux parties qui seront destinés pour des ports appartenants à une puissance ennemie de l'autre allié et dont le voïage ou la nature des marchandises dont ils seront chargés donneroit de justes soupçons, seront tenus d'exhiber soit en haute mer, soit dans les ports et havres, non seulement leurs passeports mais encore les certificats qui constateront expressement que leur chargement n'est pas de la qualité de ceux qui sont prohibés comme contrebande.

Article XIII

If by the exhibiting of the abovesaid certificates the other party discover there are any of those sorts of goods which are prohibited and declared contraband and consigned for a port under the obedience of his enemies, it shall not be lawful to break up the hatches of such ship,

Article XIII

Si l'exhibition des dits certificats conduit à découvrir que le navire porte des marchandises prohibées et reputées contrebande, consignées pour un port ennemi, il ne sera pas permis de briser les écoutilles des dits navires, ni d'ouvrir aucune caisse, coffre, malle, ballots, tonneaux et autres

or to open any chest, coffers, packs, casks, or any other vessels found therein, or to remove the smallest parcels of her goods, whether such ship belongs to the subjects of France, or the inhabitants of the said United States, unless the lading be brought on shore in the presence of the officers of the court of admiralty, and an inventory thereof made; but there shall be no allowance to sell, exchange or alienate the same, in any manner, until after that due and lawful process shall have been had against such prohibited goods, and the court of admiralty shall by a sentence pronounced have confiscated the same; saving always as well the ship itself as any other goods found therein, which by this treaty are to be esteemed free, neither may they be detained on pretence of their being as it were infected by the prohibited goods, much less shall they be confiscated, as lawful prize; but if not the whole cargo, but only part thereof, shall consist of prohibited or contraband goods, and the commander of the ship shall be ready and willing to deliver them to the captor who has discovered them, in such case the captor having received those goods shall forthwith discharge the ship, and not hinder her by any means freely to prosecute the voyage on which she was bound. But in case

caisses qui s'y trouveront, ou d'en déplacer et détourner la moindre partie des marchandises soit que le navire apartienne aux sujets du Roi très Chretien ou aux habitans des Etats Unis, jusqu'a ce que la cargaison ait été mise à terre en presence des officiers des cours d'amirauté, et que l'inventaire en ait ete fait; mais on ne permettra pas de vendre, échanger ou aliéner les navires ou leur cargaison en manierè quelconque, avant que le proces ait été fait et parfait legalement pour déclarer la contrebande, et que les cours d'amirauté auront prononcé leur confiscation par jugement, sans prejudice néanmoins des navires, ainsi que des marchandises qui en vertu du traité doivent être censées libres. Il ne sera pas permis de retenir ces marchandises sous pretexte qu'elles ont été entachées par les marchandises de contrebande et bien moins encore de les confisquer comme des prises légales. Dans le cas ou une partie seulement et non la totalité du chargement consisteroit en marchandises de contrebande, et que le commandant du vaisseau consente à les délivrer au corsaire qui les aura découvertes, àlors le capitaine qui aura fait la prise, après avoir reçu ces marchandises, doit incontinent relâcher le navire et ne doit l'empêcher en aucune manière de continuer son voïage.

the contraband merchandises cannot be all received on board the vessel of the captor, then the captor may, notwithstanding the offer of delivering him the contraband goods, carry the vessel into the nearest port agreeable to what is above directed.

ARTICLE XIV

On the contrary, it is agreed that whatever shall be found to be laden by the subjects and inhabitants of either party on any ship belonging to the enemys of the other, or to their subjects, the whole, although it be not of the sort of prohibited goods, may be confiscated in the same manner as if it belonged to the enemy, except such goods and merchandizes as were put on board such ship before the declaration of war, or even after such declaration, if so be it were done without knowledge of such declaration. So that the goods of the subjects and people of either party, whether they be of the nature of such as are prohibited or otherwise, which, as is aforesaid, were put on board any ship belonging to an enemy before the war or after the declaration of the same, without the knowledge of it, shall no ways be liable to confiscation, but shall well and truely be restored without delay to the proprietors de-

Mais dans le cas où les marchandises de contrebande ne pourroient pas être toutes chargées sur le vaisseau capteur, àlors le capitaine du d^e^. vaisseau sera le maitre, malgré l'offre de remettre la contrebande, de conduire le patron dans le plus prochain port, conformement à ce qui est préscrit plus haut.

ARTICLE XIV

On est convenu au contraire que tout ce qui se trouvera chargé par les sujets respectifs sur des navires apartenants aux ennemis de l'autre partie ou à leurs sujets sera confisqué sans distinction des marchandises prohibées ou non prohibées, ainsi et de même que si elles appartenoient à l'ennemi, à l'exception toute fois, des effets et marchandises qui auront été mis à bord des dits navires avant la déclaration de guerre, ou même après la d^e^. déclaration, si au moment du chargement on a pu l'ignorer, de manière que les marchandises des sujets des deux parties, soit qu'elles se trouvent du nombre de celles de contrebande ou autrement, les quelles comme il vient d'être dit, auront été mises à bord d'un vaisseau apartenant à l'ennemi, avant la guerre ou même après la d^e^. déclaration, lorsqu'on l'ignoroit, ne seront en aucune manière, sujetes à confiscation, mais seront fidèlement et de bonne foi rendües sans

manding the same; but so as that if the said merchandizes be contraband, it shall not be any ways lawful to carry them afterwards to any ports belonging to the enemy. The two contracting parties agree, that the term of two months being passed after the declaration of war, their respective subjects, from whatever part of the world they come, shall not plead the ignorance mentioned in this article.

ARTICLE XV

And that more effectual care may be taken for the security of the subjects and inhabitants of both parties, that they suffer no injury by the men-of-war or privateers of the other party, all the commanders of the ships of His Most Christian Majesty and of the said United States, and all their subjects and inhabitants, shall be forbid doing any injury or damage to the other side; and if they act to the contrary, they shall be punished, and shall moreover be bound to make satisfaction for all matter of damage, and the interest thereof, by reparation, under the pain and obligation of their person and goods.

ARTICLE XVI

All ships and merchandizes, of what nature soever, which shall be

delai à leurs propriétaires, qui les reclameront; bien entendu néanmoins qu'il ne soit pas permis de portee dans les ports ennemis les marchandises qui seront de contrebande. Les deux parties contractantes conviennent que le terme de deux mois, passés depuis la déclaration de guerre, leurs sujets respectifs, de quelque partie du monde qu'ils viennent ne pourront plus alléguer l'ignorance dont il est question dans le présent article.

ARTICLE XV

Et afin de pourvoir plus efficacement à la sûreté des sujets des deux parties contractantes, pour qu'il ne leur soit fait aucun préjudice par les vaisseaux de guerre de l'autre partie ou par des armateurs particuliers, il sera fait défense à tous capitaines des vaisseaux de sa Majesté très Chretienne et des dits Etats Unis, et à tous leurs sujets de faire aucun dommage ou insulte à ceux de l'autre partie, et au cas où ils y contreviendroient, ils en seront punis; et, de plus, ils seront tenus et obligés en leurs personnes et en leurs biens de réparer tous les dommages et intérêts.

ARTICLE XVI

Tous vaisseaux et marchandises de quelque nature que ce puisse

rescued out of the hands of any pirates or robbers on the high seas, shall be brought into some port of either State, and shall be delivered to the custody of the officers of that port, in order to be restored entire to the true proprietor, as soon as due and sufficient proof shall be made concerning the property thereof.

ARTICLE XVII

It shall be lawful for the ships of war of either party, and privateers, freely to carry whithersoever they please the ships and goods taken from their enemies, without being obliged to pay any duty to the officers of the admiralty or any other judges; nor shall such prizes be arrested or seized when they come to and enter the ports of either party; nor shall the searchers or other officers of those places search the same, or make examination concerning the lawfulness of such prizes, but they may hoist sail at any time, and depart and carry their prizes to the places expressed in their commissions, which the commanders of such ships of war shall be obliged to show; on the contrary, no shelter or refuge shall be given in their ports to such as shall have made prize of the subjects, people or property of either of the parties;

être, lors qu'ils auront été enlevés des mains de quelques pirates en pleine mer, seront amenés dans quelque port de l'un des deux Etats, et seront remis à la garde des officiers du dit port àfin d'être rendus, en entier, a leur veritable propriétaire, aussitôt qu'il aura düement et sufisament fait conster de sa propriété.

ARTICLE XVII

Les vaisseaux de guerre de sa Majesté très Chretienne et ceux des Etats Unis, de même que ceux que leurs sujets auront armés en guerre, pourront, en toute liberté, conduire où bon leur semblera les prises qu'ils auront faites sur leurs ennemis, sans être obligés à aucuns droits, soit des sieurs amiraux ou de l'amirauté où d'aucuns autres, sans qu'aussi les dits vaisseaux ou les d^e^. prises, entrant dans les havres ou ports de sa Majesté très Chretienne ou des dits Etats Unis, puissent être arrêtés ou saisis, ni que les officiers des lieux puissent prendre connoissance de la validité des d^e^. prises, les quelles pourront sortir et être conduites franchement et en toute liberté, aux lieux portés par les commissions dont les capitaines des dits vaisseaux seront obligés de faire aparoir. Et au contraire, ne sera donné asile ni retraite dans leurs ports ou havres

but if such shall come in, being forced by stress of weather, or the danger of the sea, all proper means shall be vigorously used that they go out and retire from thence as soon as possible.

ARTICLE XVIII

If any ship belonging to either of the parties, their people or subjects, shall, within the coasts or dominions of the other, stick upon the sands, or be wrecked, or suffer any other damage, all friendly assistance and relief shall be given to the persons shipwrecked, or such as shall be in danger thereof. And letters of safe conduct shall likewise be given to them for their free and quiet passage from thence and the return of every one to his own country.

ARTICLE XIX

In case the subjects and inhabitants of either party, with their shipping, whether publick and of war, or private and of merchants, be forced, through stress of weather, pursuit of pirates or enemies, or any other urgent necessity for seeking of shelter and harbour, to retreat and enter into any of the rivers, bays, roads, or ports belonging to the other party, they shall be received and treated with all humanity and kindness,

à ceux qui auront fait des prises sur les sujets de sa Majesté ou des dits Etats Unis; et s'ils sont forcés d'y entrer par tempête ou peril de la mer, on les fera sortir le plustôt qu'il sera possible.

ARTICLE XVIII

Dans le cas où un vaisseau apartenant à l'un des deux Etats ou à leurs sujets, aura échoué, fait naufrage ou souffert quelqu' autre dommage sur les côtes ou sous la domination de l'une des deux parties, il sera donné toute aide et assistance amiable aux personnes naufragées ou qui se trouvent en danger, et il leur sera accordé des sauf conduits pour assûrer leur passage et leur retour dans leur patrie.

ARTICLE XIX

Lorsque les sujets et habitans de l'une des deux parties avec leurs vaisseaux soit publics et de guerre, soit particuliers et marchands, seront forcés par une tempête, par la poursuite des pirates et des ennemis, ou par quelqu' autre nécessité urgente, de chercher refuge et un abri, de se retirer et entrer dans quelqu' une des rivières, bayes, rades ou ports de l'une des deux parties, ils seront reçus et traités avec huma-

and enjoy all friendly protection and help; and they shall be permitted to refresh and provide themselves, at reasonable rates, with victuals and all things needful for the sustenance of their persons or reparation of their ships, and conveniency of their voyage; and they shall no ways be detained or hindered from returning out of the said ports or roads, but may remove and depart when and whither they please, without any let or hindrance.

nité, et jouiront de toute amitié, protection et assistance, et il leur sera permis de se pourvoir de raffraichissemens, de vivres, et de toutes choses nécessaires pour leur subsistance, pour la reparation de leurs vaisseaux, et pour continüer leur voïage; le tout moïennant un prix raisonable, et ils ne seront retenus en aucune manière, ni empêchés de sortir des dits ports ou rades, mais pourront se retirer et partir quand, et comme il leur plaira, sans aucun obstacle ni empêchement.

Article XX

For the better promoting of commerce on both sides, it is agreed that if a war shall break out between the said two nations, six months after the proclamation of war shall be allowed to the merchants in the cities and towns where they live for selling and transporting their goods and merchandizes; and if any thing be taken from them, or any injury be done them within that term by either party, or the people or subjects of either, full satisfaction shall be made for the same.

Article XX

Afin de promouvoir d'autant mieux le commerce de deux côtés, il est convenu que dans le cas où la guerre surviendroit entre les deux nations susdites, il sera accordé six mois, après la déclaration de guerre, aux marchands dans les villes et cités qu'ils habitent, pour rassembler et transporter les marchandises: et s'il en est enlevé quelque chose ou s'il leur a été fait quelqu' injure durant le terme préscrit ci-dessus, par l'une des deux parties, leurs peuples ou sujets, il leur sera donné à cet égard pleine et entière satisfaction.

Article XXI

No subjects of the Most Christian King shall apply for or take any commission, or letters of

Article XXI

Aucun sujet du Roi très Chretien ne prendra de commission ou de lettres de marque, pour armer

marque, for arming any ship or ships to act as privateers against the said United States, or any of them, or against the subjects, people or inhabitants of the said United States, or any of them, or against the property of any of the inhabitants of any of them, from any Prince or State with which the said United States shall be at war; nor shall any citizen, subject, or inhabitant of the said United States, or any of them, apply for or take any commission or letters of marque for arming any ship or ships to act as privateers against the subjects of the Most Christian King, or any of them, or the property of any of them, from any Prince or State with which the said King shall be at war; and if any person of either nation shall take such commissions or letters of marque, he shall be punished as a pirate.

quelque vaisseau ou vaisseaux à l'effet d'agir comme corsaires contre les dits Etats Unis ou quelques uns d'entr' eux, ou contre les sujets, peuples ou habitans d'iceux, ou contre leur propriété ou celle des habitans d'aucun d'entr' eux, de quelque prince que ce soit avec lequel les dits Etats Unis seront en guerre. De même aucun citoïen, sujet, ou habitant des susdits Etats Unis et de quelqu' un d'entr' eux, ne demandera ni n'acceptera aucune commission ou lettres de marque, pour armer quelque vaisseau, ou vaisseaux pour courre sus aux sujets de sa Majesté très Chretienne, ou quelques uns d'entre eux ou leur propriété, de quelque prince ou etat que ce soit avec qui sa d^e^. Majesté se trouvera en guerre; et si quelqu' un de l'une ou de l'autre nation prenoit de pareilles commissions ou lettres de marque, il sera puni comme pirate.

Article XXII

It shall not be lawful for any foreign privateers, not belonging to subjects of the Most Christian King nor citizens of the said United States, who have commissions from any other Prince or State in enmity with either nation, to fit their ships in the ports of either the one or the other of the aforesaid parties, to sell what they have

Article XXII

Il ne sera permis à aucun corsaire étranger non apartenant à quelque sujet de sa Majesté très Chretienne ou à un citoïen des dits Etats Unis, lequel aura une commission de la part d'un prince ou d'une puissance en guerre avec l'une des deux nations, d'armer leurs vaisseaux dans les ports de l'une des deux parties, ni d'y ven-

taken, or in any other manner whatsoever to exchange their ships, merchandizes or any other lading; neither shall they be allowed even to purchase victuals, except such as shall be necessary for their going to the next port of that Prince or State from which they have commissions.

dre les prises qu'il aura faites, ni décharger en autre manière quelconque les vaisseaux, marchandises ou aucune partie de leur cargaison; il ne sera même pas permis d'acheter d'autres vivres que ceux qui lui seront nécessaires pour se rendre dans le port le plus voisin du prince ou de l'etat dont il tient sa commission.

Article XXIII

It shall be lawful for all and singular the subjects of the Most Christian King, and the citizens, people and inhabitants of the said United States, to sail with their ships with all manner of liberty and security, no distinction being made who are the proprietors of the merchandizes laden thereon, from any port to the places of those who now are or hereafter shall be at enmity with the Most Christian King or the United States. It shall likewise be lawful for the subjects and inhabitants aforesaid to sail with the ships and merchandizes aforementioned, and to trade with the same liberty and security from the places, ports and havens of those who are enemies of both or either party, without any opposition or disturbance whatsoever, not only directly from the places of the enemy aforementioned to neutral places, but also from one place

Article XXIII

Il sera permis à tous et un chacun des sujets du Roi très Chretien et aux citoïens, peuple et habitans des susdits Etats Unis, de naviguer avec leurs batimens avec toute liberté et sûreté, sans qu'il puisse être fait d'exception à cet égard, à raison des propriétaires des marchandises chargées sur les dits batimens venant de quelque port que ce soit, et destinés pour quelque place d'une puissance actuellement ennemie, ou qui pourra l'être dans la suite de sa Majesté très Chretienne ou des Etats Unis. Il sera permis également aux sujets et habitans sus mentionnés de naviguer avec leurs vaisseaux et marchandises et de frequenter avec la même liberté et sûreté, les places, ports, et havres des puissances ennemies des deux parties contractantes ou d'une d'entre elles, sans opposition ni trouble, et de faire le commerce non seulement directement des

belonging to an enemy to another place belonging to an enemy, whether they be under the jurisdiction of the same Prince or under several. And it is hereby stipulated that free ships shall also give a freedom to goods, and that everything shall be deemed to be free and exempt which shall be found on board the ships belonging to the subjects of either of the confederates, although the whole lading or any part thereof should appertain to the enemies of either, contraband goods being always excepted. It is also agreed in like manner that the same liberty be extended to persons who are on board a free ship, with this effect, that although they be enemies to both or either party, they are not to be taken out of that free ship, unless they are soldiers and in actual service of the enemies.

ARTICLE XXIV

This liberty of navigation and commerce shall extend to all kinds of merchandizes, excepting those only which are distinguished by the name of contraband; and under this name of contraband or prohibited goods shall be comprehended arms, great guns, bombs with the fuzes, and other things

ports de l'ennemi susdit à un port neutre, mais aussi d'un port ennemi à un autre port ennemi, soit qu'il se trouve sous sa jurisdiction ou sous celle de plusieurs; et il est stipulé par le present traité que les batimens libres assûreront également la liberté des marchandises, et qu'on jugera libres toutes les choses qui se trouveront àbord des navires apartenants aux sujets d'une des parties contractantes, quand même le chargement ou partie d'icelui apartiendroit aux ennemis de l'une des deux; bien entendu néanmoins que la contrebande sera toujours exceptée. Il est également convenu que cette même liberté s'étendroit aux personnes qui pourroient se trouver àbord du batiment libre, quand même elles seroient ennemies de l'une des deux parties contractantes, et elles ne pourront être enlevées des dits navires, à moins qu'elles ne soient militaires et actuellement au service de l'ennemi.

ARTICLE XXIV

Cette liberté de navigation et de commerce doit s'étendre sur toutes sortes de marchandises, à l'exception seulement de celles qui sont designées sous le nom de contrebande: Sous ce nom de contrebande ou de marchandises prohibées, doivent être compris les armes, canons, bombes avec leurs

belonging to them, cannon-ball, gunpowder, match, pikes, swords, lances, spears, halberds, mortars, petards, granades, saltpetre, muskets, musket-ball, bucklers, helmets, breast-plates, coats of mail, and the like kinds of arms proper for arming soldiers, musket-rests, belts, horses with their furniture, and all other warlike instruments whatever. These merchandizes which follow shall not be reckoned among contraband or prohibited goods; that is to say, all sorts of cloths, and all other manufactures woven of any wool, flax, silk, cotton, or any other materials whatever; all kinds of wearing apparel, together with the species whereof they are used to be made; gold and silver, as well coined as uncoined, tin, iron, latten, copper, brass, coals; as also wheat and barley, and any other kind of corn and pulse; tobacco, and likewise all manner of spices; salted and smoked flesh, salted fish, cheese and butter, beer, oils, wines, sugars, and all sorts of salts; and in general all provisions which serve for the nourishment of mankind and the sustenance of life; furthermore, all kinds of cotton, hemp, flax, tar, pitch, ropes, cables, sails, sail-cloths, anchors and any parts of anchors, also ships' masts, planks, boards and beams of what trees soever; and all other things

fusées et autres choses y relatives, boulets, poudre à tirer, méches, piques, epées, lances, dards, hallebardes, mortiers, petards, grenades, salpêtre, fusils, balles, boucliers, casques, cuirasses, cote de mailles, et autres armes de cette espèce, propres à armer les soldats, porte-mousqueton, baudriers, chevaux avec leurs equipages, et tous autres instrumens de guerre quelconques. Les marchandises dénommées ci-après ne seront pas comprises parmi la contrebande ou choses prohibées, savoir: toutes sortes de draps et toutes autres étoffes de laine, lin, soye, coton ou d'autres matieres quelconques; toutes sortes de vétemens avec les étoffes dont on a coutume de les faire, l'or et l'argent monnoïe ou non, l'étain, le fer, laiton, cuivre, airain, charbons, de même que le froment et l'orge, et toute autre sorte de bleds et légumes; le tabac et toutes les sortes d'épiceries, la viande salée et fumée, poisson sallé, fromage et beurre, bierre, huiles, vins, sucres, et toute espece de sel, et en général toutes provisions servant pour la nourriture de l'homme et pour le soutien de la vie. De plus, toutes sortes de coton, de chanvre, lin, goudron, poix, cordes, cables, voiles, toiles à voiles, ancres, parties d'ancres, mats, planches, madriers, et bois de toute espèce, et toutes autres choses propres à la construction et

proper either for building or repairing ships, and all other goods whatever which have not been worked into the form of any instrument or thing prepared for war by land or by sea, shall not be reputed contraband, much less such as have been already wrought and made up for any other use; all which shall be wholly reckoned among free goods; as likewise all other merchandizes and things which are not comprehended and particularly mentioned in the foregoing enumeration of contraband goods; so that they may be transported and carried in the freest manner by the subjects of both confederates, even to places belonging to an enemy, such towns or places being only excepted as are at that time besieged, blocked up, or invested.

réparation des vaisseaux, et autres matieres quelconques qui n'ont pas la forme d'un instrument préparé pour la guerre par terre comme par mer, ne seront pas reputées contrebande, et encore moins celles qui sont déjà preparées pour quelqu' autre usage: Toutes les choses dénommées cidessus, doivent être comprises parmi les marchandises libres, de même que toutes les autres marchandises et effets qui ne sont pas compris et particulierèment nommés dans l'énumeration des marchandises de contrebande; de manière qu'elles pourront être transportées et conduites de la manière la plus libre, par les sujets des deux parties contractantes, dans des places ennemies, à l'exception néanmoins de celles qui se trouveroient actuellement assiégées, bloquées ou investies.

Article XXV

To the end that all manner of dissentions and quarrels may be avoided and prevented, on one side and the other, it is agreed that in case either of the parties hereto should be engaged in war, the ships and vessels belonging to the subjects or people of the other ally must be furnished with sea-letters or passports, expressing the name, property and bulk of the ship, as also the name and place of habitation of the master

Article XXV

Afin d'écarter et de prévenir de part et d'autre toutes discussions et querelles, il a été convenu que dans le cas où l'une des deux parties se trouveroit engagée dans une guerre, les vaisseaux et batimens apartenans aux sujets ou peuple de l'autre allié, devront être pourvus de lettres de mer ou passeports, les quels exprimeront le nom, la propriété et le port du navire, ainsi que le nom et la demeure du maitre ou commandant

or commander of the said ship, that it may appear thereby that the ship really and truely belongs to the subjects of one of the parties, which passport shall be made out and granted according to the form annexed to this treaty; they shall likewise be recalled every year, that is, if the ship happens to return home within the space of a year. It is likewise agreed that such ships being laden are to be provided not only with passports as above mentioned, but also with certificates, containing the several particulars of the cargo, the place whence the ship sailed, and whither she is bound, that so it may be known whether any forbidden or contraband goods be on board the same; which certificates shall be made out by the officers of the place whence the ship set sail, in the accustomed form; and if any one shall think it fit or advisable to express in the said certificates the person to whom the goods on board belong, he may freely do so.

du dit vaisseau, àfin qu'il aparoisse par là que le même vaisseau apartient réellement et véritablement aux sujets de l'une des deux parties contractantes; lequel passeport devra être expédié selon le modèle annexé au present traité. Ces passeports devront également être renouvellés chaque année, dans le cas ou le vaisseau retourne chez lui dans l'espace d'une année. Il a été convenu également que les vaisseaux susmentionnés, dans le cas où ils seroient chargés, devront être pourvus non seulement de passeports, mais aussi de certificats, contenant le détail de la cargaison, le lieu d'où le vaisseau est parti, et la déclaration des marchandises de contrebande qui pourroient se trouver àbord; lesquels certificats devront être expédiés dans la forme accoutumée par les officiers du lieu d'où le vaisseau aura fait voile: et s'il étoit jugé utile ou prudent d'exprimer dans les dits passeports, la personne à laquelle les marchandises apartiennent, on pourra le faire librement.

Article XXVI

The ships of the subjects and inhabitants of either of the parties coming upon any coasts belonging to either of the said allies, but not willing to enter into port, or being entered into port and not willing to unload their cargoes or

Article XXVI

Dans le cas ou les vaisseaux des sujets et habitans de l'une des deux parties contractantes aprocheroient des côtes de l'autre, sans cependant avoir le dessein d'entrer dans le port, ou après être entré, sans avoir le dessein de décharger

break bulk, they shall be treated according to the general rules prescribed or to be prescribed relative to the object in question.

ARTICLE XXVII

If the ships of the said subjects, people or inhabitants of either of the parties shall be met with, either sailing along the coasts or on the high seas, by any ship of war of the other, or by any privateers, the said ships of war or privateers, for the avoiding of any disorder, shall remain out of cannon-shot, and may send their boats aboard the merchant ship which they shall so meet with, and may enter her to number of two or three men only, to whom the master or commander of such ship or vessel shall exhibit his passport concerning the property of the ship, made out according to the form inserted in this present treaty, and the ship, when she shall have showed such passport, shall be free and at liberty to pursue her voyage, so as it shall not be lawful to molest or search her in any manner, or to give her chase or force her to quit her intended course.

ARTICLE XXVIII

It is also agreed that all goods, when once put on board the ships

la cargaison, ou rompre leur charge, on se conduira à leur égard suivant les réglemens généraux préscrits ou à prescrire relativement à l'objet dont il est question.

ARTICLE XXVII

Losqu'un batiment apartenant aux dits sujets, peuple et habitans de l'une des deux parties, sera rencontré navigant le long des côtes ou en pleine mer, par un vaisseau de guerre de l'autre, ou par un armateur, le dit vaisseau de guerre, ou armateur, àfin d'éviter tout désordre, se tiendra hors de la portée du canon, et pourra envoïer sa chaloupe àbord du batiment marchand, et y faire entrer deux ou trois hommes, aux quels le maitre ou commandant du batiment montrera son passeport, le quel devra être conforme à la formule annexeé au present traité, et constatera la propriété du batiment: et après que le dit batiment aura exhibé un pareil passeport, il lui sera libre de continüer son voïage, et il ne sera pas permis de le molester, ni de chercher en aucune manière, de lui donner la chasse, ou de le forcer de quiter la course qu'il s'étoit proposée.

ARTICLE XXVIII

Il est convenu que lorsque les marchandises auront été chargées

or vessels of either of the two contracting parties, shall be subject to no farther visitation; but all visitation or search shall be made beforehand, and all prohibited goods shall be stopped on the spot, before the same be put on board, unless there are manifest tokens or proofs of fraudulent practice; nor shall either the persons or goods of the subjects of His Most Christian Majesty or the United States be put under any arrest or molested by any other kind of embargo for that cause; and only the subject of that State to whom the said goods have been or shall be prohibited, and who shall presume to sell or alienate such sort of goods, shall be duly punished for the offence.

ARTICLE XXIX

The two contracting parties grant mutually the liberty of having each in the ports of the other Consuls, Vice-Consuls, agents, and commissaries, whose functions shall be regulated by a particular agreement.

ARTICLE XXX

And the more to favour and facilitate the commerce which the subjects of the United States may have with France, the Most Chris-

sur les vaisseaux ou batimens de l'une des deux parties contractantes, elles ne pourront plus être assujeties à aucune visite; toute visite et recherche devant être faite avant le chargement, et les marchandises prohibées devant être arrêtées et saisies sur la plage avant de pouvoir être embarquées, à moins qu'on n'ait des indices manifestes ou des preuves de versements frauduleux. De même aucun des sujets de sa Majesté très Chrêtienne ou des Etats Unis, ni leurs marchandises, ne pourront être arrêtés ni molestés pour cette cause, par aucune espèce d'embargo; et les seuls sujets de l'etat, auxquels les d^e^. marchandises auront été prohibées, et qui se seront emancipés à vendre et aliéner de pareilles marchandises, seront düement punis pour cette contravention.

ARTICLE XXIX

Les deux parties contractantes se sont accordées mutuellement la faculté de tenir dans leurs ports respectifs, des consuls, vice-consuls, agents et commissaires, dont les fonctions seront reglées par une convention particulière.

ARTICLE XXX

Pour d'autant plus favoriser et faciliter le commerce que les sujets des Etats Unis feront avec la France, le Roi très Chretien leur

tian King will grant them in Europe one or more free ports, where they may bring and dispose of all the produce and merchandize of the thirteen United States; and His Majesty will also continue to the subjects of the said States the free ports which have been and are open in the French islands of America; of all which free ports the said subjects of the United States shall enjoy the use, agreeable to the regulations which relate to them.

ARTICLE XXXI

The present treaty shall be ratified on both sides, and the ratifications shall be exchanged in the space of six months, or sooner if possible.

In faith whereof the respective Plenipotentiaries have signed the above articles, both in the French and English languages, declaring, nevertheless, that the present treaty was originally composed and concluded in the French language, and they have thereto affixed their seals.

Done at Paris this sixth day of February, one thousand seven hundred and seventy-eight.

C. A. GERARD. [L. S.]
B. FRANKLIN. [L. S.]
SILAS DEANE, [L. S.]
ARTHUR LEE. [L. S.]

accordera en Europe un ou plusieurs ports Francs dans lesquels ils pourront amener et débiter toutes les denrées et marchandises provenant des treize Etats Unis; sa Majesté conservera d'un autre côté, aux sujets des dits Etats, les ports Francs qui ont été, et sont ouverts dans les isles Françoises de l'Amerique. De tous les quels ports Francs les dits sujets des Etats Unis jouiront conformement aux règlemens qui en déterminent l'usage.

ARTICLE XXXI

Le present traité sera ratifié de part et d'autre, et les ratifications seront echangées dans l'espace de six mois ou plustôt si faire se peut.

In foi de quoi les Plenipotentiaires respectifs ont signé les articles ci-dessus, tant en langue Françoise qu'en langue Angloise, déclarant néanmoins que le present traité a été originairement redigé et arrêté en langue Françoise; et ils y ont apposé le cachet de leurs armes.

Fait à Paris, le sixieme jour du mois de Fevrier, mil sept cent soixante dix-huit.

C. A. GERARD. [L. S.]
B. FRANKLIN. [L. S.]
SILAS DEANE, [L. S.]
ARTHUR LEE. [L. S.]

Treaty of Alliance, February 6, 1778[1]

Concluded February 6, 1778; Ratified by the Continental Congress May 4, 1778; Ratifications exchanged at Paris July 17, 1778

The Most Christian King and the United States of North America, to wit: New Hampshire, Massachusetts Bay, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, having this day concluded a treaty of amity and commerce, for the reciprocal advantage of their subjects and citizens, have thought it necessary to take into consideration the means of strengthening those engagements, and of rendering them useful to the safety and tranquillity of the two parties; particularly in case Great Britain, in resentment of that connection and of the good correspondence which is the object of the said treaty, should break the peace with France, either by direct hostilities, or by hindering her commerce and navigation in a manner contrary to the rights of nations, and the peace subsisting between the two Crowns. And His Majesty and the said United States, having resolved in that case to join their councels and efforts against the enterprises of their common enemy, the respective

Le Roi très Chrétien et les Etats Unis de l'Amerique Septentrionale, favoir, New-Hampshire, la Baye de Massachuset, Rhode-Island, Connecticut, New-York, New-Jersey, Pensylvania, Delaware, Maryland, Virginie, Caroline Septentrionale, Caroline Meridionale, et Georgia; ayant conclu ce jourd'huy un traité d'amitié, de bonne intelligence et de commerce, pour l'avantage réciproque de leurs sujets et citoyens, ils ont cru devoir prendre en considération, les moyens de refferrer leurs liaisons, et de les rendre utiles à la sureté et à la tranquilité des deux parties, notament dans le cas où la Grande Bretagne, en haine de ces mêmes liaisons et de la bonne correspondance qui forment l'objet du dit traité, se porteroit à rompre la paix avec la France, soit en l'attaquant hostilement, soit en troublant son commerce, et sa navigation, d'une maniere contraire au droit des gens et à la paix subsistante entre les deux couronnes: Et sa Majesté et les dits Etats Unis ayant résolu éventuellement d'unir, dans le cas prévû, leurs conseils et leurs efforts contre les entreprises de leur en-

[1] 8 Stat. L. 6; 18 Stat. L. pt. 2, p. 201; Treaties and Conventions, 1889, p. 307.

Plenipotentiaries impowered to concert the clauses and conditions proper to fulfil the said intentions, have, after the most mature deliberation, concluded and determined on the following articles:

ARTICLE I

If war should break out between France and Great Britain during the continuance of the present war between the United States and England, His Majesty and the said United States shall make it a common cause and aid each other mutually with their good offices, their counsels and their forces, according to the exigence of conjunctures, as becomes good and faithful allies.

ARTICLE II

The essential and direct end of the present defensive alliance is to maintain effectually the liberty, sovereigntys, and independance absolute and unlimited, of the said United States, as well in matters of government as of commerce.

ARTICLE III

The two contracting parties shall each on its own part, and in the manner it may judge most proper, make all the efforts in its power against their common enemi commun, les plenipotentiaires respectifs, chargés de concerter les clauses et conditions propres à remplir leurs intentions, ont, après la plus mure délibération conclu et arresté les points et articles qui s'ensuivent.

ARTICLE I

Si la guerre éclate entre la France et la Grande Brétagne, pendant la durée de la guerre actuelle entre les Etats Unis et l'Angleterre, sa Majesté et les dits Etats Unis seront cause commune et s'entr'aideront mutuellement de leurs bons offices, de leurs conseils et de leurs forces, selon l'exigence des conjonctures, ainsy qu'il convient à de bons et fideles alliés.

ARTICLE II

Le but essentiel et direct de la présente alliance deffensive, est de maintenir efficacement la liberte, la souveraineté, et l'indépendance absolue et illimitée des dits Etats Unis, tant en matière politique que de commerce.

ARTICLE III

Les deux parties contractantes feront chacune de leur côté, et de la maniére qu'elles jugeront plus convenable, tous les efforts, qui seront en leur pouvoir, contre

my, in order to attain the end proposed.

ARTICLE IV

The contracting parties agree that in case either of them should form any particular enterprise in which the concurrence of the other may be desired, the party whose concurrence is desired, shall readily, and with good faith, join to act in concert for that purpose, as far as circumstances and its own particular situation will permit; and in that case, they shall regulate, by a particular convention, the quantity and kind of succour to be furnished, and the time and manner of its being brought into action, as well as the advantages which are to be its compensation.

ARTICLE V

If the United States should think fit to attempt the reduction of the British power, remaining in the northern parts of America, or the islands of Bermudas, those countries or islands, in case of success, shall be confederated with or dependant upon the said United States.

ARTICLE VI

The Most Christian King renounces forever the possession of the islands of Bermudas, as well as of any part of the continent of

leur ennemi commun, afin d'atteindre au but qu'elles se proposent.

ARTICLE IV

Les parties contractantes sont convenues que dans le cas où l'une d'entre elles formeroit quelqu' entreprise particuliére, pour laquelle elle désireroit le concours de l'autre, celle-ci, se prêteroit de bonne foi à un concert sur cet objet, autant que les circonstances et sa propre situation pourront le lui permettre, et dans ce cas, on réglera, par une convention particuliére, la portée des secours à fournir, et le tems et la maniére de le faire agir, ainsy que les avantages destinés à en former la compensation.

ARTICLE V

Si les Etats Unis jugent à propos de tenter la reduction des isles Bermudes et des parties septentrionales de l'Amerique, qui sont encore au pouvoir de la Grande Bretagne, les dites isles et contrées, en cas de succès, entreront dans la confedération ou seront dépendantes des dits Etats Unis.

ARTICLE VI

Le Roi très Chrétien renonce à posseder jamais les Bermudes, ni aucune des parties du continent de l'Amérique septentrionale, qui,

North America, which before the treaty of Paris in 1763, or in virtue of that treaty, were acknowledged to belong to the Crown of Great Britain, or to the United States, heretofore called British Colonies, or which are at this time, or have lately been under the power of the King and Crown of Great Britain.

ARTICLE VII

If His Most Christian Majesty shall think proper to attack any of the islands situated in the Gulph of Mexico, or near that Gulph, which are at present under the power of Great Britain, all the said isles, in case of success, shall appertain to the Crown of France.

ARTICLE VIII

Neither of the two parties shall conclude either truce or peace with Great Britain without the formal consent of the other first obtained; and they mutually engage not to lay down their arms until the independence of the United States shall have been formally or tacitly assured by the treaty or treaties that shall terminate the war.

ARTICLE IX

The contracting parties declare, that being resolved to fulfil each

avant le traité de Paris de mil sept cent soixante trois, ou en vertu de ce traité, ont êté reconnuës appartenir à la couronne de la Grande Bretagne, ou aux Etats Unis, qu'on appelloit ci-devant colonies Britanniques, ou qui sont maintenant, ou ont êté récemment sous la jurisdiction et sous le pouvoir de la couronne de la Grande Bretagne.

ARTICLE VII

Si sa Majesté très Chrétienne juge à propos d'attaquer aucune des isles situées dans le golphe de Méxique ou près du dit golphe, qui sont actuellement au pouvoir de la Grande Bretagne, toutes les dites isles, en cas de succès, appartiendront à la couronne de France.

ARTICLE VIII

Aucune des deux parties ne pourra conclure ni treve ni paix avec la Grande Brétagne, sans le consentement préalable et formel de l'autre partie, et elles s'engagent mutuellement à ne mettre bas les armes, que lorsque l'indépendance des dits Etats Unis aura êté assurée formellement ou tacitement par le traité ou les traités qui termineront la guerre.

ARTICLE IX

Les parties contractantes déclarent, qu'etant resolues de rem-

on its own part the clauses and conditions of the present treaty of alliance, according to its own power and circumstances, there shall be no after claim of compensation on one side or the other, whatever may be the event of the war.

ARTICLE X

The Most Christian King and the United States agree to invite or admit other powers who may have received injuries from England, to make common cause with them, and to accede to the present alliance, under such conditions as shall be freely agreed to and settled between all the parties.

ARTICLE XI

The two parties guarantee mutually from the present time and forever against all other powers, to wit: The United States to His Most Christian Majesty, the present possessions of the Crown of France in America, as well as those which it may acquire by the future treaty of peace: And His Most Christian Majesty guarantees on his part to the United States their liberty, sovereignty and independence, absolute and unlimited, as well in matters of government as commerce, and also their possessions, and the ad-

plir chacune de son côté les clauses et conditions du présent traité d'alliance selon son pouvoir et les circonstances, elles n'auront aucune repetition, ni aucun dedommagement, à se demander réciproquement, quelque puisse etre l'evenement de la guerre.

ARTICLE X

Le Roi très Chretien et les Etats Unis sont convenus d'inviter de concert ou d'admettre les puissances, qui auront des griefs contre l'Angleterre, à faire cause commune avec eux, et à accéder à la présente alliance, sous les conditions qui seront librement agrées et convenuës entre toutes les partiès.

ARTICLE XI

Les deux parties se garantissent mutuellement dès à present et pour toujours envers et contre tous, savoir, les Etats Unis à sa Majesté très Chrétienne les possessions actuelles de la couronne de France en Amérique, ainsy que celles qu'elle pourra acquérir par le futur traité de paix; Et sa Majesté très Chretienne, garantit de son côté aux Etats Unis leur liberté, leur souveraineté et leur indépendance absolue et illimitée, tant en matiére de politique que de commerce, ainsy que leurs possessions et les accroissements ou

ditions or conquests that their confederation may obtain during the war, from any of the dominions now, or heretofore possessed by Great Britain in North America, conformable to the 5th and 6th articles above written, the whole as their possessions shall be fixed and assured to the said States, at the moment of the cessation of their present war with England.

conquêtes que leur confédération pourra se procurer pendant la guerre, d'aucun des domaines maintenant ou ci-devant possedés par la Grande Bretagne dans l'Amérique septentrionale, conformément aux articles cinq et six ci-dessus, et tout ainsy que leurs possessions seront fixées et assurées aux dits Etats, au moment de la cessation de leur guerre actuelle contre l'Angleterre.

Article XII

In order to fix more precisely the sense and application of the preceding article, the contracting parties declare, that in case of a rupture between France and England the reciprocal guarantee declared in the said article shall have its full force and effect the moment such war shall break out; and if such rupture shall not take place, the mutual obligations of the said guarantee shall not commence until the moment of the cessation of the present war between the United States and England shall have ascertained their possessions.

Article XII

Afin de fixer plus précisément le sens et l'application de l'article précédent, les parties contractantes déclarent qu'en cas de rupture entre la France et l'Angleterre, la garantie réciproque enoncée dans le susdit article, aura toute sa force et valeur du moment où la guerre éclatera, et si la rupture n'avoit pas lieu, les obligations mutuelles de la ditte garantie, ne commenceroient, que du moment susdit, où la cessation de la guerre actuelle entre les Etats Unis et l'Angleterre aura fixé leurs possessions.

Article XIII

The present treaty shall be ratified on both sides, and the ratifications shall be exchanged in the space of six months, or sooner if possible.

Article XIII

Le present traité sera ratiffié de part et d'autre et les ratiffications seront échangées dans l'espace de six mois ou plustôt si faire se peut.

In faith whereof the respective Plenipotentiaries, to wit: On the part of the Most Christian King, Conrad Alexander Gerard, Royal Syndic of the city of Strasbourgh, and Secretary of his Majesty's Council of State; and on the part of the United States, Benjamin Franklin, Deputy to the General Congress from the State of Pennsylvania, and President of the Convention of the same State, Silas Deane, heretofore Deputy from the State of Connecticut, and Arthur Lee, Councellor at Law, have signed the above articles both in the French and English languages, declaring, nevertheless, that the present treaty was originally composed and concluded in the French language, and they have hereunto affixed their seals.

Done at Paris, this sixth day of February, one thousand seven hundred and seventy-eight.

C. A. Gerard. [L. S.]
B. Franklin. [L. S.]
Silas Deane, [L. S.]
Arthur Lee. [L. S.]

En foi de quoi les plenipotentiaires respectifs, savoir, de la part du Roi très Chretien le S^r^. Conrad, Alexandre Gerard, Sindic Royal de la Ville de Strasbourg et Sécrétaire du Conseil d'Etat de sa Majesté, et de la part des Etats Unis les S^rs^. Benjamin Franklin, Deputé au Congrès Général de la part de l'etat de Pensylvanie et President de la Convention du meme etat; Siles Deane cy-devant Député de l'etat de Connecticut, et Arthur Leé *Conseiller ès Loix,* ont signé les articles ci-dessus, tant en langue Françoise qu'en langue Angloise, déclarant néanmoins, que le present traité, a été originairement redigé et arrêté en langue Françoise, et ils les ont munis du cachet de leurs armes.

Fait à Paris, le sixieme jour du mois de Fevrier, mil sept cent soixante dix-huit.

C. A. Gerard. [L. S.]
B. Franklin. [L. S.]
Silas Deane, [L. S.]
Arthur Lee. [L. S.]

Convention Defining and Establishing the Functions and Privileges of Consuls and Vice-Consuls[1]

Concluded November 14, 1788; Ratifications exchanged at Paris January 6, 1790; although the certificate of exchange was dated January 1, 1790

His Majesty the Most Christian King, and the United States of America, having, by the twenty-ninth article of the treaty of amity and commerce concluded between them, mutually granted the liberty of having in their respective States and ports, Consuls, Vice-Consuls, agents and commissaries, and being willing, in consequence thereof, to define and establish, in a reciprocal and permanent manner, the functions and privileges of Consuls and Vice-Consuls, which they have judged it convenient to establish of preference, His Most Christian Majesty has nominated the Sieur Count of Montmorin, of St. Herent, Marechal of his Camps and Armies, Knight of his Orders and of the Golden Fleece, his Counsellor in all his Councils, Minister and Secretary of State, and of his Commandments and Finances, having the Department of Foreign Affairs; and the United States have nominated the Sieur Thomas Jefferson, citizen of the United States of America, and their Minister Plenipotentiary near the King; who, after having

Sa Majesté le Roi très Chrétien, et les Etats Unis de l'Amérique, s'étant accordés mutuellement par l'art. XXIX, du traité d'amitié et de commerce conclu entr'eux, la liberté de tenir dans leurs Etats et ports respectifs, des consuls, et vice-consuls, agens et commissaires, et voulant en conséquence déterminer et fixer d'une manière réciproque et permanente, les fonctions et prérogatives des consuls, et vice-consuls qu'ils ont jugé convenable d'établir de préférence, sa Majesté très Chrétienne a nommé le Sieur Comte de Montmorin de St. Herent, maréchal de ses camps et armées, chevalier de ses ordres et de la toison-d'or, son conseiller en tous ses conseils, ministre et sécrétaire d'état et de ses commandements et finances, aïant le département des affaires étrangères; et les Etats Unis ont nommé le Sieur Thomas Jefferson, citoyen des Etats Unis de l'Amérique, et leur ministre plénipotentiaire auprès du Roi, lesquels, après s'être communiqué leurs plein-pouvoirs respectifs sont convenus de ce qui suit.

[1] 8 Stat. L. 106; 18 Stat. L., pt. 2, p. 219; Treaties and Conventions, 1889, p. 316.

communicated to each other their respective full powers, have agreed on what follows:

ARTICLE I

The Consuls and Vice-Consuls named by the Most Christian King and the United States shall be bound to present their commissions according to the forms which shall be established respectively by the Most Christian King within his dominions, and by the Congress within the United States. There shall be delivered to them, without any charges, the *exequatur* necessary for the exercise of their functions; and on exhibiting the said *exequatur*, the governors, commanders, heads of justice, bodies corporate, tribunals and other officers having authority in the ports and places of their consulates, shall cause them to enjoy immediately, and without difficulty, the pre-eminences, authority, and privileges reciprocally granted, without exacting from the said Consuls and Vice-Consuls any fee, under any pretext whatever.

ARTICLE II

The Consuls and Vice-Consuls, and persons attached to their functions; that is to say, their Chancellors and Secretaries, shall enjoy a full and entire immunity for their chancery, and

ARTICLE I

Les consuls et vice-consuls nommés par le Roi très Chrétien et les Etats Unis seront tenus de présenter leurs provisions selon la forme qui se trouvera établie respectivement par le Roi très Chrétien dans ses Etats, et par le Congrès dans les Etats Unis. On leur delivrera sans aucuns fraîx l'*exequatur* nécessaire à l'éxercice de leurs fonctions, et sur l'exhibition qu'ils feront du dit *exequatur*, les gouverneurs, commandants, chefs de justice, les corps, tribunaux ou autres officiers aïant autorité dans les ports et lieux de leurs consulats, les y feront jouïr aussitôt et sans difficulté des prééminences, autorité et priviléges accordés réciproquement, sans qu'ils puissent éxiger des dits consuls et vice-consuls aucun droit sous aucun prétexte quelconque.

ARTICLE II

Les consuls et vice-consuls et les personnes attachées à leurs fonctions, savoir, leurs chanceliers et sécrétaires, jouiront d'une pleine et entière immunité pour leur chancellerie et les papiers qui

the papers which shall be therein contained. They shall be exempt from all personal service, from soldiers' billets, militia, watch, guard, guardianship, trusteeship, as well as from all duties, taxes, impositions and charges whatsoever, except on the estate real and personal of which they may be the proprietors or possessors, which shall be subject to the taxes imposed on the estates of all other individuals: And in all other instances they shall be subject to the laws of the land as the natives are. Those of the said Consuls and Vice-Consuls who shall exercise commerce, shall be respectively subject to all taxes, charges and impositions established on other merchants. They shall place over the outward door of their house the arms of their sovereign; but this mark of indication shall not give to the said house any privilege of asylum for any person or property whatsoever.

ARTICLE III

The respective Consuls and Vice-Consuls may establish agents in the different ports and places of their departments where necessity shall require. These agents may be chosen among the merchants, either national or foreign, and furnished with a commission from one of the said Consuls: They shall confine themselves re-

y seront renfermés. Ils seront exemts de tout service personnel, logement des gens de guerre, milice, guet, garde, tutelle, curatelle, ainsi que de tous droits, taxes, impositions et charges quelconques, à l'exception seulement des biens meubles et immeubles dont ils seroient propriétaires ou possesseurs, lesquels seront assujettis aux taxes imposées sur ceux de tous autres particuliers, et à tous égards ils demeureront sujets aux loix du païs comme les nationaux. Ceux des dits consuls et vice-consuls qui feront le commerce seront respectivement assujettis à toutes les taxes, charges et impositions établies sur les autres négociants. Ils placeront sur la porte extérieure de leurs maisons les armes de leur souverain, sans que cette marque distinctive puisse donner aux dites maisons le droit d'asîle, soit pour des personnes, soit pour des effets quelconques.

ARTICLE III

Les consuls et vice-consuls respectifs pourront établir des agens dans les différens ports et lieux de leurs départements où le besoin l'éxigera; ces agens pourront être choisis parmi les négociants nationaux ou étrangers, et munis de la commission de l'un des dits consuls. Ils se renfermeront respectivement à rendre aux com-

spectively to the rendering to their respective merchants, navigators, and vessels, all possible service, and to inform the nearest Consul of the wants of the said merchants, navigators and vessels, without the said agents otherwise participating in the immunities, rights and privileges attributed to Consuls and Vice-Consuls, and without power, under any pretext whatever, to exact from the said merchants any duty or emolument whatsoever.

ARTICLE IV

The Consuls and Vice-Consuls respectively may establish a chancery, where shall be deposited the consular determinations, acts and proceedings, as also testaments, obligations, contracts and other acts done by or between persons of their nation, and effects left by deceased persons, or saved from shipwreck. They may consequently appoint fit persons to act in the said chancery, receive and swear them in, commit to them the custody of the seal, and authority to seal commissions, sentences and other consular acts, and also to discharge the functions of notary and register of the consulate.

ARTICLE V

The Consuls and Vice-Consuls respectively shall have the exclu-

merçants, navigateurs et bâtiments respectifs, tous les services possibles, et à informer le consul le plus proche des besoins des dits commerçants, navigateurs et bâtiments, sans que les dits agens puissent autrement participer aux immunités, droits et priviléges attribués aux consuls et vice-consuls, et sans pouvoir sous aucun prétexte que ce soit, éxiger aucun droit ou émolument quelconque des dits commerçants.

ARTICLE IV

Les consuls et vice-consuls respectifs pourront établir une chancellerie où seront déposés les délibérations, actes et procédures consulaires, ainsi que les testaments, obligations, contrats, et autres actes faits par les nationaux ou entr'eux, et les effets délaissés par mort, ou sauvés des naufrages. Ils pourront en conséquence commettre à l'exercice de la dite chancellerie des personnes capables, les recevoir, leur faire prêter serment, leur donner la garde du sceau et le droit de sceller les commissions, jugements et autres actes consulaires, ainsi que d'y remplir les fonctions de notaire et greffiers du consulat.

ARTICLE V

Les consuls et vice-consuls respectifs auront le droit exclusif de

sive right of receiving in their chancery, or on board of vessels, the declarations and all other the acts which the captains, masters, crews, passengers, and merchants of their nation may chuse to make there, even their testaments and other disposals by last will: And the copies of the said acts, duly authenticated by the said Consuls or Vice-Consuls, under the seal of their consulate, shall receive faith in law, equally as their originals would, in all the tribunals of the dominions of the Most Christian King and of the United States. They shall also have, and exclusively, in case of the absence of the testamentary executor, administrator, or legal heir, the right to inventory, liquidate, and proceed to the sale of the personal estate left by subjects or citizens of their nation who shall die within the extent of their consulate; they shall proceed therein with the assistance of two merchants of their said nation, or, for want of them, of any other at their choice, and shall cause to be deposited in their chancery the effects and papers of the said estates; and no officer, military, judiciary, or of the police of the country, shall disturb them or interfere therein, in any manner whatsoever: But the said Consuls and Vice-Consuls shall not deliver up the said effects, nor the pro-

recevoir dans leur chancellerie, ou à bord des bâtiments, les déclarations et tous les autres actes que les capitaines, patrons, equipages, passagers, et négociants de leur nation voudront y passer, même leur testament et autres dispositions de derniére volonté, et les dispositions des dits actes duëment legalisés par les dits consuls ou vice-consuls, et munis du sceau de leur consulat, feront foi en justice comme le feroient les originaux dans tous es tribunaux des états du Roi très Chrétien et des Etats Unis. Ils auront aussi, et exclusivement, en cas d'absence d'éxécuteur testamentaire, curateur ou héritiers légitimes, le droit de faire l'inventaire, la liquidation et de procéder à la vente des effets mobiliers de la succession des sujets ou citoyens de leur nation, qui viendront à mourir dans l'étenduë de leur consulat. Ils y procéderont avec l'assistance de deux négocians de leur dite nation, ou à leur défaut, de tout autre à leur choix, et feront déposer dans leur chancellerie les effets et papiers des dites successions, sans qu'aucuns officiers militaires, de justice, ou de police du païs, puissent les y troubler, ni y intervenir de quelque manière que ce soit; mais les dits consuls et vice-consuls ne pourront faire la déliverance des successions et de leur produit aux héritiers légi-

ceeds thereof, to the lawful heirs, or to their order, till they shall have caused to be paid all debts which the deceased shall have contracted in the country; for which purpose the creditors shall have a right to attach the said effects in their hands, as they might in those of any other individual whatever, and proceed to obtain sale of them till payment of what shall be lawfully due to them. When the debts shall not have been contracted by judgment, deed or note, the signature whereof shall be known, payment shall not be ordered but on the creditor's giving sufficient surety, resident in the country, to refund the sums he shall have unduly received, principal, interest and cost; which surety nevertheless shall stand duly discharged, after the term of one year in time of peace, and of two in time of war, if the demand in discharge cannot be formed before the end of this term against the heirs who shall present themselves. And in order that the heirs may not be unjustly kept out of the effects of the deceased, the Consuls and Vice-Consuls shall notify his death in some one of the gazettes published within their consulate, and that they shall retain the said effects in their hands four months to answer all demands which shall be presented; and they shall be bound

times, ou à leurs mandataires, qu'après avoir fait aquitter toutes les dettes que les défunts auront pû avoir contractées dans le païs; à l'effet de quoi les créanciers auront droit de saisir les dits effets dans leurs mains, de même que dans celles de tout autre individu quelconque, et en poursuivre la vente jusqu'au paiëment de ce qui leur sera légitimement dû; lorsque les dettes n'auront été contractées par jugement, par acte, ou par billet dont la signature sera reconnuë, le païement ne pourra en être ordonné qu'en fournissant par le créancier caution suffisante et domiciliée de rendre les sommes induëment percuës, principal, intérêts et fraix; les quelles cautions cependant demeureront duëment déchargées après une année, en tems de paix, et deux, en tems de guerre, si la demande en décharge ne peut être formée avant ces délais contre les héritiers qui se présenteront. Et afin de ne pas faire injustement attendre aux héritiers les effets du défunt, les consuls et vice-consuls feront annoncer sa mort dans quelqu'une des gazettes qui se publient dans l'étenduë de leur consulat, et qu'ils retiendront les dits effets sous leurs mains pendant quatre mois pour répondre à toutes les demandes qui se présenteront: et ils seront tenus, après ce délai, de délivrer aux

after this delay to deliver to the persons succeeding thereto, what shall be more than sufficient for the demands which shall have been formed.

héritiers, l'excédent du montant des demandes qui auront été formées.

Article VI

The Consuls and Vice-Consuls respectively shall receive the declarations, protests and reports of all captains and masters of their respective nation on account of average losses sustained at sea; and these captains and masters shall lodge in the chancery of the said Consuls and Vice-Consuls the acts which they may have made in other ports on account of the accidents which may have happened to them on their voyage. If a subject of the Most Christian King and a citizen of the United States, or a foreigner, are interested in the said cargo, the average shall be settled by the tribunals of the country, and not by the Consuls or Vice-Consuls; but when only the subjects or citizens of their own nation shall be interested, the respective Consuls or Vice-Consuls shall appoint skillful persons to settle the damages and average.

Article VI

Les consuls et vice-consuls respectifs recevront les déclarations, protestations et rapports de tous capitaines et patrons de leur nation respective, pour raison d'avaries essuyées à la mer, et ces capitaines et patrons remettront dans la chancellerie des dits consuls et vice-consuls les actes qu'ils auront faits dans d'autres ports pour les accidens qui leur seront arrivés pendant leur voyage. Si un sujet du Roi très Chrétien et un habitant des Etats Unis, ou un étranger, sont intéressés dans la dite cargaison, l'avarie sera réglée par les tribunaux du païs, et non par les consuls et vice-consuls; mais lorsqu'il n'y aura d'intéressés que les sujets ou citoyens de leur propre nation, les consuls ou les vice-consuls respectifs nommeront des experts pour régler les dommages et avaries.

Article VII

In cases where, by tempest or other accident, French ships or vessels shall be stranded on the

Article VII

Dans le cas où, par tempête, ou autres accidents, des vaisseaux ou bâtiments Français échoüeront

coasts of the United States, and ships or vessels of the United States shall be stranded on the coasts of the dominions of the Most Christian King, the Consul or Vice-Consul nearest to the place of shipwreck shall do whatever he may judge proper, as well for the purpose of saving the said ship or vessel, its cargo and appurtenances, as for the storing and the security of the effects and merchandize saved. He may take an inventory of them, without the intermeddling of any officers of the military, of the customs, of justice, or of the police of the country, otherwise than to give to the Consuls, Vice-Consuls, captain and crew of the vessel shipwrecked or stranded, all the succour and favour which they shall ask of them, either for the expedition and security of the saving, and of the effects saved, or to prevent all disturbance. And in order to prevent all kinds of dispute and discussion in the said cases of shipwreck, it is agreed that when there shall be no Consul or Vice-Consul to attend to the saving of the wreck, or that the residence of the said Consul or Vice-Consul (he not being at the place of the wreck) shall be more distant from the said place than that of the competent judge of the country, the latter shall immediately proceed therein, with

sur les côtes des Etats Unis, et des vaisseaux et bâtiments des Etats Unis échoüeront sur les côtes des Etats de sa Majesté très Chrétienne, le consul ou le vice-consul, le plus proche du lieu du naufrage, pourra faire tout ce qu'il jugera convenable, tant pour sauver le dit vaisseau ou bâtiment, son chargement et apartenances, que pour le magazinage et la sûreté des effets sauvés et marchandises. Il pourra en faire l'inventaire, sans quaucuns officiers militaires, des doüanes, de justice ou de police du païs, puissent s'y immiscer autrement que pour faciliter aux consuls et vice-consuls, capitaine et equipage du vaisseau naufragé, ou échoué, tous les secours et faveurs qu'ils leur demanderont, soit pour la célérité, et la sûreté du sauvetage et des effets sauvés, soit pour éviter tous désordres. Pour prévenir même toute espèce de conflit et de discussion dans les dits cas de naufrage, il a été convenu que lorsqu'il ne se trouvera pas de consul ou vice-consul pour faire travailler au sauvetage, ou que la résidence du dit consul ou vice-consul, qui ne se trouvera pas sur le lieu du naufrage, sera plus éloignée du dit lieu que celle du juge territorial compétent, ce dernier sera procéder sur le champ avec toute la célérité, la sûreté et les précautions prescrites par les

all the dispatch, certainty, and precautions prescribed by the respective laws; but the said territorial judge shall retire on the arrival of the Consul or Vice-Consul, and shall deliver over to him the report of his proceedings, the expenses of which the Consul or Vice-Consul shall cause to be reimbursed to him, as well as those of saving the wreck. The merchandize and effects saved shall be deposited in the nearest custom-house, or other place of safety, with the inventory thereof, which shall have been made by the Consul or Vice-Consul, or by the judge who shall have proceeded in their absence, that the said effects and merchandize may be afterwards delivered, (after levying therefrom the costs,) and without form of process to the owners, who, being furnished with an order for their delivery from the nearest Consul or Vice-Consul, shall reclaim them by themselves or by their order, either for the purpose of re-exporting such merchandize, in which case they shall pay no kind of duty of exportation, or for that of selling them in the country, if they be not prohibited there, and in this last case the said merchandize, if they be damaged, shall be allowed an abatement of entrance duties, proportioned to the damage they have sustained, which shall be ascer-

loix respectives; sauf au dit juge territorial à se retirer, le consul ou vice-consul survenant, et à lui remettre l'expédition des procédures par lui faites, dont le consul ou vice-consul lui fera rembourser les frâix, ainsi que ceux du sauvetage. Les marchandises et effets sauvés devront être déposés à la doüane ou autre lieu de sûreté le plus prochain avec l'inventaire qui en aura été dressé par le consul ou vice-consul, ou en leur absence par le juge qui en aura connu, pour les dits effets et marchandises être ensuite délivrés après le prélevement des frâix, et sans forme de procès, aux propriétaires, qui, munis de la mainlevée du consul ou vice-consul le plus proche, les réclameront par eux-mêmes, ou par leurs mandataires, soit pour réexporter les marchandises, et dans ce cas elles ne païeront aucune espèce de droits de sortie, soit pour les vendre dans le païs, si elles n'y sont pas prohibées; et dans ce dernier cas, les dites marchandises se trouvant avariées, on leur accordera une modération sur les droits d'entrée proportionné au dommage souffert, lequel sera constaté par le procès verbal dressé lors du naufrage ou de l'échoüement.

tained by the affidavits taken at the time the vessel was wrecked or struck.

ARTICLE VIII

The Consuls or Vice-Consuls shall exercise police over all the vessels of their respective nations, and shall have on board the said vessels all power and jurisdiction in civil matters, in all the disputes which may there arise; they shall have an entire inspection over the said vessels, their crew, and the changes and substitutions there to be made; for which purpose they may go on board the said vessels whenever they may judge it necessary. Well understood that the functions hereby allowed shall be confined to the interior of the vessels, and that they shall not take place in any case which shall have any interference with the police of the ports where the said vessels shall be.

ARTICLE IX

The Consuls and Vice-Consuls may cause to be arrested the captains, officers, mariners, sailors and all other persons being part of the crews of the vessels of their respective nations, who shall have deserted from the said vessels, in order to send them back and transport them out of the

ARTICLE VIII

Les consuls ou vice-consuls éxerceront la police sur tous les bâtiments de leurs nations respectives, et auront à bord des dits bâtiments tout pouvoir et jurisdiction en matière civile dans toutes les discussions qui pourront y survenir; ils auront une entière inspection sur les dits bâtiments, leurs équipages et les changements et remplacements à y faire; pour quel effet ils pourront se transporter à bord des dits bâtiments toutes les fois qu'ils le jugeront nécessaire; bien entendu que les fonctions ci-dessus énoncées seront concentrées dans l'intérieur des bâtiments, et qu'elles ne pourront avoir lieu dans aucun cas qui aura quelque rapport avec la police des ports où les dits bâtiments se trouveront.

ARTICLE IX

Les consuls et vice-consuls pourront faire arrêter les capitaines, officiers, mariniers, matelots et toutes autres personnes faisant partie des équipages des bâtiments de leurs nations respectives, qui auroient déserté des dits bâtiments, pour les renvoyer et faire transporter hors du païs.

country; for which purpose the said Consuls and Vice-Consuls shall address themselves to the courts, judges and officers competent, and shall demand the said deserters in writing, proving by an exhibition of the registers of the vessel or ship's roll that those men were part o fthe said crews; and on this demand so proved (saving, however, where the contrary is proved) the delivery shall not be refused; and there shall be given all aid and assistance to the said Consuls and Vice-Consuls for the search, seizure and arrest of the said deserters, who shall even be detained and kept in the prisons of the country, at their request and expense, until they shall have found an opportunity of sending them back; but if they be not sent back within three months, to be counted from the day of their arrest, they shall be set at liberty, and shall be no more arrested for the same cause.

Auquel effet les dits consuls et vice-consuls s'addresseront aux tribunaux, juges, et officiers compétents et leur feront, par écrit, la demande des dits déserteurs, en justifiant par l'exhibition des régistres du bâtiment ou rôle d'équipage, que ces hommes faisoient partie des susdits équipages. Et sur cette demande, ainsi justifiée, sauf toutefois la preuve contraire, l'extradition ne pourra être refusée; et il sera donné toute aide et assistance aux dits consuls et vice-consuls pour la recherche, saisie et arrestation des susdits déserteurs, lesquels seront même détenus et gardés dans les prisons du païs, à leur réquisition, et à leurs fraîs jusqu'à ce qu'ils aïent trouvé occasion de les renoyer. Mais s'ils n'étoient renvoyés dans le délai de trois mois à compter du jour de leur arrêt, ils seront élargis, et ne pourront plus être arrêtés pour la même cause.

Article X

In cases where the respective subjects or citizens shall have committed any crime, or breach of the peace, they shall be amenable to the judges of the country.

Article X

Dans le cas où les sujets ou citoyens respectifs auront commis quelque crime ou infraction de la tranquillité publique, ils seront justiciables des juges du païs.

Article XI

When the said offenders shall be a part of the crew of a vessel

Article XI

Lorsque les dits coupables feront partie de l'équipage de l'un

of their nation, and shall have withdrawn themselves on board the said vessel, they may be there seized and arrested by order of the judges of the country. These shall give notice thereof to the Consul or Vice-Consul, who may repair on board if he thinks proper; but this notification shall not in any case delay execution of the order in question. The persons arrested shall not afterwards be set at liberty until the Consul or Vice-Consul shall have been notified thereof; and they shall be delivered to him, if he requires it, to be put again on board of the vessel on which they were arrested, or of others of their nation, and to be sent out of the country.

ARTICLE XII

All differences and suits between the subjects of the Most Christian King in the United States, or between the citizens of the United States within the dominions of the Most Christian King, and particularly all disputes relative to the wages and terms of engagement of the crews of the respective vessels, and all differences, of whatever nature they be, which may arise between the privates of the said crews, or between any of them and their captains, or between the captains of different vessels of their nation, shall be determined by the respec-

des bâtiments de leur nation, et se seront retirés à bord des dits navires, ils pourront y être saisis et arrêtés par l'ordre des juges territoriaux: ceux-ci en préviendront le consul ou vice-consul, lequel pourra se rendre à bord s'il le juge à-propos: mais cette prévenance ne pourra en aucun cas retarder l'éxecution de l'ordre dont il est question. Les personnes arrêtées ne pourront ensuite être mises en liberté, qu'après que le consul ou vice-consul en aura été prévenu, et elles lui seront remises s'il le requiert, pour être reconduites sur les bâtiments où elles auront été arrêtés, ou autres de leur nation, et être renvoyées hors du païs.

ARTICLE XII

Tous différends et procès entre les sujets du Roi très Chrétien dans les Etats Unis, ou entre les citoyens des Etats Unis dans les Etats du Roi très Chrétien, et notamment toutes les discustions relatives aux salaires et conditions des engagements des équipages des bâtiments respectifs, et tous différends de quelque nature qu'ils soient, qui pourroient s'élever entre les hommes des dits équipages, ou entre quelques uns d'eux et leurs capitaines, ou entre les capitaines de divers bâtiments nationaux, seront terminés par les consuls et vice-consuls respectifs,

tive Consuls and Vice-Consuls, either by a reference to arbitrators, or by a summary judgment, and without costs. No officer of the country, civil or military, shall interfere therein, or take any part whatever in the matter; and the appeals from the said consular sentences shall be carried before the tribunals of France or of the United States, to whom it may appertain to take cognizance thereof.

soit par un renvoi par devant des arbitres, soit par un jugement sommaire, et sans fraîs. Aucun officier territorial, civil ou militaire ne pourra y intervenir, ou prendre une part quelconque à l'affaire, et les appels des dits jugements consulaires seront portés devant les tribunaux de France ou des Etats Unis qui doivent en connaître.

ARTICLE XIII

The general utility of commerce having caused to be established within the dominions of the Most Christian King particular tribunals and forms for expediting the decision of commercial affairs, the merchants of the United States shall enjoy the benefit of these establishments; and the Congress of the United States will provide in the manner the most conformable to its laws for the establishment of equivalent advantages in favour of the French merchants, for the prompt dispatch and decision of affairs of the same nature.

ARTICLE XIII

L'utilité générale du commerce aïant fait établir dans les états du Roi très Chrétien, des tribunaux et des formes particulières pour accélérer la décision des affaires de commerce, les négocians des Etats Unis jouiront du bénéfice de ces établissements, et le Congrès des Etats Unis pourvoira de la manière la plus conforme à ses lois, à l'établissement des avantages équivalents en faveur des négociants Français pour la prompte expédition et décision des affaires de la même nature.

ARTICLE XIV

The subjects of the Most Christian King, and the citizens of the United States who shall prove by legal evidence that they are of the said nations respectively, shall in consequence enjoy an exemption

ARTICLE XIV

Les sujets du Roi très Chrétien et les citoyens des Etats Unis, qui justifieront authentiquement être du corps de la nation respective, jouiront en conséquence de l'exemption de tout service personnel

from all personal service in the place of their settlement.

ARTICLE XV

If any other nation acquires by virtue of any convention whatever a treatment more favourable with respect to the consular pre-eminences, powers, authority and privileges, the Consuls and Vice-Consuls of the Most Christian King, or of the United States, reciprocally shall participate therein, agreeable to the terms stipulated by the second, third and fourth articles of the treaty of amity and commerce concluded between the Most Christian King and the United States.

ARTICLE XVI

The present convention shall be in full force during the term of twelve years, to be counted from the day of the exchange of ratifications, which shall be given in proper form, and exchanged on both sides within the space of one year, or sooner if possible.

In faith whereof, we, Ministers Plenipotentiary, have signed the present convention, and have thereto set the seal of our arms.

Done at Versailles the 14th of November, one thousand seven hundred and eighty-eight.

L. C. DE MONTMORIN [L. S.]
TH: JEFFERSON [L. S.]

dans le lieu de leur établissement.

ARTICLE XV

Si quelqu'autre nation acquiert, en vertu d'une convention quelconque, un traitement plus favorable relativement aux prééminences, pouvoirs, autorité et priviléges consulaires, les consuls et vice-consuls du Roi très Chrétien ou des Etats Unis, réciproquement, y participeront, aux termes stipulés par les articles deux, trois et quatre, du traité d'amitié et de commerce conclu entre le Roi très Chrétien et les Etats Unis.

ARTICLE XVI

La présente convention aura son plein effet pendant l'espace de douze ans à compter du jour de l'échange des ratifications, lesquelles seront données en bonne forme et échangées de part et d'autre dans l'espace d'un an, ou plutôt si faire se peut.

En foi de quoi, nous, Ministres Plénipotentiaires, avons signé la présente convention, et y avons fait apposer le cachet de nos armes.

Fait à Versailles, le 14 Novembre, mil sept cent quatre-vingt-huit.

L. C. DE MONTMORIN [L. S.]
THOMAS JEFFERSON [L. S.]

Convention of Peace, Commerce and Navigation, September 30, 1800[1]

Concluded September 30, 1800; ratifications exchanged at Paris, July 31, 1801; proclaimed December 21, 1801

The Premier Consul of the French Republic in the name of the people of France, and the President of the United States of America, equally desirous to terminate the differences which have arisen between the two States, have respectively appointed their Plenipotentiaries, and given them full powers to treat upon those differences, and to terminate the same; that is to say, the Premier Consul of the French Republic, in the name of the people of France, has appointed for the Plenipotentiaries of the said Republic the citizens Joseph Bonaparte, ex-Ambassador at Rome and Counsellor of State; Charles Pierre Claret Fleurieu, Member of the National Institute and of the Board of Longitude of France and Counsellor of State, President of the Section of Marine; and Pierre Louis Rœderer, Member of the National Institute of France and Counsellor of State, President of the Section of the Interior; and the President of the United States of America, by and with the advice and consent of the Senate of the said States, has appointed for their Plenipotentiaries, Oliver Ellsworth, Chief Justice of

Le Premier Consul de la République Française au nom du Peuple Français, et le President des Etats-Unis d'Amérique, également animés du désir de mettre fin aux différends qui sont survenus entre les deux Etats, ont respectivement nommé leurs Plénipotentiaires, et leur ont donné pleinpouvoir pour négocier sur ces différends et les terminer; c'est à dire, le Premier Consul de la République Française, au nom du Peuple Française, a nommé pour plénipotentiaires de la dite République, les Citoyens *Joseph Bonaparte,* ex-ambassadeur de la République Français à Rome et Conseiller d'Etat, *Charles Pierre Claret Fleurieu,* membre de l'Institut National et du Bureau des Longitudes de France, et Conseiller d'Etat, Président de la Section de la Marine, et *Pierre Louis Roederer,* membre de l'Institut National de France, et Conseiller d'Etat, President de la Section de l'Intérieur; et le President des Etats-Unis, d'Amérique, par et avec l'avis et le consentement du Sénat des dits Etats, a nommé pour leurs Plénipotentiaires, *Olivier Ellsworth,* Chef de la Justice des Etats-Unis; *William Richard-*

[1] 8 Stat. L. 178; 18 Stat. L. pt. 2, p. 224; Treaties and Conventions, 1889, p. 322.

the United States; William Richardson Davie, late Governor of the State of North Carolina; and William Vans Murray, Minister Resident of the United States at the Hague; who, after having exchanged their full powers, and after full and mature discussion of the respective interests, have agreed on the following articles:

son Davie, ci-devant Gouverneur de l'Etat de la Caroline septentrionale, et *William Vans Murray,* Ministre résident des Etats-Unis à La Haye.

Lesquels, après avoir fait l'exchange de leurs pleins-pouvoirs longuement et murement discuté les Intérêts respectifs, sont convenus des articles suivans.

ARTICLE I

There shall be a firm, inviolable, and universal peace, and a true and sincere friendship between the French Republic and the United States of America, and between their respective countries, territories, cities, towns, and people, without exception of persons or places.

ARTICLE I

Il y aura une paix ferme, inviolable et universelle, et une amitié vraie et sincère, entre la République Française et les Etats-Unis d'Amérique, ainsi qu'entre leurs pays, territoires, villes et places, et entre leurs citoyens et habitants, sans exception de personnes ni de lieux.

ARTICLE II[1]

The Ministers Plenipotentiary of the two parties not being able to agree at present respecting the treaty of alliance of 6th February, 1778, the treaty of amity and commerce of the same date, and the convention of 14th of November, 1788, nor upon the indemnities mutually due or claimed, the parties will negociate further on these subjects at a convenient time, and until they may have

ARTICLE II

Les Ministres Plénipotentiaires des deux parties ne pouvant pour le présent s'accorder relativement au Traité d'Alliance du 6 Février 1778, au Traité d'Amitié et de commerce de la même date, et à la Convention en date du 14 Novembre 1788, non plus que relativement aux indemnités mutuellement dues ou réclamées, les parties négocieront ultérieurement sur ces objets, dans un tems conve-

[1] This article was expunged before the final ratification of the treaty, and the following article was added:

"It is agreed that the present convention shall be in force for the term of eight years from the time of the exchange of ratifications."

agreed upon these points the said treaties and convention shall have no operation, and the relations of the two countries shall be regulated as follows:

ARTICLE III

The public ships which have been taken on one part and the other, or which may be taken before the exchange of ratifications, shall be restored.

ARTICLE IV

Property captured, and not yet definitively condemned, or which may be captured before the exchange of ratifications (contraband goods destined to an enemy's port excepted) shall be mutually restored on the following proofs of ownership, viz: The proof on both sides with respect to merchant ships, whether armed or unarmed, shall be a passport in the form following:

"*To all who shall see these presents, greeting:*

"It is hereby made known that leave and permission has been given to ——— ———, master and commander of the ship called ———, of the town of ———, burthen ——— tons, or thereabouts, lying at present in the

nable: et jusqu' à ce qu'elles se soyent accordées sur ces points, les dits Traités et convention n'auront point d'Effet, et les relations des deux Nations seront réglées ainsi qu'il suit.

ARTICLE III

Les Bâtimens d'Etats qui ont été pris de part et d'autre ou qui pourraient être pris avant l'échange des ratifications seront rendus.

ARTICLE IV

Les propriétés capturées et non encore condamnées définitivement, ou qui pourront être capturées avant l'échange des ratifications, excepté les marchandises de contrabande destinées pour un port ennemi, seront rendues mutuellement sur les preuves suivantes de propriété; *Savoir:*

De part et d'autre, les preuves de propriété relativement aux navires marchands, armés ou non armés, seront un passeport de la form suivante:

"*A tous ceux* qui les présentes verront, soit notoire que faculté et permission a été accordée à maitre ou commandant du navire, appellé de la ville de de la capacité de tonneaux ou environ, se trouvant présentement dans le port et hâvre de et destiné pour chargé

port and haven of ———, and bound for ———, and laden with ———; after that his ship has been visited, and before sailing, he shall make oath before the officers who have the jurisdiction of maritime affairs, that the said ship belongs to one or more of the subjects of ——, the act whereof shall be put at the end of these presents, as likewise that he will keep, and cause to be kept, by his crew on board, the marine ordinances and regulations, and enter in the proper office a list, signed and witnessed, containing the names and surnames, the places of birth and abode of the crew of his ship, and of all who shall embark on board her, whom he shall not take on board without the knowledge and permission of the officers of the marine; and in every port or haven where he shall enter with his ship, he shall shew this present leave to the officers and judges of the marine, and shall give a faithful account to them of what passed and was done during his voyage; and he shall carry the colours, arms, and ensigns of the [French Republic or the United States] during his voyage. In witness whereof we have signed these presents, and put the seal of our arms thereunto, and caused the same to be countersigned by —— ——— at ——— the ——— day of ——— anno Domini."

de qu'après que son navire a été visité et avant son départ, il prêtera serment entre les mains des officiers autorisés à cet effet; que le dit navire appartient à un ou plusieurs sujets de dont l'acte sera mis à la fin des présentes; de même qu'il gardera et fera garder par son équipage, les ordonnances et règlemens maritimes, et remettra une liste signée et confirmée par témoins, contenant les noms et surnoms, les lieux de naissance, et la Demeure des Personnes composant l'équipage de son navire, et de tous ceux qui s'y embarqueront, lesquels il ne recevra pas à bord sans la connaissance et permission des officiers autorisés à ce; et dans chaque port ou hâvre où il entrera avec son navire, il montrera la présente permission aux officiers à ce autorisés, et leur fera un rapport fidèle de ce qui s'est passé durant son voyage; et il portera les couleurs, armes et enseignes (de la République Française ou des Etats Unis) durant son dit voyage. En témoin de quoi nous avons signé les présentes, les avons fait contresigner par et y avons fait apposer le sceau de nos armes.

Donné à le de l'an de grace, le ."

And this passport will be sufficient without any other paper, any ordinance to the contrary notwithstanding; which passport shall not be deemed requisite to have been renewed or recalled, whatever number of voyages the said ship may have made, unless she shall have returned home within the space of a year. Proof with respect to the cargo shall be certificates, containing the several particulars of the cargo, the place whence the ship sailed and whither she is bound, so that the forbidden and contraband goods may be distinguished by the certificates; which certificates shall have been made out by the officers of the place whence the ship set sail, in the accustomed form of the country. And if such passport or certificates, or both, shall have been destroyed by accident or taken away by force, their deficiency may be supplied by such other proofs of ownership as are admissible by the general usage of nations. Proof with respect to other than merchant ships shall be the commission they bear.

This article shall take effect from the date of the signature of the present convention. And if, from the date of the said signature, any property shall be condemned contrary to the intent of the said convention, before the knowledge of this stipulation shall

Et ce passeport suffira sans autre pièce, non obstant tout réglement contraire. Il ne sera pas exigé que ce passeport ait été renouvellé ou révoqué, quelque nombre de voyages que le dit navire ait pu faire, à moins qu'il ne soit revenu chez lui dans l'espace d'une année.

Par rapport à la cargaison, les preuves seront des certificates contenant le détail de la cargaison, du lieu d'où le Bâtiment est parti et de celui où il va, de manière que les marchandises défendues et de contrebande puissent être distinguées par les certificats, lesquels certificats auront été faits par les officiers de l'endroit d'ou le navire sera parti, dans la forme usitée dans le pays, et si ces passeports ou certificats, ou les uns et les autres ont été détruits par accident, ou enlevés de force, leur Défaut pourra être supplée par toutes les autres preuves de propriété admissibles d'après l'usage géneral des Nations.

Pour les Bâtimens autres que les navires marchands, les preuves seront la Commission dont il sont porteurs. Cet article aura son effet à dater de la signature de la présente convention; et si à dater de la dite signature, des propriétés sont condamnées contrairement à l'esprit de la dite convention, avant qu'on ait connaissance de cette stipulation la propriété ainsi con-

be obtained, the property so condemned shall, without delay, be restored or paid for.

ARTICLE V

The debts contracted by one of the two nations with individuals of the other, or by the individuals of one with the individuals of the other, shall be paid, or the payment may be prosecuted, in the same manner as if there had been no misunderstanding between the two States. But this clause shall not extend to indemnities claimed on account of captures or confiscations.

ARTICLE VI

Commerce between the parties shall be free. The vessels of the two nations and their privateers, as well as their prizes, shall be treated in their respective ports as those of the nation the most favoured; and, in general, the two parties shall enjoy in the ports of each other, in regard to commerce and navigation, the privileges of the most favoured nation.

ARTICLE VII

The citizens and inhabitants of the United States shall be at liberty to dispose by testament, donation, or otherwise, of their goods, moveable and immoveable, holden in the territory of the

damnée sera, sans délai, rendue ou payée.

ARTICLE V

Les Dettes contractées par l'une des deux nations envers les particuliers de l'autre, ou par des particuliers de l'une envers des particuliers de l'autre, seront acquittées ou le payement en sera poursuivi comme s'il n'y avait eu aucune mésintelligence entre les deux Etats; mais cette clause ne s'étendra point aux indemnités réclamées pour des captures ou pour des condamnations.

ARTICLE VI

Le commerce entre les deux Parties sera libre: les vaisseaux des deux nations et leurs corsaires, ainsi que leurs prises, seront traités dans les ports respectifs comme ceux de la nation la plus favorisée, et, en general, les deux parties jouiront dans les ports l'une de l'autre, par rapport au commerce et à la navigation, des privilèges de la nation la plus favorisée.

ARTICLE VII

Les Citoyens et Habitans des Etats-Unis pourront disposer par testament, donation ou autrement, de leurs biens, meubles et immeubles possédés dans le territoire Européen de la République Fran-

French Republic in Europe, and the citizens of the French Republic shall have the same liberty with regard to goods, moveable and immoveable, holden in the territory of the United States, in favor of such persons as they shall think proper. The citizens and inhabitants of either of the two countries who shall be heirs of goods, moveable or immoveable, in the other, shall be able to succeed *ab intestato,* without being obliged to obtain letters of naturalization, and without having the effect of this provision contested or impeded, under any pretext whatever; and the said heirs, whether such by particular title, or *ab intestato,* shall be exempt from any duty whatever in both countries. It is agreed that this article shall in no manner derogate from the laws which either State may now have in force, or hereafter may enact, to prevent emigration; and also that in case the laws of either of the two States should restrain strangers from the exercise of the rights of property with respect to real estate, such real estate may be sold, or otherwise disposed of, to citizens or inhabitants of the country where it may be, and the other nation shall be at liberty to enact similar laws.

çaise; et les citoyens de la République Française auront la même faculté à l'égard des biens, meubles et immeubles possédés dans le Territoire des Etats-Unis, en faveur de telle personne que bon leur semblera. Les citoyens et habitans d'un des deux Etats, qui seront héritiers des Biens, meubles ou immeubles situés dans l'autre, pourront succéder *ab intestat,* sans qu'ils ayent besoin de lettres de naturalité et sans que l'effet de cette stipulation, leur puisse être contesté ou empêché, sous quelque prétexte que ce soit; et seront les dits héritiers, soit à titre particulier, soit *ab intestat,* exempts de tout droit quelconque chex les deux nations. Il est convenu que cet article ne dérogera en aucune manière aux lois qui sont à présent en vigeur chez les deux nations ou qui pourraient être promulguées à la suite contre l'emigration, et aussi que dans le cas où les lois de l'un des deux Etats limiteraient pour les étrangers l'exercice des droits de la propriété sur les immeubles on pourrait vendre ces immeubles ou en disposer autrement en faveur d'habitans ou de citoyens du pays où ils seraient sitúes, et il sera libre à l'áutre nation d'etablir de semblables lois.

ARTICLE VIII

To favor commerce on both sides it is agreed that, in case a war should break out between the two nations, which God forbid, the term of six months after the declaration of war shall be allowed to the merchants and other citizens and inhabitants respectively, on one side and the other, during which time they shall be at liberty to withdraw themselves, with their effects and moveables, which they shall be at liberty to carry, send away, or sell, as they please, without the least obstruction; nor shall their effects, much less their persons, be seized during such term of six months; on the contrary, passports, which shall be valid for a time necessary for their return, shall be given to them for their vessels and the effects which they shall be willing to send away or carry with them; and such passports shall be a safe conduct against all insults and prizes which privateers may attempt against their persons and effects. And if anything be taken from them, or any injury done to them or their effects, by one of the parties, their citizens or inhabitants, within the term above prescribed, full satisfaction shall be made to them on that account.

ARTICLE VIII

Pour favoriser de part d'autre le commerce, il est convenu que si, ce qu'à Dieu ne plaise, le guerre éclatait entre les deux nations, on allouera, de part et d'autre, aux marchands et autres citoyens ou habitans respectifs, six mois après la déclaration de guerre, pendant lequel tems il sauront la faculté de se retirer avec leurs effets et meubles qu'ils pourront emmener envoyer ou vendre, comme ils les voudront, sans le moindre empêchment. Leurs effets, et encore moins leurs personnes, ne pourront point, pendent ce tems de six mois, être saisis; au contraire, on leur donnera des passeports qui seront valables pour le tems nécessaire à leur retour chez eux; et ces passeports seront donnés pour eux, ainsi que pour leur bâtimens et effets qu'ils désireront emmener ou envoyer. Ces passeports serviront de sauf-conduit contre toute insulte et contre toute capture de la part des corsaires, tant contre eux que contre leur effets; et si, dans le terme ci-dessus désigné, il leur était fait par l'une des parties, ces citoyens ou ses habitans, quelque tort dans leur personnes ou dans leurs effets, on leur en donnera satisfaction complete.

ARTICLE IX

Neither the debts due from individuals of the one nation to individuals of the other, nor shares, nor monies, which they may have in public funds, or in the public or private banks, shall ever, in any event of war or of national difference, be sequestered or confiscated.

ARTICLE X

It shall be free for the two contracting parties to appoint commercial agents for the protection of trade, to reside in France and the United States. Either party may except such place as may be thought proper from the residence of those agents. Before any agent shall exercise his functions, he shall be accepted in the usual forms by the party to whom he is sent; and when he shall have been accepted and furnished with his exequatur, he shall enjoy the rights and prerogatives of the similar agents of the most favoured nations.

ARTICLE XI

The citizens of the French Republic shall pay in the ports, havens, roads, countries, islands, cities, and towns of the United States, no other or greater duties or imposts, of what nature soever

ARTICLE XI

Les dettes dues par des individus de l'une des deux nations aux individus de l'autre, ne pourront, dans aucun cas de guerre, ou de démêlés nationaux, être séquestrées ou confisquées non plus que les actions ou fonds qui se trouveraient dans les fonds publics, au dans des banques publiques ou particulières.

ARTICLE X

Les deux parties contractantes pourront nommer, pour protéger le negoce, des agens commerciaux qui résideront en France et dans les Etats-Unis; chacune des parties pourra excepter telle place qu'elle jugera à propos, des lieux où la résidence de ces agens pourra être fixée. Avant qu'aucun agent puisse exercer ses fonctions, il devra être accepté, dans les formes resçues, par la partie chez laquelle il est envoyé; et quand il aura été accepté et pourvu de son *Exequatur,* il jouira des droits et prérogatives dont jouiront les Agens semblables des nations le plus favorisées.

ARTICLE XI

Les citoyens de la République Française ne payeront dans les ports, hâvres, rades, contrées, isles, cités et lieux des Etats-Unis, d'autres ni de plus grands droits, impots de quelque nature

they may be, or by what name soever called, than those which the nation most favoured are or shall be obliged to pay; and they shall enjoy all the rights, liberties, privileges, immunities, and exemptions in trade, navigation, and commerce, whether in passing from one port in the said States to another, or in going to and from the same from and to any part of the world, which the said nations do or shall enjoy. And the citizens of the United States shall reciprocally enjoy, in the territories of the French Republic in Europe, the same privileges and immunities, as well for their property and persons as for what concerns trade, navigation, and commerce.

qu'ils puissent être, quelque nom qu'ils puissent avoir, que ceux que les nations les plus favorisées sont ou seront tenues de payer; et ils jouiront de tous les droits, libertés, priviléges, immunités, et exemptions en fait de négoce, navigation et commerce, soit en passant d'un port des dits Etats à un autre, soit en y allant ou en revenant de quelque partie ou pour quelque partie du monde que ce soit, dont les nations susdites jouissent ou jouiront. Et réciproquement, les citoyens des Etats-Unis jouiront, dans le Territoire de la République Française en Europe, des mêmes privilèges, immunités, tant pour leurs biens et leurs personnes, que pour ce qui concerne le négoce, la navigation et le commerce.

Article XII

It shall be lawful for the citizens of either country to sail with their ships and merchandize (contraband goods always excepted) from any port whatever to any port of the enemy of the other, and to sail and trade with their ships and merchandise, with perfect security and liberty, from the countries, ports, and places of those who are enemies of both, or of either party, without any opposition or disturbance whatsoever, and to pass not only directly from the places and ports of the

Article XII

Les citoyens des deux nations pourront conduire leurs vaisseaux et marchandises (*en exceptant toujours la contrebande*) de tout port quelconque, dans un autre port appartenant à l'ennemi de l'autre nation; ils pourront naviguer et commercer en toute liberté et sécurité, avec leurs navire set marchandises, dans les pays, ports et places des ennemis des deux parties ou de l'une ou de l'autre partie, sans obstacles et sans entraves, et non seulement passer directement des places et ports de

enemy aforementioned to neutral ports and places, but also from one place belonging to an enemy to another place belonging to an enemy, whether they be under the jurisdiction of the same Power or under the several, unless such ports or places shall be actually blockaded, besieged, or invested.

And whereas it frequently happens that vessels sail for a port or place belonging to an enemy without knowing that the same is either besieged, blockaded, or invested, it is agreed that every vessel so circumstanced may be turned away from such port or place, but she shall not be detained, nor any part of her cargo, if not contraband, be confiscated, unless, after notice of such blockade or investment, she shall again attempt to enter; but she shall be permitted to go to any other port or place she shall think proper. Nor shall any vessel of either that may have entered into such port or place before the same was actually besieged, blockaded, or invested by the other, be restrained from quitting such place with her cargo, nor if found therein after the reduction and surrender of such place shall such vessel or her cargo be liable to confiscation, but they shall be restored to the owners thereof.

l'ennemi sus mentionnés, dans les ports et places neutres, mais encore de toute place appartenant à un ennemi dans toute autre place appartenant à un ennemi, qu'elle soit ou ne soit pas soumise à la même jurisdiction, à moins que ces places ou ports ne soyent réellement bloqués, assiégés ou investis.

Et dans le cas, comme il arrive souvent, où les vaisseaux feraient voile pour une place ou port appartenant à un ennemi, ignorant qu'ils sont blocqués, assiégés ou investis, il est convenu que tout navire qui se trouvera dans une pareille circonstance, sera détourné de cette place ou port, sans qu'on puisse le retener ni confisquer aucune partie de sa cargaison (*à moins qu'elle ne soit de contrebande, ou qu'il ne soit prouveé que le dit navire, après avoir été averti du blocus ou investissement, a roulu rentrer dans ce même port*); mais il lui sera permis d'aller dans tout autre port ou place, qu'il jugera convenable. Aucun navire de l'une ou de l'autre nation, entré dans un port au place avant qu'ils ayent été réellement bloqués, assiégés ou investis par l'autre, ne pourra être empêché de sortir avec sa cargaison: s'il s'y trouve, lorsque la dite place sera rendue, le navire et sa cargaison ne pourront être confisqués, mais seront remis aux propriétaires.

ARTICLE XIII

In order to regulate what shall be deemed contraband of war, there shall be comprised, under that denomination, gun-powder, saltpetre, petards, match, ball, bombs, grenades, carcasses, pikes, halberts, swords, belts, pistols, holsters, cavalry-saddles and furniture, cannon, mortars, their carriages and beds, and generally all kinds of arms, ammunition of war, and instruments fit for the use of troops; all the above articles, whenever they are destined to the port of an enemy, are hereby declared to be contraband, and just objects of confiscation; but the vessel in which they are laden, and the residue of the cargo, shall be considered free, and not in any manner infected by the prohibited goods, whether belonging to the same or a different owner.

ARTICLE XIII

Pour régler ce qu'on entendra par contrebande de guerre, seront compris sous cette dénomination la poudre, le salpêtre, les pétards, mêches, balles, boulets, bombes, grenades, carcasses, piques, hallebardes, épées, ceinturons, pistolets, foureaux, selles de cavalerie, harnais, canons, mortiers avec leurs affuts, et généralement toutes armes et munitions de guerre et untensiles, à l'usage des troupes. Tous les articles ci-dessus, toutes les fois qu'ils seront destinés pour le port d'un ennemi, sont déclarés de contrabande et justement soumis à la confiscation. Mais le bâtiment sur lequel ils étaient chargés, ainsi que le reste de la cargaison, seront regardés comme libres, et ne pourront en aucune manière être viciés par les marchandises de contrebande, soit qu'ils appartiennent à un même ou à différens propriétaires.

ARTICLE XIV

It is hereby stipulated that free ships shall give a freedom to goods, and that everything shall be deemed to be free and exempt which shall be found on board the ships belonging to the citizens of either of the contracting parties, although the whole lading, or any part thereof, should appertain to the enemies of either, contraband

ARTICLE XIV

Il est stipulé par le presént traité que les bâtimens libres assureront également la liberté des marchandises, et qu'on jugera libres toutes les choses qui se trouveront à bord des navires appartenant aux citoyens d'une des parties contractantes, quand même le chargement ou partie d'icelui appartiendrait aux ennemis de l'une

goods being always excepted. It is also agreed, in like manner, that the same liberty be extended to persons who are on board a free ship, with this effect, that although they be enemies to either party, they are not to be taken out of that free ship, unless they are soldiers and in actual service of the enemy.

des deux; bien entendu néanmoins que la contrebande sera toujours excepté. Il est également convenu que cette même liberté s'étendra aux personnes qui pourraient se trouver à bard du bâtimen libre, quand même elles seraient ennemies de l'une de deux parties contractantes, et elles ne pourront être enlevées des dits navires libres, à moins qu'elles ne soyent militaires et actuellement au service de l'ennemi.

Article XV

On the contrary, it is agreed that whatever shall be found to be laden by the citizens of either party on any ship belonging to the enemies of the other, or their citizens, shall be confiscated without distinction of goods, contraband or not contraband, in the same manner as if it belonged to the enemy, except such goods and merchandizes as were put on board such ship before the declaration of war, or even after such declaration, if so be it were done without knowledge of such declaration; so that the goods of the citizens of either party, whether they be of the nature of such as are prohibited, or otherwise, which, as is aforesaid, were put on board any ship belonging to an enemy before the war, or after the declaration of the same, with-

Article XV

On est convenu, au contraire que tout ce qui se trouvera chargé par les citoyens respectifs, sur des navires appartenant aux ennemis de l'autre partie ou à leurs sujets, sera confisqué, sans distinctions des marchandises prohibées ou non prohibées, ainsi et de même que si elles appartenaient à l'ennemi, à l'exception toutefois des effets et marchandises qui auront été mis à bord des dits navires avant la declaration de guerre, ou même après la dite declaration, si, au moment du chargement, on a pu l'ignorer; de manière que les marchandises des citoyens des deux parties, soit qu'elles se trouvent du nombre de celles de contrebande ou autrement, lesquelles, comme il vient d'être dit, auront été mises à bord d'un vaisseau appartenant à l'ennemi avant la

out the knowledge of it, shall no ways be liable to confiscation, but shall well and truly be restored without delay to the proprietors demanding the same; but so as that if the said merchandizes be contraband, it shall not be any ways lawful to carry them afterwards to any ports belonging to the enemy. The two contracting parties agree that the term of two months being passed after the declaration of war, their respective citizens, from whatever part of the world they come, shall not plead the ignorance mentioned in this article.

guerre, ou même après la dite déclaration lorsqu'on l'ignorait, ne seront, en aucune manière, sujettes à confiscation, mais seront fidèlement et de bonne foi rendues, sans délai, à leurs propriétaires qui les réclameront; bien entendu néanmoins qu'il ne soit pas permis de porter dans les ports ennemis les marchandises qui seront de contrebande. Les deux parties contractantes conviennent que le terme de deux mois passé depuis la déclaration de guerre, leurs citoyens respectifs, de quelque partie du monde qu'ils viennent, ne pourront plus alléguer l'ignorance dont il est question dans le présent article.

Article XVI

The merchant ships belonging to the citizens of either of the contracting parties, which shall be bound to a port of the enemy of one of the parties, and concerning whose voyage and the articles of their cargo there shall be just grounds of suspicion, shall be obliged to exhibit, as well upon the high seas as in the ports or roads, not only their passports, but likewise their certificates, showing that their goods are not of the quality of those which are specified to be contraband in the thirteenth article of the present convention.

Article XVI

Les navires marchands appartenant à des citoyens de l'une ou d'autre des deux parties contractantes, lorsqu'ils voudront passer dans le port de l'ennemi de l'une des deux parties, et que leur voyage ainsi que les effets de leur cargaison pourront donner de justes soupçons, les dits navires seront obligés d'exhiber en pleine mer, comme dans les ports ou rades, non seulement leurs passeports, mais encore leurs certificats prouvant que ces effets ne sont point de la même espèce que ceux de contrebande spécifiés dans l'article treize de la présente convention.

ARTICLE XVII

And that captures on light suspicions may be avoided, and injuries thence arising prevented, it is agreed that when one party shall be engaged in war, and the other party be neuter, the ships of the neutral party shall be furnished with passports similar to that described in the fourth article, that it may appear thereby that the ships really belong to the citizens of the neutral party; they shall be valid for any number of voyages, but shall be renewed every year; that is, if the ship happens to return home in the space of a year. If the ships are laden, they shall be provided not only with the passports above mentioned, but also with certificates similar to those described in the same article, so that it may be known whether they carry any contraband goods. No other paper shall be required, any usage or ordinance to the contrary notwithstanding. And if it shall not appear from the said certificates that there are contraband goods on board, the ships shall be permitted to proceed on their voyage. If it shall appear from the certificates that there are contraband goods on board any such ship, and the commander of the same shall offer to deliver them up, the offer shall be accepted, and the ship shall be at liberty to pursue its voyage, un-

ARTICLE XVII

Et afin d'éviter des captures sur des soupçons frivoles, et de prévenir les dommages qui en résultent, il est convenu que, quand une des deux parties sera en guerre et l'autre neutre, les navires de la partie neutre seront pourvus de passeports semblables à ceux spécifiés dans l'article quatre, de maniére qu'il puisse par là apparaitre que les navires appartiennent véritablement à la partie neutre. Ces passeports seront valides pour un nombre quelconque de voyages; mais il seront renouvellés chaque année, si le navire retourne chez lui dans l'espace d'une année. Si ces navires sont chargés, il seront pourvus non seulement des passeports sus mentionnés mais aussi de certificats semblables à ceux mentionnés au même article, de manière que l'on puisse connaitre s'il y a à bord des marchandises de contrebande. Il ne sera exigé aucune autre pièce, non obstant tous usages et règlemens contraires; et s'il n'apparait pas par ces certificats qu'il y ait des marchandises de contrebande à bord, les navires seront laissés à leur destination. Si, au contraire, il apparait, par ces certificats, que les dits navires ayent des marchandises de contrebande à bord, et que le commandant offre de les délivrer, l'offre sera acceptée, et le navire sera remis en liberté de

less the quantity of the contraband goods be greater than can conveniently be received on board the ship of war or privateer, in which case the ship may be carried into port for the delivery of the same.

If any ship shall not be furnished with such passport or certificates as are above required for the same, such case may be examined by a proper judge or tribunal, and if it shall appear from other documents or proofs admissible by the usage of nations, that the ship belongs to the citizens of the neutral party, it shall not be confiscated, but shall be released with her cargo (contraband goods excepted) and be permitted to proceed on her voyage.

If the master of a ship named in the passport should happen to die, or be removed by any other cause, and another put in his place, the ship and cargo shall nevertheless be equally secure, and the passport remain in full force.

poursuivre son voyage; à moins que la quantité de marchandises de contrebande ne soit trop grande pour pouvoir être prise convenablement à bord du vaisseau de guerre ou corsaire; dans ce cas le navire pourra être amené dans le port pour y délivrer la dite marchandise.

Si un navire est trouvé sans avoir le passeport ou les certificats ci-dessus exigés, l'affaire sera examinée par les juges ou tribunaux compétens; et s'il conste par d'autres documens ou preuves admissibles par l'usage des nations, que le navire appartient à des citoyens de la partie neutre, il ne sera pas condamné, et il sera remis en liberte avec son chargement, la contrebande exceptée, et aura la liberté de poursuivre sa route.

Si le capitaine nommé dans le passeport du navire venait à mourir, ou à être oté par toute autre cause, et qu'un autre fut nommé à sa place, le navire et sa cargaison n'en seront pas moins en sûreté, et le passeport demeurera dans toute sa force.

Article XVIII

If the ships of the citizens of either of the parties shall be met with, either sailing along the coasts or on the high seas, by any ship of war or privateer of the other, for the avoiding of any

Article XVIII

Si les bâtimens des citoyens de l'une ou l'autre nation sont rencontrés le long des cotes, ou en pleine mer, par quelques vaisseaux de guerre ou corsaires de l'autre; pour prévenir tout désordre, les

disorder the said ships of war or privateers shall remain out of cannon-shot, and may send their boats on board the merchant ship which they shall so meet with, and may enter her to the number of two or three men only, to whom the master or commander of such ship shall exhibit his passport concerning the property of the ship, made out according to the form prescribed in the fourth article. And it is expressly agreed that the neutral party shall in no case be required to go on board the examining vessel for the purpose of exhibiting his papers, or for any other examination whatever.

ARTICLE XIX

It is expressly agreed by the contracting parties that the stipulations above mentioned, relative to the conduct to be observed on the sea by the cruisers of the belligerent party towards the ships of the neutral party, shall be applied only to ships sailing without convoy; and when the said ships shall be convoyed, it being the intention of the parties to observe all the regard due to the protection of the flag displayed by public ships, it shall not be lawful to visit them; but the verbal declaration of the commander of the convoy, that the ships he convoys belong to the nation whose flag he

dits vaisseaux ou corsaires se tiendront hors de la portée du canon et enverront leur canot à bord du navire marchand qu'ils auront rencontré: ils n'y pourront entrer qu'au nombre de deux ou trois hommes, et demander au patron ou capitaine du dit navire, exhibition du passeport concernant la propriété du dit navire, fait d'après la formule prescrite dans l'article quatre, ainsi que les certificats sus mentionnés relatifs à la cargaison. Il est expressément convenu que le neutre ne pourra être contraint d'aller à bord du vaisseau visitant pour y faire l'exhibition demandée des papiers ou pour toute autre information quelconque.

ARTICLE XIX

Il est expressément convenu par les parties contractantes, que les stipulations ci-dessus, relatives à la conduite qui sera tenue à la mer par les croiseurs de la partie belligérante, envers les bâtimens de la partie neutre, ne s'appliqueront qu'aux bâtimens naviguant sans convoi; et dans le cas où les dits bâtimens seraient convoyés, l'intention des parties étant d'observer tous les égards dus à la protection du pavillon aboré sur les vaisseaux publics, on ne pourra point en faire la visite. Mais la déclaration verbale du commandant de l'escorte, que les navires de son convoi appartiennent à la

carries, and that they have no contraband goods on board, shall be considered by the respective cruisers as fully sufficient, the two parties reciprocally engaging not to admit, under the protection of their convoys, ships which shall carry contraband goods destined to an enemy.

nation dont ils portent le pavillon, et qu'ils n'ont aucune contrabande à bord, sera regardée par les croiseurs respectifs comme pleinement suffisante; les deux parties s'engageant réciproquement à ne point admettre sous la protection de leur convoi, des bâtimens qui porteraient des marchandises prohibées à une destination ennemie.

Article XX

In all cases where vessels shall be captured or detained, under pretence of carrying to the enemy contraband goods, the captor shall give a receipt for such of the papers of the vessel as he shall retain, which receipt shall be annexed to a descriptive list of the said papers; and it shall be unlawful to break up or open the hatches, chests, trunks, casks, bales, or vessels found on board, or remove the smallest part of the goods, unless the lading be brought on shore in presence of the competent officers, and an inventory be made by them of the said goods; nor shall it be lawful to sell, exchange, or alienate the same in any manner, unless there shall have been lawful process, and the competent judge or judges shall have pronounced against such goods sentence of confiscation, saving always the ship and the other goods which it contains.

Article XX

Dans le cas ou les bâtimens seront pris ou arrêtés, sous prétexte de porter à l'ennemi quelqu'article de contrebande, le capteur donnera un reçu des papiers du bâtiment qu'il retiendra, lequel reçu sera joint à une liste énonciative des dits papiers: il ne sera point permis de forcer ni d'ouvrir les écoutilles, coffres, caisses, caissons, balles, ou vases trouvés à bord du dit navire, ni d'enlever la moindre chose des effets, avant que la cargaison ait été débarquée en présence des officiers compétens, qui feront un inventaire des dits effet; ils ne pourront, en aucune manière être vendus, échangés ou aliénés, à moins qu'aprés une procédure légale, le juge ou les juges compétens n'ayent porté contre les dits effets sentence de confiscation (*en exceptant toujours le navire et les autres objets qu'il contient.*)

ARTICLE XXI

And that proper care may be taken of the vessel and cargo, and embezzlement prevented, it is agreed that it shall not be lawful to remove the master, commander, or supercargo of any captured ship from on board thereof, either during the time the ship may be at sea after her capture, or pending the proceedings against her or her cargo, or anything relative thereto. And in all cases where a vessel of the citizens of either party shall be captured or seized, and held for adjudication, her officers, passengers, and crew shall be hospitably treated. They shall not be imprisoned or deprived of any part of their wearing apparel, nor of the possession and use of their money, not exceeding for the captain, supercargo, and mate five hundred dollars each, and for the sailors and passengers one hundred dollars each.

ARTICLE XXI

Pour que le bâtiment et la cargaison soyent surveillés avec soin, et pour empêcher les dégâts, il est arrêté que le patron, capitaine ou subrecargue du navire *capturé,* ne pourront être éloignés, du bord, soit pendant que le navire sera en mer, aprés avoir été pris, soit pendant les procédures qui pourront avoir lieu contre lui, sa cargaison ou quelque chose y relative.

Dans le cas où le navire appartenant à des citoyens de l'une ou de l'autre partie serait pris, saisi et retenu pour être jugé, ses officiers, passagers et équipage seront traités avec humanité; ils ne pourront être emprisonnés, ni dépouillés de leurs vêtemens, ni de l'argent à leur usage, qui ne pourra excéder, pour le capitaine, le subrecargue, et le second, cinq cents dollars chacun; et pour les matelots et passagers, cent dollars chacun.

ARTICLE XXII

It is further agreed that in all cases the established courts for prize causes, in the country to which the prizes may be conducted, shall alone take cognizance of them. And whenever such tribunal of either of the parties shall pronounce judgment against any vessel or goods, or property

ARTICLE XXII

Il est de plus convenu que dans tous les cas, les tribunaux établis pour les causes de prises dans les pays où les prises seront conduites, pourront seuls en prendre connaissance; et quelques jugement que le tribunal de l'une ou de l'autre partie prononce contre quelques navires ou marchandises ou pro-

claimed by the citizens of the other party, the sentence or decree shall mention the reasons or motives on which the same shall have been founded, and an authenticated copy of the sentence or decree, and of all the proceedings in the case, shall, if demanded, be delivered to the commander or agent of the said vessel, without any delay, he paying the legal fees for the same.

priétés réclameés par des citoyens de l'autre partie, la sentence ou décret fera mention des raisons ou motifs qui ont déterminé ce jugement, dont copie authentique, ainsi que de toute la procédure y relative, sera, à leur réquisition, delivrée, sans délai, au capitaine ou agent du dit navire, moyennant le payement des frais.

ARTICLE XXIII

And that more abundant care may be taken for the security of the respective citizens of the contracting parties, and to prevent their suffering injuries by the men-of-war or privateers of either party, all commanders of ships of war and privateers, and all others the said citizens, shall forbear doing any damaage to those of the other party, or committing any outrage against them, and if they act to the contrary they shall be punished, and shall also be bound in their persons and estates to make satisfaction and reparation for all damages and the interest thereof, of whatever nature the said damages may be.

For this cause all commanders of privateers, before they receive their commissions, shall hereafter be obliged to give, before a competent judge, sufficient security by

ARTICLE XXIII

Et afin de pourvoir plus efficacement à la sureté respective des citoyens des deux parties contractantes, et prévenir les torts qu'ils auraient à craindre des vaisseaux de guerre ou corsaires, de l'une ou l'autre partie, tous commandans des vaisseaux de guerre et de corsaires, et tous autres citoyens de l'une des deux parties, s'abstiendront de tout dommage envers les citoyens de l'autre et de toute insulte envers leurs personnes. S'ils faisaient le contraire, ils seront punis, et tenus à donner, dans leurs personnes et propriétés, satisfaction et réparation pour les dommages, avec intérêt, de quelque espèce que soyent les dits dommages.

A cet effet, tous capitaines de corsaires, avant de recevoir leurs commissions, s'obligeront, devant un juge compétent, à donner une garantie au moins par deux cau-

at least two responsible sureties who have no interest in the said privateer, each of whom, together with the said commander, shall be jointly and severally bound in the sum of seven thousand dollars or thirty-six thousand eight hundred and twenty francs, or if such ships be provided with above one hundred and fifty seamen or soldiers, in the sum of fourteen thousand dollars, or seventy-three thousand six hundred and forty francs, to satisfy all damages and injuries which the said privateer, or her officers, or men, or any of them, may do or commit during their cruise, contrary to the tenor of this convention, or to the laws and instructions for regulating their conduct; and further, that in all cases of aggression the said commission shall be revoked and annulled.

ARTICLE XXIV

When the ships of war of the two contracting parties, or those belonging to their citizens which are armed in war, shall be admitted to enter with their prizes the ports of either of the two parties, the said public or private ships, as well as their prizes, shall not be obliged to pay any duty either to the officers of the place, the judges, or any others; nor shall such prizes, when they come to

tions responsables, lesquelles n'auront aucun intérêt sur le dit corsaire, et dont chacune, ainsi que le capitaine, s'engagera particuliérement et solidairement pour la somme de sept mille dollars ou trente six mille huit cent vingt francs; et si les dits vaisseaux portent plus de cent cinquante Matelots ou Soldats, pour la somme de quatorze mille dollars ou soixante treize mille six cent quarante francs, qui serviront à reparer les torts ou dommages que les dits corsaires, leurs officiers, équipages ou quelqu'un d'eux auraient fait ou commis pendant leur croisière, de contraire aux dispositions de la presénte convention, ou aux lois et instructions qui devront être la régle de leur conduite: en outre, les dites commissions seront révoquées et annullées dans tous les cas où il y aura en aggression.

ARTICLE XXIV

Lorsque les vaisseaux de guerre des deux parties contractantes, ou ceux que leurs citoyens auraient armés en guerre, seront admis à relâcher, avec leurs prises, dans les ports de l'une des deux parties, les dits vaisseaux publics ou particuliers, de même que leurs prises, ne seront obligés a payer aucun droit, soit aux officiers du lieu, soit aux juges ou à tous autres; les dites prises entrant dans les hâvres

and enter the ports of either party, be arrested or seized, nor shall the officers of the place make examination concerning the lawfulness of such prizes; but they may hoist sail at any time and depart, and carry their prizes to the places expressed in their commissions, which the commanders of such ships of war shall be obliged to shew. It is always understood that the stipulations of this article shall not extend beyond the privileges of the most favored nation.

ARTICLE XXV

It shall not be lawful for any foreign privateers who have commissions from any Prince or State in enmity with either nation, to fit their ships in the ports of either nation, to sell their prizes, or in any manner to exchange them; neither shall they be allowed to purchase provisions, except such as shall be necessary for their going to the next port of that Prince or State from which they have received their commissions.

ARTICLE XXVI

It is further agreed that both the said contracting parties shall not only refuse to receive any pirates into any of their ports, havens, or towns, or permit any of their inhabitants to receive, protect, harbor, conceal, or assist

ou ports de l'une des deux parties, ne pourront être arretées ou saisies, et les officiers des lieux ne pourront prendre connaissance de la validité des dites prises, lesquelles pourront sortir et être conduites en toute franchise et liberté aux lieux portés par les commissions dont les capitaines des dits vaisseaux seront obligés de faire apparoir. Il est toujours entendu que les stipulations de cet article ne s'etendront pas au delà des priviléges des nations les plus favorisées.

ARTICLE XXV

Tous corsaires étrangers ayant des commissions d'un Etat ou Prince en guerre avec l'une ou l'autre nation, ne pourront armer leurs vaisseaux dans les ports de l'une ou l'autre nation, non plus qu'y vendre leurs prises, ni les échanger en aucune manière: il ne leur sera permis d'acheter des provisions que la quantité nècessaire pour gagner le port le plus voisin de l'Etat ou Prince duquel ils ont reçu leurs commissions.

ARTICLE XXVI

Il est de plus convenu qu'aucune des deux parties contractantes non seulement ne recevra point de pirates dans ces ports, rades ou villes, et ne permettra pas qu'aucun de ses habitans les reçoive, protége, accueille ou recèle en au-

them in any manner, but will bring to condign punishment all such inhabitants as shall be guilty of such acts or offenses.

And all their ships, with the goods or merchandises, taken by them and brought into the port of either of the said parties, shall be seized as far as they can be discovered, and shall be restored to the owners, or their factors or agents duly authorized by them; (proper evidence being first given before competent judges for proving the property;) even in case such effects should have passed into other hands by sale, if it be proved that the buyers knew or had good reason to believe or suspect that they had been piratically taken.

ARTICLE XXVII

Neither party will intermeddle in the fisheries of the other on its coasts, nor disturb the other in the exercise of the rights which it now holds or may acquire on the coast of Newfoundland, in the Gulf of St. Lawrence, or elsewhere on the American coast northward of the United States. But the whale and seal fisheries shall be free to both in every quarter of the world.

This convention shall be ratified on both sides in due form, and the ratifications exchanged in the

cune manière, mais encore livrera à un juste châtiment ceux de ses habitans qui seraient coupables de pareils faits ou délits. Les vaisseaux de ces pirates, ainsi que les effets et marchandises par eux pris et amenés dans les ports de l'une ou l'autre nation, seront saisis par tout où ils seront découverts et restitués à leurs propriétaires, agens ou facteurs duement autorisés par eux, aprés toutefois qu'ils auront prouvé devant les juges compétens le droit de proprieté.

Que si les dits effets avaient passé, pavente, en d'autres mains, et que les acquéleurs fussent ou pussent être instruits ou soupçonnaient que les dits effets avaient été enlevês par des pirates, ils seront également restitués.

ARTICLE XXVII

Aucune des deux nations ne viendra participer aux pêcheries de l'autre sur ses cotes, ni la troubler dans l'exercise des droits qu'elle a maintenant ou pourrait acquérir sur les cotes de Terre neuve, dans le golfe de St. Laurent, ou par tout ailleurs, sur les cotes d'Amêrique au nord des Etats-Unis; mais la pêche de la baleine et du veau marin sera libre pour les deux nations dans toutes les parties du monde. Cette convention sera ratifiée de part et d'autre en bonne et due forme et

space of six months, or sooner if possible.

In faith whereof the respective Plenipotentiaries have signed the above articles both in the French and English languages, and they have thereto affixed their seals: declaring, nevertheless, that the signing in the two languages shall not be brought into precedent, nor in any way operate to the prejudice of either party.

Done at Paris the eighth day of Vendémiaire of the ninth year of the French Republic, the thirtieth day of September, anno Domini eighteen hundred.

J. Bonaparte. [L. S.]
C. P. Fleurieu. [L. S.]
Roederer. [L. S.]
O. Ellsworth. [L. S.]
W. R. Davie. [L. S.]
W. V. Murray. [L. S.]

les ratifications seront êchangées dans l'espace de six mois, ou plutot, s'il est possible.

En foi de quoi les plénipotentiaires respectifs ont signê les articles ci-dessus, tant en langue Française, qu'en langue Anglaise, et ils y ont apposé leurs sceau, déclarant néanmoins que la signature en deux langues ne sera point citée comme exemple, et ne préjudiciera à aucune des deux parties.

Fait à Paris, le huitième Jour de Vendémiaire de l'an neuf de la République Française et le trentième Jour de Septembre mil huit cent.

(*Signé:*) J. Bonaparte.
C. P. Fleurieu.
Roederer.
O. Ellsworth.
W. R. Davie.
W. V. Murray.