INTERNATIONAL LAW

IN CONNEXION WITH

MUNICIPAL STATUTES

RELATING TO

The Commerce, Rights and Liabilities of the Subjects of Neutral States pending Foreign War,

CONSIDERED

WITH REFERENCE TO THE TRIAL OF THE CASE OF THE "ALEXANDRA,"
SEIZED UNDER THE PROVISIONS OF THE

FOREIGN ENLISTMENT ACT.

BY

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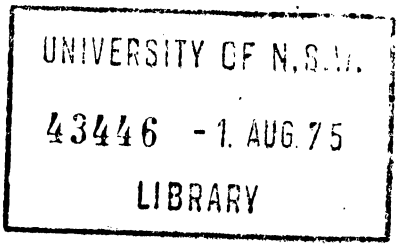
LONDON:
BUTTERWORTHS, 7 FLEET STREET,
Law Publishers to the Queen's most excellent Majesty.
HODGES, SMITH, & CO., GRAFTON STREET, DUBLIN.
1863.



PRINTED BY WILLIAM MACKENZIE, 45 & 47 HOWARD STREET, GLASGOW.

DEDICATION.

TO

FELIX JOHN HAMEL, Esq.,

SOLICITOR FOR HER MAJESTY'S CUSTOMS, ETC., ETC.

My dear Father,

Since it is chiefly to you, as my legal preceptor, that I owe the little knowledge I have acquired of the profession in which you have earned such honourable distinction, permit me, in grateful recognition of your paternal kindness and untiring devotion to my interests, to dedicate to you the first legal essay to which I venture to give publicity.

I know that I might have trespassed largely on your time and patience, with great advantage to myself, for advice and assistance in that which has to me been a work of much thought and laborious research; but having regard to your official position, I deemed it more discreet to avoid any course which might even indirectly involve you in any responsibility for the opinions I might independently express.

I know that, however severe may be the criticisms of others, my work will be perused and accepted by you in that generous

spirit of liberality and that candid impartiality which have always been eminently characteristic of yourself; it is therefore with the less hesitation that I inscribe it to you. Doubtless it abounds with many faults naturally inseparable from inexperienced authorship, and which will evoke the censure of astute reviewers, should the work be deemed worthy of comment at their hands. I shrink not from that ordeal, because honest criticism is the sternest, and therefore the best instructor, of those who are ready to profit by its teachings.

In one particular, at least, I anticipate observation—I mean with respect to the frequent repetitions which occur in it. In defence of this permit me to remark, that it is one of those subjects which it is impossible properly to discuss without reference to many distinct propositions of law, and recognized rules and principles which by general acceptance have acquired the force of law, upon the due consideration of which the main issues depend; and that it naturally resolves itself into several parts demanding separate consideration, the discussion of each being dependent upon some one or other of the same propositions demanding reiteration. It is true that to the accomplished lawyer the slightest reference to previous statements where necessary would be sufficient, indeed they would recur to his mind without mention; but this work is designed for the information of the public generally, rather than of a class, and I have preferred repeating the propositions essential to each branch of the argument, preferring tautological perspicuity to laconic obscurity. Nor am I blind to the fact that, particularly in the last chapter, I have been somewhat discursive, partly because I thought it might conduce to the profitable exhaustion of a subject of present interest, to take notice of the ephemeral

discussions in the public press which either threw light upon the subject or called for refutation. These interpolations, though giving a more desultory and inconsecutive character to the argument, appeared so well calculated to elucidate the important features of the controversy in question, that much would have been lost by their omission. Here I leave it, trusting that my labours may not prove valueless to the shipbuilder, the manufacturer, the merchant, and others who may be interested in this important question; and with every sentiment of dutiful respect, I beg to subscribe myself,

Your devoted Son,

F. HARGRAVE HAMEL.

London, Sept. 29, 1863.

CONTENTS.

CHAPTER I.

INTRODUCTORY OBSERVATIONS.

CHAPTER II.

JURISDICTION OVER SEAS AND NAVIGABLE RIVERS, AND MATTERS INCIDENT TO A STATE OF WAR.

CHAPTER III.

LAW OF BLOCKADE AND RIGHT OF SEARCH.

CHAPTER IV.

CONTRABAND OF WAR.

CHAPTER V.

INTERNATIONAL IN CONNEXION WITH MUNICIPAL LAW.

CHAPTER VI.

CONCLUDING OBSERVATIONS.

APPENDIX.

TABLE OF CASES.

WORKS AND AUTHORS REFERRED TO.

INTERNATIONAL LAW

IN CONNEXION WITH

MUNICIPAL STATUTES.

CHAPTER I.

INTRODUCTORY OBSERVATIONS.

Introductory observations.

It has been eloquently observed by an American citizen* of no mean standing and ability, that "the struggle in "which the Government and loyal people of the country "(the United States of America) have been now for "nearly two years engaged, is one of almost unex- "ampled magnitude, attended with all the difficulties, the "sacrifices, the alternations of success and failure, which "are incident to a contest of such stupendous dimensions. "Scarce ever have there been arrayed against each "other, on a field of action so vast, forces so numerous, "at an expense so great, with such profusion of material "supplies and financial resources, and, what is infinitely "more important, with interests so momentous at stake. "The scene of the conflict, co-extensive as it is with "the settlements of the United States this side of the "Rocky Mountains, is but little inferior in extent to "Europe; the military forces in array, and amply "supplied with the *materiel* of war, are as great as "were ever placed in the field in the wars of the French

* The Honourable Edward Everett.

Introductory observations.

"Revolution; the sea-coast held in rigid blockade by our "navy, is more extensive than that actually blockaded "by the navy of Great Britain during that war; our "armies and navy, owing to the character of our soldiers "and seamen, and the higher standard of comfort in "this country, are sustained at greater expense than "those of any other service: and the objects of the war "are nothing less than to prevent a great and prosperous "Union of States, under one constitutional government, "from being broken up into wretched fragments; to "protect the organic life of a mighty people, in the "morning of their national existence, from the murder-"ous and suicidal blow aimed at it; to rescue the work "of our revolutionary and constitutional fathers, the "greatest political work of human wisdom, from igno-"minious ruin; and to hand down this peerless inherit-"ance of public and private blessings unimpaired to "our posterity."

Character of the war.

The page of history furnishes no parallel to this gigantic crusade. The civilized portion of the world, notwithstanding its large experience of the horrors of war, has from day to day been appalled by the revolting details of wholesale slaughter and merciless carnage which have marked the footsteps of the contending armies. The best feelings of mankind have been shocked by the reckless indifference to the sacrifice of human life, and the heartless spoliation of the property of non-combatants, even to the destruction of the implements of reproduction, which have characterized this war. Nay, we may add to the dark catalogue the murder in cold blood of innocent victims to fratricidal animosity, and cite for instance the solemn mockery of a military execution of a young, handsome, and gallant officer, and two of his comrades, on the bare suspicion

of having disposed of an enemy who subsequently to the bloody tragedy reappeared safe and sound. Viewing the horrors of civil strife from afar, the neutral countries of Europe could only stand aghast at the frightful spectacle, and deplore the remorseless cruelty and rapine which, in defiance of all the principles of modern warfare observed by civilized nations, have conferred an unenviable notoriety upon the actors in this terrible drama. Desirable as it may be for neutral nations to stand aloof from the intestine feuds which disturb the peace of the other great families of the earth, it is impossible for them to avert the calamitous consequences which war indirectly brings upon the non-belligerent countries, particularly where, as in the present case, great mercantile interests are involved. The sea-board of the contending parties beset by blockading squadrons, is measured not by hundreds, but thousands of miles. Commercial enterprise, ever daring in the pursuit of gain, tempted by the high premium on success, is ready to peril its ships and cargoes in the hope of maintaining lucrative inter-communication with the mercantile depôts of the immense territory beyond the guarded line of coast. Sympathy, too, for one or other of the belligerents, encourages a chivalrous desire on the part of the neutral, whatever the policy of his country's government, to run all risks to succour those whose cause he is disposed to espouse. Conflicts are in such a state of things inevitable; hence, complications ensue both as affects the international rights of their respective countries, and the duties and privileges of their respective subjects. With such questions it is often difficult to deal, notwithstanding the acknowledged rules laid down for the general government of nations in such emer-

Introductory observations.

Calamitous consequences to neutrals.

Introductory observations. gencies, and the municipal laws and regulations adopted by particular states. Those rules, so to speak, have grown out of the exigencies of the case, the provisions of treaties, and the decisions of the courts of civilized nations, from time to time accepted by common consent of the strongest, and quoted for or against each other, as parallel circumstances arise. These constitute what

Origin of International Law. is called International Law, forming as it were a code for the mutual government of the nations of the earth in their relations with each other.

Treaties. The power of concluding treaties and contracting alliances with other states, is an important national prerogative, which, however, can only be exercised so as not to endanger the rights, liberties, and safety of surrounding nations. With reference to these it has been observed by that eminent American writer Chancellor Kent, that treaties of commerce which define or establish the rights and extent of commercial intercourse, occupy from their great utility a very important title in the code of national law.*

Municipal Laws. The municipal laws of particular states, having relative objects in view, are rather designed for the control of the subject in matters where it may be deemed essential, in time of war or peril, to interfere with the free action or liberty of the subject, as political expediency or the interests of the state may require. The propriety of enforcing these municipal statutes properly rests with the executive. The declared object of the Foreign Equipment Act of this country clearly is, as its preamble indicates, to restrain the subject from pursuing such a course as might " be prejudicial to, and tend to " endanger the peace and welfare of this kingdom."

It is the undoubted right of every independent state

* Kent's Com., vol. i., p. 36.

to regulate its own government, and administer its own laws, as it may deem expedient. Any foreign interference with the exercise of these privileges, where the policy of one state does not seriously endanger the safety and welfare of another, is at all times questionable, though there are exceptional cases in which interference may find a justification. *Introductory observations.*

In cases of revolt, interposition by foreign powers in favour of one of the contending parties may sometimes be exercised with propriety, but should never be resorted to without great caution. Succour is seldom afforded to the revolting parties, unless in extreme cases, until they have so far established their independence as to give a fair guarantee of permanent stability. In cases of civil war, where the nation is divided into conflicting armies and opposing camps, the two parties may be dealt with as distinct communities, and foreign assistance rendered to either side as in a war between separate and independent nations. The framers of the 7th section of the Foreign Enlistment Act of this country might have had special regard to this proposition, inasmuch as the words applicable to *persons exercising* or *assuming to exercise the powers of government* over any province or *part of any province or people* are peculiarly adapted to this view of the case, and exhibit a marked distinction between the language of the corresponding or 3rd section of the Act of Congress or United States Foreign Equipment Act of 20th April, 1818, and that of the British Act, which was passed in the following year. But the reason usually assigned for it is, that as the law against enlistment and equipment only pointed to acknowledged states, it was expedient to give the prohibition a distinct application to non-recognized belligerent powers. Foreign interference. Application of Foreign Enlistment Act.

Introductory observations. How far one friendly state is entitled to invoke for its own advantage, at the expense of another friendly state, the exercise by a neutral country of the provisions of a purely domestic act of this nature, will be a fair subject for discussion in its proper place.

Pending contest and its incidents. Many circumstances arising out of, or incident to, the pending struggle in the United States, are necessarily fraught with deep interest to a great maritime and commercial people. Seizures have been made, and ships have been carried into prize courts for adjudication, under circumstances which materially affect the honour of the British Flag, or the rights of British merchants in their intercourse, not only with the blockaded Southern ports at their own risk, but with other neutral countries; whilst the recent seizure and prosecution of the "Alexandra" at Liverpool under the Foreign Enlistment Act before referred to, and the abortive attempts which have been made, at the instance of the United States, to frustrate the departure of other British-built ships, have raised questions of grave importance to the merchants and ship-builders of this country.

Apt time for elucidating Law of Nations. The war still continues, and our relations with the belligerent parties remain the same. It would seem therefore that at no time could a condensation of the broad principles of international law, and an elucidation of the provisions of the municipal statutes affecting the question, be more acceptable than at this conjuncture. The object of the present treatise is to furnish this desideratum in a popular form, so as to render it of some value to the commercial community, as well as to the student of international law. This it is proposed to accomplish without entering into any disquisition on the merits or demerits of the conflict now raging

beyond the waters of the broad Atlantic, or the motives by which the respective combatants are influenced, but as far as practicable, calmly and dispassionately to set forth the law, more especially with reference to its bearing on the maritime and mercantile interests of this country. *Introductory observations.*

It is obvious that the British Government has hitherto sought, by the observance of a strict and impartial neutrality, to avoid any direct or dangerous interference in the quarrels of the contending parties. It has, however, not only taken the precautionary step of guarding the subject against any infringement of that neutrality, by the issue of a warning proclamation, in which attention has been carefully drawn to the restrictive provisions of the Foreign Enlistment Act, but has resorted to active measures by its interference with ships and vessels suspected of infractions of the municipal law. How far these measures were legally justifiable is a grave question, which is for the time being adversely determined by the recent judgment of the Lord Chief Baron, whose ruling, however, has been questioned and appealed against on the part of the Crown. This will probably become the subject of elaborate argument, and final decision in the ensuing term. British regard for neutrality; Questionable use of the Foreign Enlist. Act.

In the mean time, independently of the fair right of discussion of the grave questions involved in the late trial, there are various doctrines of international law, affecting the rights of neutral subjects, of which they ought not to be ignorant, and which cannot be devoid of interest, particularly to a great commercial and maritime community.

These are to be found only by diligent research amongst other matter in the voluminous treatises, law

Introductory observations.

reports, and other works, usually accessible only to a particular class.

Object of this work.

The most convenient course that suggests itself, appears to be to set forth, as succinctly as due regard to perspicuity will admit, the leading features of international law so far as they affect the privileges and disabilities of neutrals in general, without confining the inquiry exclusively to those laws, rules, and maxims which bear upon the peculiar question of the day which it is intended more especially to discuss.

CHAPTER II.

JURISDICTION OVER SEAS AND NAVIGABLE RIVERS, AND MATTERS INCIDENT TO A STATE OF WAR.

Jurisdiction over seas, &c.

THE open sea is free to the whole world, nor can the progress of vessels sailing upon it be arrested or retarded, unless in time of war, or when the right of visitation and search has been conceded by treaty. On the ocean a nation can only exercise a legal jurisdiction over its own ships.

Narrow seas.

With respect to dominion over narrow seas, the generally adopted rule is that national occupancy extends only so far as it is established by prior possession or treaty.* As regards water approaching the land, the jurisdiction according to ancient doctrine is limited to the range of a cannon shot, or with greater certainty, in these days of powerful projectiles, to a league seaward; beyond which distance, says Sir William Scott, "universal use is presumed in like manner as "common use in rivers flowing through co-terminous "states is presumed."† (The *Twee Gebroeders*, 3 Rob. Adm. Rep., 336.)

Navigable rivers.

The right to navigable rivers may be thus briefly summed up:—When a navigable river is bounded on both sides by the same territory for its entire length, it is the property of the state through which it flows, and may be closed or opened to foreign navigation and commerce at the discretion of its proprietors; but when each bank is the boundary of a distinct state, each has

* Kent's Com., i. 29. † Kent's Com., i. 31.

Jurisdiction over seas, &c.

equal rights; and when a river flows, as to one portion, between banks both belonging to one state, and, as to another portion, through the banks of another state, each of those states is entitled to the right of navigation throughout the stream or river, which thus becomes open to the whole world.

Navigation of rivers by treaty.

The free navigation of the various European rivers, is regulated by treaties based upon the *dicta* of the Congress of Vienna in 1815.* That of the Rhine and Scheldt was declared to be free in that year, and the Danube was thrown open by subsequent treaties between Austria and Russia in December, 1842,† and England and Russia in January, 1843,‡ by which this right of free navigation was also extended to several other rivers of minor importance.

In July, 1852, the Argentine Confederacy, by treaty with England, conceded to the merchant vessels of all nations the free navigation of the Parana and Uruguay, subject to the local regulations.§ The English Government, by treaty with the United States in June, 1854, sanctioned the navigation of the St. Lawrence by the Americans, subject only to the "same tolls, &c., as are "now or may hereafter be exacted from Her Majesty's "subjects," reserving, however, the right of suspending these privileges after due notice.‖ By article 15 of the treaty of peace after the Crimean war, signed at Paris in March, 1856, the free navigation of the Danube was restored in accordance with the provisions of the Act of Congress of Vienna.¶

Declaration of war.

War is at present declared by manifesto, which publishes to the world that hostilities are about to

* Hertslett's Treaties, vol. i., pp. 3—45. † Do. vol. vi., pp. 38—42.
‡ Do. vol. vi., p. 762. § Do. vol. ix., p. 191. ‖ Do. vol. ix., p. 998.
¶ Do. vol. x., p. 553.

commence, and enables other nations to determine what part they shall take in the coming contest. *Jurisdiction over seas, &c.*

The extent to which nations are bound to assist one another in time of war is determined by treaty, and assistance even then cannot be compulsorily demanded unless the cause be just. * When the alliance is defensive only, the ally merely covenants to assist another nation should it be attacked. Assistance by treaty.

Ransomed vessels are exempted from further seizure by the ships of the captor or his allies, until they have completed the voyage on which they were proceeding at the time of capture. Ransom.

Recaptured or rescued vessels that have not been condemned, do not become the property of the recaptor or rescuer, but are, by what is called the *jus postliminii*, to be restored to the original owners on proof of title and payment of salvage; the same privilege is afforded to allies if their conduct be equally liberal. Right of Postliminy.

As germane to this and to an important question subsequently to be discussed, it may be proper here to observe that the protection of the people and property of a belligerent country is generally the subject of treaty regulating their entry into and departure from the foreign dominions. The exercise of any further leniency than that conceded by treaty, is entirely at the discretion of the government, being a question of policy rather than law. Enemy's property within the country.

A nation may impose an embargo upon such foreign vessels within her ports as belong to states against whom she has declared war, or is about to declare it, and this course is justifiable as an indemnification against injuries received from the foreign state; † as Embargoes.

* Grotius, book ii., chap. 25; Vattel, book ii., chap. 12, sec. 168; book iii., chap. 6, sec. 86, 87.

† The *Gertruyda*, 2 Rob. Adm. Rep., 211.

Jurisdiction over seas, &c.

according to Lord Mansfield, upon the declaration of war or hostilities, all the ships of the enemy are detained in our ports to be confiscated as the property of the enemy, if no reciprocal agreement is made.*

Letters of marque and reprisal.

The doubtful expedient of granting letters of marque or reprisal during peace has sometimes been resorted to by a sovereign, enabling his subjects to seize the property of another nation as a pledge for the reparation of injuries sustained; and it has been held that unless redress is afforded, the property seized may be confiscated by a competent court.†

Trading and contracts with the enemy.

No commercial intercourse can properly subsist between the subjects of two belligerent countries without the sanction of their respective governments,‡ and all property taken in such traffic is confiscable as prize to the captor. Trade under the guise of partnership, or by the intervention of third parties, is illegal.§ Partnerships between belligerents, entered into before the war, are void, as are also contracts, with the exception of ransom bonds, entered into subsequent to its declaration; but contracts which existed before the war are simply in abeyance until peace is restored.

Trade of an ally with the enemy.

The co-allies of a belligerent power are also precluded from commerce with the enemy of that power, and the vessels and property of an offending subject of the former so employed, may be seized and confiscated by the co-belligerent whose interests are affected.‖

* Lindo v. Rodney—Doug. Rep., 613.

† Vattel, book ii., chap. 18, sec. 342, *et seq.*—Valin, Liv. 3, Tit. 10 Des Reprisailes.

‡ The *Hoop,* Rob. Adm. Rep., vol. i., p. 196; the *Jvffrow Catharina,* Rob. Adm. Rep., vol. v., p. 140.

§ The *Jonge Pietre,* Rob. Adm. Rep., vol. iv., p. 79; the *Franklin,* Rob. Adm. Rep., vol. vi., p. 127.

‖ The *Nayade,* 4 Rob. Rep., 251; the *Neptunus,* vi. Rob. Rep., 403.

Jurisdiction over seas, &c.

Neutral vessels employed in the coasting trade of the enemy, or sailing under his flag or pass, are liable to seizure and confiscation.* Transfers of goods of a hostile character *in transitu* during a war will not avert the liability to capture. † Contraband of war forwarded by a neutral to and for a belligerent state, is liable to seizure and condemnation by the enemy of such state, ‡ but the venture is not unlawful.

Coasting and sailing under enemy's flags.

Contraband of war in neutral ships.

Privateering.

The subjects or individual members of a belligerent state cannot, according to the customary law of Europe, enter upon hostilities, or fit out privateers to cruise against an enemy, without permission of their respective governments; and if taken by the enemy are not entitled to the mitigated treatment of prisoners of war; nor can the subjects of one belligerent hold commissions or letters of marque under another belligerent, to fight against their own country.§

Prizes and prize courts.

Prizes taken at sea must be condemned by a competent tribunal before they can become the lawful property of the captor or his representative. A prize court must sit in its own country or that of its ally, and cannot be held in a neutral territory, though a captured vessel taken into a neutral port may be condemned by the prize court of the country of the captor or of his ally. ‖

Prizes in neutral ports.

The privilege of bringing prizes into neutral ports can be granted to or withheld from belligerents at the option of the neutrals, but must be extended impartially

* The *Vrow Elizabeth*, 5 Rob. Adm. Rep., 2; the *Vreede Schotlys*, 5 Rob. Adm. Rep. 5 (note).

† The *Jan Frederick*, 5 Rob. Adm. Rep., 127, *et seq.*

‡ The *Jonge Margaretha*, 1 Rob. Adm. Rep., 190.

§ Vattel, book iii., chap. 15, sec. 226.

‖ The *Vlad Oyen*, 1 Rob. Adm. Rep., 134; the *Kierlighett*, 3 Rob. Adm. Rep., 96, and *Constant Mary*, note, p. 97; the *Heinrick and Maria*, 4 Rob. Adm. Rep., 43; the *Comet*, 5 Rob. Adm. Rep., 285.

Jurisdiction over seas, &c.

to both sides. Neutrals cannot object to or interfere with the decision of prize courts, unless the rights of neutral jurisdiction have been violated.

Enemy's property in neutral vessels.

Enemy's property found in neutral vessels beyond the neutral jurisdiction may be confiscated,* but the

Neutral's property in enemy's vessels.

vessel is free; when, however, neutral property is conveyed in enemy's ships, the vessel is liable to confiscation, but the goods are exempt.† These rules are subject to variation by treaty, as where it is agreed that goods in free ships shall be free. To adopt the language of Kent, "The two distinct propositions that "enemy's goods found on board a neutral ship may "lawfully be seized as prize of war, and that the goods "of a neutral found on board an enemy's vessel are to "be restored, have been incorporated into the juris-"prudence of the United States, and declared by the "supreme courts to be founded on the law of nations."‡

* Grotius, books i., iii., chap. 6, sec. 6; Vattel, book iii., chap. 7, sec. 115.

† Grotius, book iii., chap. 6 and 16; Vattel, book iii. chap. 7, sec. 116.

‡ Kent's Com., vol. i.

CHAPTER III.

LAW OF BLOCKADE AND RIGHT OF SEARCH.

Law of Blockade, &c.

WHEN a blockade has been established, and a sufficient legal notice of its existence has been given to neutrals, any vessel or cargo attempting to violate such blockade, is liable to seizure and confiscation.* This rule is, according to modern usage, subject to modification, neutral vessels in blockaded ports at the commencement of the blockade being allowed to leave with cargo *bonâ fide* purchased and shipped before the blockade was instituted.†

Violation of blockade.

Intention of breaking the blockade.

Neutral vessels sailing in close proximity to blockaded ports and places for the purpose of breaking the blockade, incur the risk of search, seizure, and subsequent condemnation, and the cargo is liable to confiscation unless it be proved that its destination was not to the blockaded port, and that it was taken there without the owner's wish or directions.‡

Right of visitation and search.

The right of visitation and search exists only in time of war, or when conceded by treaty, and if a vessel searched by a belligerent ship of war, is found to be carrying on contraband trade, or bearing enemy's despatches, she is liable to seizure and condemnation,

* *Vrow Johanna*, 2 Rob. Adm. Rep., 109; the *Neptunus*, 2 Rob. Adm. Rep., 110; the *Calypso*, 2 Rob. Adm. Rep., 298; the *Mercurius*, 1 Rob. Adm. Rep., 83.

† The *Potsdam*, 4 Rob. Adm. Rep., 89.

‡ The *Columbia*, 1 Rob. Adm. Rep., 154; the *Betsey*, 1 Rob. Adm. Rep., 332; the *Neutralitat*, 6 Rob. Adm. Rep., 30; the *Jute Erwartung*, 6 Rob. Adm. Rep., 182; the *Adonis*, 5 Rob. Adm. Rep., 256; the *Hurtige Hane*. Rob. 2 Adm. Rep., 124.

Law of Blockade, &c.

as are also neutral ships resisting the legitimate exercise of the right of search, even under convoy;* but this does not apply to public ships of war, which have universally been exempted from visitation or search.

Neutral documents.

It is essential to the protection of neutral ships and their cargo that they be supplied with the necessary papers or credentials to establish their neutral character; and the absence, concealment, or destruction of a ship's papers, or the simulation of protective documents, justify capture.†

Penalty of blockade running.

The penalty of blockade running is only coextensive with the voyage, as a ship can only be captured *in delicto*.‡ The *delictum* also ceases when the blockade is raised.§ According to Kent, "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."‖

Blockade should be strict and effective.

The generally accepted doctrine heretofore insisted on with reference to the maintenance of blockade, is that it should be strict and effectual, that the investing power must possess a squadron capable of enforcing the blockade, and of so far defeating every attempt to break it as to render it dangerous to enter the blockaded port, and that no blockade of any place can lay claim to recognition in the absence of a sufficient force to repel evasion, as it must be complete.¶ Indeed Kent admits that "the Government of the United States has uni- "formly insisted that the blockade should be effective

* The *Maria*, 1 Rob. Adm. Rep., 340 (359 *et seq.*).

The *Two Brothers*, 1 Rob. Adm. Rep., 131; the *Rising Sun*, 2 Rob. Adm. Rep., 104; the *Carolina*, 3 Rob. Adm. Rep., 75; the *Nancy*, 3 Rob. Adm. Rep., 123; *Johanna Pholen*, 6 Rob. Adm. Rep., 78, and *Ebenezer*, 252.

‡ The *Welvaart Van Pellaw*, 2 Rob. Rep., 128; The *Christiansberg*, 6 Rob. Rep., 382, and note.

§ The *Lisette*, 6 Rob. Rep., 387. ‖ Kent's Com., vol. i., p. 150.

¶ The *Betsey*, 1 Rob. Adm. Rep., 94.

"by the presence of a competent force stationed and "present at or near the entrance of the port, and "they have protested with great energy against the "application of the right of seizure and confiscation to "ineffectual or fictitious blockades."* *Law of Blockade, &c.*

When the blockade is raised by an enemy, or is rendered abortive by the remissness of the blockading force, the ingress and egress of neutrals becomes once more free; and should the blockade be resumed, they are entitled to a fresh notice before the ordinary consequences of the breach of the blockade attach to them.† Raising of blockade by enemy, or remissness.

The accidental absence of the blockading squadron from the unavoidable effects of storm or tempest, is not deemed to constitute a suspension of the blockade if re-established with all possible despatch.‡ Suspension by storm or tempest.

As already shown, from the admission of their own great authority on international law, the American Government has most strenuously upheld the doctrine of strict blockade as essential to its validity; yet the ineffectual character of the blockade which it is at present affecting to maintain, is so notorious, that, according to their own doctrine, it is not entitled to that respect which, during the existing war with the Southern States, England and other European powers have liberally accorded to it. Acquiescence in this relaxation of the principle heretofore so strongly insisted upon, may not only go far, in case of need, to confirm the right of other nations to insist on similar treatment, but it furnishes a practical answer to the complaints against the Western powers in which America so freely indulges. The inadequacy of their present blockade of Efficacy of blockade. Relaxation of practice.

* Kent's Com., vol. i., p. 151.

† The *Hoffnung*, 6 Rob. Adm. Rep., 112.

‡ The *Juffrow Maria Schroeder*, 3 Rob. Adm. Rep., 155; the *Hoffnung*, 6 Rob. Adm. Rep., 116, 117.

Law of Blockade, &c. the Confederate States can scarcely be questioned whilst every week brings well authenticated tidings of its successful evasion by neutral ships, affording ample grounds, according to the generally accepted doctrine before referred to, for the repudiation of such an interference with the commerce of the world. Stronger evidence of the forbearance of this country cannot well be afforded than its passive acquiescence in such a state of things, whilst as an inseparable consequence an important branch of our national industry has been paralyzed, thousands of our once thriving population reduced to absolute beggary, and the national benevolence taxed to an almost fabulous extent to ameliorate their sufferings. The acknowledged policy of the governments of this country and of our imperial ally being peace, so long as it is consistent with national honour and justice to the subjects of the neutral powers, the patient endurance of the manifest injury to which they have been subjected by the blockade of the Southern ports, speaks volumes for the loyalty of the people of both nations, and the confidence they repose in the executive. The wonderful energy, however, of these great commercial communities in supplementing the failure of one market, or one class of commodities, through other fields of mercantile enterprise, has no doubt done much towards repressing any importunate clamour for such interference as would again open the cotton ports of the Southern States to the labour market of the manufacturing districts of England and France; and there can be little doubt that the beneficial results of the treaty of commerce between these countries, have opportunely tended to promote the mercantile prosperity of both during this crisis.

Forbearance of Western powers.

Energy of British & French commerce.

CHAPTER IV.

CONTRABAND OF WAR.

Contraband of War.

PERHAPS there is nothing more difficult than to lay down a settled rule to distinguish between what does and what does not constitute contraband of war, because the character of ships and merchandise in this respect changes with ever-varying circumstances, such as the object of the voyage and the destination of the ships taken in connection with the nature of the goods. Thus when guns, gunpowder, swords, and bayonets, are *bona fide* consigned from one neutral port to another, they are no more contraband of war than would be a cargo of guano; whilst a ship-load of wheat, or even of paving stones, bound for and seeking entry into a belligerent port might, with evidence of intention to succour the enemy, be deemed prize of war, since the one might be intended to feed the enemy, and the other to repair his fortresses.

Incertitude of definitions of contraband.

Opposing policy as to contraband.

Neutrals are naturally anxious to diminish the list of contraband, that they may extend their commerce by conveying the goods of the hostile powers, with the less risk of confiscation. Belligerents, on the other hand, are of course interested, particularly if they possess a predominating command of the seas, in increasing the prohibitory list, to enable them the more effectually to deprive the adversary of the means of maintaining or improving his warlike position.

Contraband of War.

When the number and variety* of the goods that have from time to time been declared contraband of war are taken into consideration, it is scarcely matter of surprise that the decisions of the authorities are so various and uncertain. Vattel enumerates arms, military and naval stores, horses, timber, and in case of siege, provisions, as contraband of war;† and according to the same author, even ships come within that denomination. These opinions are upheld by various treaties, ordinances, and legal decisions. Sail-cloth, tar, pitch, and hemp, being necessary to the equipment of vessels of war, and also ship-timber, have been added to the list; although in some instances their hostile character has been negatived by proof of destination, as for instance, when transmitted to an exclusively commercial port, from which it might fairly be presumed that they were to be applied to civil purposes. The raw material is viewed with more favour than articles fabricated from it.‡ By a treaty between the United States and this country in 1796, it was expressly provided that unwrought iron and fir planks should be exempted from seizure.

Varieties of contraband.

Fallacy of attempting arbitrary rules.

Under these circumstances it would be utterly fallacious to lay down rules of universal application as to what constitutes contraband of war. The invention of

* The following articles have on different occasions been declared contraband of war, viz., butter, cheese, copper in sheets, cordage, corn, hemp, masts, pitch, rice, rosin, salted cod, herrings and salmon, sea biscuits, tar, and wine.

† Les choses qui sont d'un usage particulier pour la guerre et dont on empêche le transport chez l'ennemi s'appellent marchandises de contraband. Telle sont les armes, les munitions de guerre, les bois et tout ce qui sert a la construction et a l'armement des vaisseaux de guerre, les chevaux *et les vivres mêmes* en certaines occasions, ou l'on espère de reduire l'ennemi par la faim, Vattel, book iii., chap. 7, sec. 112.

‡ The *Jonge Margaretha*, 1 Rob. Rep., 188; the *Neptunus*, 3 Rob. Rep., 108; the *Twee Juffrowen*, 4 Rob. Rep., 242; *Nostra Signora de Begona*, 5 Rob. Rep., 97.

novel instruments of warfare has necessarily augmented the number of contraband articles, by embracing new materials required to render such instruments serviceable, whereby goods formerly deemed innocuous, have by force of circumstances become liable to confiscation at the hands of those against whom they are attempted to be used. Such, of course, was the case when gunpowder superseded the catapult and the bow, and again more recently when the power of steam was adopted for propelling vessels of war. Thus, during the Crimean campaign, engines, boilers, and other marine machinery were amongst the prohibited articles of commerce; and now that the explosive power of gun-cotton is known, were its application to warlike purposes to become general, it would necessarily bring cotton, as well as the chemicals by which it acquires its new character, within the list of contraband of war, as the components of gunpowder, sulphur, saltpetre, &c., came to be treated.

Contraband of War.

The most important feature in the law of contraband of war in relation to the controversial question of the day, is that ships, and armed vessels, come within that denomination.

Ships declared contraband of war.

This opinion has prevailed and been acted upon from a very early date, and has gained strength, and indeed the full force of international law, by recognition in treaties and by the decisions of courts, which have been accepted by European as well as American states, and by none more unequivocally than the latter. So far back as 1625, by treaty between England and the Low Countries, "ships, arms," &c., by express mention, are deemed "contraband of war," and the articles enumerated, as well as "ships and persons on board," are declared "good prize."* The terms of this treaty

* Treaty of Southampton, September, 1625.

Contraband of War.

would seem to embrace every description of ship; but in 1661 by treaty between this country and Sweden,* the expression is narrowed to "ships of war" and guard-ships; this very limitation points the more distinctly to the fact that ships for warlike purposes are particularly intended. Vattel draws no distinction between contraband for naval and military warfare. Indeed so far from considering that neutrality is violated by trading in either with the belligerent, he thus distinctly affirms the contrary with reasons for the opinion:—"If

Dictum of Vattel *inter alia* as to ships.

"a nation trades in arms, timber for shipbuilding, *ships*, "and warlike stores, I cannot take it amiss that it sells "such things to my enemy, provided he does not refuse "to sell them to me also at a reasonable price. It "carries on its trade without any design to injure me, "and by continuing it in the same manner as if I were "not engaged in war, it gives me no just cause of "complaint."† Nay, he brings the matter home to the precise state of affairs as at present subsisting between this country and the transatlantic belligerents, for he proceeds to explain, placing himself for argument in the place of the belligerents:—"In what I have said above, "it is supposed that my enemy goes himself to the "neutral country to make his purchases." This is exactly what the Federals are doing here with regard to arms, and what the Confederates have been charged with doing in respect of ships. But he carries the analogy still further by the discussion of another supposititious case—that of "neutral nations resorting "to the enemy's country for commercial purposes. It

Neutrals not bound to renounce their commerce.

"is certain that as they have no part in my quarrel, they "are under no obligation to renounce their commerce

* Treaty of Whitehall, October, 1661.

† Vattel, book iii., sec. 110.

"for the sake of avoiding to supply my enemy with "the means of carrying on the war against me." *Contraband of War.*

Now all this has reference *inter alia* to ships, and it is difficult to conceive how consistently with this the British subject can be guilty of a breach of international law, or subject himself, much less his government, to any legitimate complaint by carrying on with either of the belligerents, in the ordinary course of commerce, his almost peculiarly national business of a builder and vender of ships. "If," says Vattel, "they only con-"tinue their customary trade, they do not thereby "declare against my interests; they only exercise a "right which they are under no obligation of sacrificing "to me." He backs this argument by the remarkably clear and strong common sense observation, that "should they (the neutrals) affect to refuse selling me "a single article, while at the same time they take "pains to convey an abundant supply to my enemy, "with an evident intention to favour him, such partial "conduct would exclude them from the neutrality "which they enjoyed." Supply of ships no breach of Law.

Neutrality then as regards contraband of war, including *ships* as well as arms, according to this great authority, consists not in the refusal to supply the belligerents, but in supplying indifferently to either the merchandise they may require in accordance with the accustomed and undisturbed course of commerce. The neutral may not only sell articles contraband of war in his own country, but may send them to either of the belligerents, subject of course to the liability to capture by the other. The neutral market is open to the sale of ships as well as other instruments or munitions of war. The foreign belligerents may purchase from the neutral subject, both or either of these articles of con- Neutrality as regards ships as well as arms.

Contraband of War.

traband, they being the judges of what they require; and it appears totally at variance with the principles of neutrality, to refuse ships to the one, if we sell arms to the other, and *vice versa*.

Confirmation by United States.

The doctrine here contended for, the practice of centuries, the *dictum* of Vattel just cited, the opinions of other great writers to the same effect, have been emphatically endorsed by the Americans themselves, the supreme courts of the United States having solemnly decided that there is "nothing in their own laws" (and they have a Foreign Enlistment Act, whose provisions as to ships are analogous to our own), "or in the law "of nations, that forbids their citizens from sending "*armed vessels*, as well as munitions of war, to foreign "ports for sale." Nay more, that "it is a commercial "adventure which no nation is bound to prohibit" (the judicial authorities of the United States not being ignorant of our Foreign Enlistment Act), "and which "only exposes the person engaged in it to the penalty "of confiscation."*

Armed ships contraband of war.

There is an end therefore to all doubt, certainly as between the United States and this country, as to the fact that ships, armed ships, are contraband of war. It follows that the rights, privileges, and liabilities of neutrals in respect of ships, differ nothing from those which relate to arms and other articles of contraband.

Neutral trade in contraband.

On the breaking out of hostilities between nations, the subjects of a neutral territory can only supply contraband of war to either of the belligerents at the risk of capture and confiscation by the other; subject to these consequences the adventure is perfectly lawful. The deprived party has no right to complain of his loss, or to demand restitution through his own government;

* J. Wheaton's Reports, 348.

nor do these perilous enterprises of the subject of a neutral power expose his government to the charge of a breach of neutrality.* "It was," says Kent, "con- "tended on the part of the French nation in 1796, that "neutral governments were bound to restrain their "subjects from selling or exporting contraband of war "to the belligerent powers. But it was successfully "shown on the part of the United States, that neutrals "may lawfully sell *at home* to a belligerent purchaser, "or carry themselves to the belligerent powers contra- "band articles, subject to the right of seizure *in transitu*. "This right has since been explicitly declared by the "judicial authorities of this country (Richardson v. "Maine, Ins. Comp., 6 Map. Rep. 113. The *Santissima* "*Trinidad*, J. Wheaton, 282). The right of the neutral "to transport, and of the hostile power to seize, are con- "flicting rights, and neither party can charge the other "with a criminal act."†

Contraband of War.

Government of neutral state not responsible.

Formerly by the law of nations, the carrying of contraband articles of war worked a forfeiture of the ship.‡ In modern practice, except when the contraband articles belong to the owner of the vessel, or where the case is attended with particular circumstances of aggravation, the penalty has been mitigated to forfeiture of freight and expenses.§ Bynkershoek strongly vindicates the strictness of the ancient law; he says—"Pub- "licabam quoque naves amicas si scientibus dominis "contrabanda ad hostes deferrent; et nisi pacta impe- "diant omnino publicandæ sunt quia earum domini

Modern practice as to contraband cargo.

* Vattel, book iii., cf., sec. 113. † Kent's Com., vol. i., p. 148.

‡ Declaration of England and Holland against Spain, art. 20, 17th September, 1625. Treaty between England and France, art. 15, 3rd November, 1653.

§ The *Ringende Jacob*, 1 Rob. Rep., 91; the *Jonge Tobias*, 1 Rob. Rep., 329; the *Franklin*, 3 Rob. Rep., 217.

Contraband of War.

"operantur rei illicitæ."* And according to Heineccius—"Quemadmodum ejusmodi pacta ad exceptionem "pertinent; ita facile patet regulam istis non tolli, "adeoque certi juris esse ob merces illicitas naves "etiam in commissum cadere." †

* Bynk. Q. I. P., lib. i., chap. 14.

† De Nav. ob Vect. Meic. Vetit. Commiss., chap. 2, sec. 6.

CHAPTER V.

INTERNATIONAL IN CONNEXION WITH MUNICIPAL LAW.

International and Municipal Law.

HAVING in the preceding pages given the principal axioms of international law affecting neutrals in time of war, as generally accepted by the civilized world, it is now proposed to consider them more particularly in connexion with the provisions of domestic or municipal laws, touching the question and the extent to which the subjects of a neutral state, but more especially those of this country, are restricted from furnishing ships, arms, and munitions of war to foreign belligerents.

Supplies of contraband permitted by law of nations.

As already shown, there is nothing in the general law of nations to prevent the supply to foreign belligerents, by the subjects of a neutral state, of arms, ammunition, ships, or other materials, whether of a warlike character or not, except the risk of capture, to which as contraband of war they may become liable at the hands of the enemy (*ante* pp. 21 to 25). But it is competent to the government of any state, by virtue of its own laws, to prohibit the exportation from its shores of any goods in time of peace or war. Thus, for instance, by the 150th section of the 17th and 18th Vict., chap. 107, the queen is authorized, by proclamation or order in council, to prohibit the exportation of "arms, ammunition, and gunpowder, military and naval stores, and any articles which her majesty shall judge capable of being converted into, or made useful in increasing the quantity of military and naval stores, provisions, or any sort of victual which may be used as food for

Right of states to prohibit exports.

Customs Consolidation Act, 1853.

International and Municipal Law.

"man," under pain of forfeiture. This, however, is a fiscal law exercisable by the queen, as public policy or the necessities of the country demand. Such an interference with the commercial rights of the subject, however, cannot properly be resorted to without strong grounds for its justification. It is to this statutory authority that the government of this country has recourse when in time of war, peril, or distress, it becomes expedient to retain necessaries for our own use, or prevent their being carried to the enemy. Such an interference would be looked upon with great jealousy in a free commercial country like this, were it exercised in favour of any foreign country because that country chanced to be at war with some other foreign state, unless it could be shown by very conclusive arguments that the general interests of the country dictated the propriety of aiding the one foreign state at the expense of the other; and scarcely then, unless the cause of quarrel were such as to require for the commercial good that this country should become an active ally, in which case, as a matter of course, prohibitions and restrictions of this kind become necessary as well as lawful, and to the honour and loyalty of this country even popular, notwithstanding the temporary inconvenience it entails on the particular branches of our trade or manufacture affected by it.

Impolicy of prohibitions.

Power to prohibit under C. C. Act, 1853, does not extend to ships.

Comprehensive, however, as these words of the section just quoted are, they cannot be construed to include ships; nor, unless the 7th section of the Foreign Enlistment Act can be so interpreted, as contended on the part of the Crown in the late trial of the *Alexandra*,* is there any prohibition against the building of ships,

Ques. whether the Foreign Enlist. Act prohibits the building of ships.

* The Attorney-general *v.* Sillim and Others, Exchequer Trinity Term, 1863.

or the sale of them to any foreign country or people, whether in time of war or peace. The Lord Chief Baron, in delivering judgment on that occasion, observed that when two belligerents are carrying on war the "subject of a neutral power may supply to either, with-"out any breach of international law, all the munitions "of war, gunpowder, every description of fire-arm, &c., "every kind of weapon, in short, whatever can be used "in war for the destruction of human beings who are "contending together in this way. Why should ships "be an exception?" *International and Municipal Law.*

With great deference to the learned judge it may, however, be remarked, that, adverting to the points at issue, this was begging the question. Munitions of war, gunpowder, &c., might be exported to the belligerent state because there was no proclamation founded on the 150th section of the act before referred to, prohibiting such exportation; whereas the Foreign Enlistment Act, if it will bear the interpretation contended for by the law officers of the Crown, contains a standing prohibition of the supply of ships to be used in the service of any foreign power against any other foreign state in amity with this country, and requires no royal proclamation or order in council to give it effect. This, however, is the moot point which will have to be determined by the judgment of the court in the ensuing term. In the meantime the ruling of the Lord Chief Baron, though a Bill of Exceptions was tendered, must be accepted as law, and according to that ruling, the British shipbuilder is perfectly free to build a ship of any kind for sale and disposal to any purchaser, or "for "the purpose of being delivered in pursuance of a "contract;" which implies that he may build not merely on speculation, but for a particular or foreknown

The moot point.

Ruling of the Lord Chief Baron Pollock.

International and Municipal Law.

purchaser, so long as he, personally, is no party to the equipping, furnishing, fitting-out, or arming of such ship, in the United Kingdom, for the purpose of aggression, or, in other words, with the intent on his part to commit hostilities against a friendly state.* To avoid the possibility of mistake as to his meaning, his lordship repeated this opinion in the following terse and argumentative words:—"A man may make a vessel, nay, "more, he may make a vessel and arm it, and then "offer it for sale. So Storey lays down. But if a "man may make a vessel, may build a vessel, for the "purpose of offering to either of the belligerent parties "who is minded to have it, may he not execute an order "for it? Because it seems to me to follow as a matter "of course, if I may make a vessel, and then say to the "United States, I have got a capital vessel, it can easily "be turned into a ship of war; of course I have not "made it a ship of war at present, will you buy it? "That is perfectly lawful. Well, if that is lawful, "surely it is lawful in the United States to say—Make "us a vessel of such a description, and when you have "made it, send it to us." In this view of the case, the building and sale to the Confederates of the *Alabama* which has achieved so great a notoriety by her depredations on the commerce of the Federals, although constructed according to contract with every possible adaptation to warlike purposes, short of actual armament in this country, was perfectly lawful, and should the judgment of the Lord Chief Baron be affirmed, the Government will have reason to congratulate itself upon the escape of that vessel from the meditated seizure, the orders for which arrived too late; and the country may rejoice in having avoided the heavy damages and

A neutral may make, arm, and sell ships.

Building and sale of the *Alabama* lawful.

* Attorney-general *v.* Sillim and Others—Direction to the jury.

costs which such a seizure would have involved. Nor can the United States complain with any justifiable reason of a decision in such exact conformity with the judgments of their own courts. *International and Municipal Law.*

In order to the proper discussion of this question, it is necessary not only to review with care the provisions of the Foreign Enlistment Act, but to consider the object of that statute so far as its true intent and meaning can be gathered from the context. It may, in the opinion of some persons, appear the more important because rumours have reached this country, that if the decision of the Lord Chief Baron should be affirmed, it will be considered by the inveterate spirits of the great Republic tantamount to a declaration of war between this country and the United States. Inimical views of Americans.

It can hardly be conceived that such a monstrous proposition could be entertained by the government of an enlightened country, whose legal tribunals have deservedly elicited the approbation of civilized nations, for their impartial administration of the laws. But it is impossible to say into what follies an overwhelming democracy may drift, where passion and prejudice so far usurp the place of reason as to present to the world the spectacle of a people, boasting of greater liberty and freedom than any other country under the face of the sun, tamely submitting, in order to gratify a revengeful feeling, to a tyrannical suspension of constitutional rights and privileges, against the slightest infraction of which in this land of loyalty and love of order the people would rise to a man. Inconsistency of United States.

It is, however, idle to speculate on possibilities like these. Were even such a consequence as war, in the event of a decision adverse to the Federal states, imminent, nay certain, it would not warp the judgment or Inflexible impartiality of British judges.

International and Municipal Law.

influence the decision of those learned functionaries, whose duty it is to expound the law. That inflexible impartiality which has secured for the judicial bench of this country a profound respect amounting almost to veneration, will never be found wanting in our courts of law. It is possible that a jury, were it left for them to decide, might be unintentionally biassed by prepossessions or prejudice. A jury of Cobdens, enamoured of everything American, might be induced to construe the law with severity against the British shipbuilder; whilst a panel consisting of men captivated by the chivalrous courage and patient endurance of a people fighting for freedom and liberty, might unconsciously incline towards that course which would best serve the latter. But the verdict already pronounced in the case of the *Alexandra*, turning as it did upon a question of law, was given by the jury under the direction of a judge who, when the solemn duty of addressing that jury devolved upon him, did not approach the question without evident emotion. His desire to maintain the most friendly relations with America, is obvious from the remarks with which he prefaced his charge to the jury:—

An unguided Jury might err.

Direction of a Judge as to Law the safeguard.

"The case," said he, "you have to decide on the "present occasion is no doubt one not merely of great "importance, but really is a momentous question. It "is a question the importance of which it is impossible "to exaggerate, and which one approaches with varied "sentiments. One certainly is a feeling of the deepest "regret that such a question should ever have arisen; "and I cannot help expressing the deepest, almost "anguish, that one feels, that such a question should have arisen by dissensions amongst those who are connected with us by the dearest possible ties that

"bind nation to nation—a common lineage, a common "language, common laws, and a common literature, "and above all, I say above all these, a strong desire "for constitutional freedom." *International and Municipal Law.*

Strongly as the learned judge might deprecate any course which could tend to excite hostile feelings in the United States towards this country, no consideration of this kind could induce him to swerve from the observance of that stern impartiality which sheds so much lustre on the judicial bench. Right or wrong in his conclusion, no fear of consequences, no timid anticipation of ulterior results, no sentimental feeling in favour of the one side or the other, could induce him, as the interpreter of the law, to lead the jury to a conclusion adverse to his honest convictions. It is the province of parliament to make laws, it is the duty of the judge to administer and, in cases of doubt, to expound them; and whenever the case again comes before the court, the same principles of honour and justice will pervade the deliberations and govern the decision of the judges: and whether, after the exhaustion of the argument on the point reserved, the ruling of the Lord Chief Baron be reversed or confirmed, the purity of the ermine will remain unsullied. Whatever the result, it will be the duty of all parties to bow to it with respect. Impartiality of Lord Chief Baron.

But to proceed. The object of the Foreign Enlistment Act, as appears by its title, is two-fold—To prevent the enlistment of British subjects to serve in foreign service; and to prevent the fitting-out, equipping, and arming of vessels, by British subjects, without the license of the sovereign. It is the latter that demands more especial attention at this moment. Object of Foreign Enlist. Act.

International and Municipal Law.

Preamble.

The preamble recites that the enlistment of British subjects to serve in foreign service without license, and the fitting-out, equipping, and arming of vessels by British subjects without license for warlike operations in or against foreign powers, "may be prejudicial to, "and tend to endanger, the peace and welfare of this "kingdom."

Enlistment prohibited.

Section 2 (given at length in the queen's proclamation, *vide* Appendix, p. 85) constitutes the offence of enlistment, or procurement of British subjects to enlist to serve in foreign service, military or naval, without a license, a misdemeanour.

Section 3 grants certain exemptions now obsolete.

Section 4 prescribes the mode of procedure before justices.

Detention of ships with recruits on board.

Section 5 authorizes the detention of ships, in the British dominions, having persons on board who have enlisted to serve in foreign service, upon proof by affidavit of such enlistment.

Pecuniary penalty on master, &c.

Section 6 imposes upon the master or owner of any ships knowingly taking on board, in British dominions, persons who have enlisted to serve in foreign service, a penalty of £50 in respect of each such person.

Interdict of equipment, &c., of ships.

Section 7 (given at length in the proclamation, Appendix, p. 87) deems persons engaged in the British dominions, without license, in the equipping, furnishing, fitting-out, or arming of ships, to be employed in foreign service against any other foreign state with whom this country is not at war, guilty of misdemeanour, punishable by fine or imprisonment, and renders the ship liable to forfeiture.

Interdict of augmentation of equipment.

Section 8 (quoted at length in proclamation, Appendix, p. 89) imposes similar punishment upon persons in the British dominions augmenting the warlike force of

ships or vessels with similar objects. It may be observed from the context, though not expressed (except in the marginal note, which is of course no part of the act), that the vessels contemplated in sec. 8 are foreign ships of war. *International and Municipal Law.*

The remaining sections are mere matter of form.

When the war which has so unhappily broken out between the Federal and Confederate States, attained such proportions as to render it expedient for this country to take cognizance of it, the royal proclamation above referred to was issued.

Several important facts are officially announced by the opening paragraphs of this proclamation:—

1st. That this country is at peace with all the world, and consequently, whether treating the United States of America as a whole, or viewing the Southern States as having acquired a separate *locus standi*, friendly relations are alike acknowledged to subsist between them and this country. Official announcement of peaceful relations.

2nd. That hostilities have commenced between the government of the United States and the Confederate States of America, distinguishing them as separate existences. War between the United States government and the Confederate States.

3rd. The determination to maintain strict and impartial neutrality in the contest between the said "contending parties;" the latter expression not only distinctly implying the recognition of the Southern States, but acting upon it. Declaration of neutrality.

Lastly, Having given for the information of Her Majesty's subjects the most important penal sections of the act, the proclamation concludes by a notification to them that if they infringe any of those provisions, they do so at their own peril; not so much the peril of crown prosecution as the risk of capture by the Effect of neutrality.

International and Municipal Law.

offended belligerents, in respect of which it warns them that they are not to look for protection, or seek compensation by or through the government.

Non-intervention would appear to be the only course consistent with the pure and absolute neutrality announced by the proclamation. If this be so, as there is nothing in the law of nations which renders illegal the supply by neutral subjects of any species of merchandise, however warlike its character, is it consistent with the true principles of neutrality for a neutral government to interdict such supplies to either belligerent at the instance of the other?

Is it consistent with common justice for the government of a neutral state to cripple, by such interference, the lawful commerce of its subjects, merely because their foreign customers happen to be at war with each other?

If those questions can only be answered in the negative, does the mere existence of a purely municipal act, designed for the benefit of a particular state, justify its enforcement at the instance of either of two foreign belligerents, with each of whom the same amicable relations subsist?

Duty of Executive.

It is evident from the preamble of the Foreign Enlistment Act, that its main object is the prevention of such hostile demonstrations on the part of the subject as "may tend to endanger the peace and welfare of "this kingdom." The evil designed to be guarded against was that of the subjects of a neutral state becoming actual participators in foreign wars, without leave, identifying themselves with and taking part in the strife with either of the belligerents, whether by enlisting or engaging others to enter into their service, or by equipping and arming, as partisans in the war,

ships with the intention of employing or joining others in employing them for purposes of aggression.

As questions of policy are involved, it rests with the executive to determine whether the provisions of the act should be enforced or not; but the same may be said of the statutory power before referred to, which authorizes the queen in council to prohibit the exportation of arms and munitions of war.

Where then is the difference? In this perhaps we may find the solution of the learned Chief Baron's meaning, when he said arms, &c., may be exported, why not ships?

If a neutral subject may, at his own risk only, furnish to either of the foreign belligerents the ordinary implements of warfare, it cannot endanger the peace and welfare of the kingdom, because according to the settled rules of international law, no *casus belli* can arise out of this independent act of the subject (*ante*, p. 25). This being so, it would appear to require an extraordinarily astute refinement of logic to distinguish between the supply of the most terribly destructive instruments of warfare, and the sale of ships to belligerent customers.

Action of Executive necessary to enforce either municipal act.

So long as the Government abstains from exercising its statutory power of prohibition, the subject is free to manufacture and export arms; and even admitting that the 7th section of the Foreign Enlistment Act prohibits the building and sale of ships, so long as the Government abstains from enforcing its provisions, the subject is free to build and sell a ship to any purchaser.

Seeing then that there are two recognized belligerents at war with each other; that arms and ammunition are as essential to the one as ships are to the other, both being contraband of war (*ante*, p. 22); and that

International and Municipal Law.

there are two domestic statutes, the one exercisable by acting on the authority to prohibit the exportation of arms, and the other exercisable by putting in force the alleged restriction on the supply of ships—the question arises whether in the true spirit of neutrality the Confederates have not as good a right to invoke the exercise of the former, as the Federals have to claim the enforcement of the latter! Or to put the question more pertinently, Is it not more consistent with the avowed principle of non-intervention to abstain from interference with either? This would be in accord not only with the authorities already cited, but with the opinion expressed by the learned Solicitor-General in his place in the House of Commons on the 21st of March last, as cited by Mr. Cobden in his speech of the 24th April following, to the effect that our neutrality may be maintained either by aiding both belligerents, or assisting neither.

Respective acknowledged positions of belligerents.

It may be argued that the United States, notwithstanding the dismemberment of the revolted portion of the country, constitute a power formally recognised by the other nations of the earth; but once more adverting to the queen's proclamation, the separate *locus standi* of the Confederate States, by its acknowledgment as a belligerent power, is equally placed beyond a doubt; and in reference to the 7th section of the Foreign Enlistment Act, it will be seen that the recognition of the separate existence of such a power under such circumstances was fully contemplated by the adoption of descriptive language remarkably appropriate to the present position and character of the Confederates, as "persons exercising or assuming to exercise the powers "of government in any colony, province, or part of any "province or country, or the inhabitants of any

"foreign colony, province, or part of any province or "country, with whom Her Majesty is not at war," and this in contradistinction to the equally apt description of ordinarily recognised nationalities, which precedes it —a distinction evidently designed by the framers of the act to suit a contingency not provided for by the Acts of Congress of the United States, which appear to have furnished the groundwork of the Foreign Enlistment Act of this country.—*Vide* corresponding section in the note on the 7th section of the Foreign Enlistment Act, cited in the proclamation, Appendix, p. 88. *International and Municipal Law.*

If the debate on the passing of this act threw no light upon the object of its promoters, many probable reasons might present themselves for the extension of the provisions of the act to cases of revolt, where policy suggested the recognition and encouragement of the struggle for freedom. The achievements of the greatest military genius of the world, whose thirst for territorial aggrandisement had made Europe the theatre of his brilliant conquests, were then fresh in memory; and although the empire of our continental neighbours had by force of circumstances been once more reduced to its natural limits, the suggestion might present itself to a thoughtful mind, that in the event of the balance of power being again disturbed by the ravages of ambition, it might be expedient to reserve to this country, in case of a political revolt against the aggressions of overgrown power, the right to treat the aspirants for independence, should they assume an importance entitled to respect, with the same consideration as an already recognised nationality. The present posture of affairs, keeping in view the interests of the world, is suggestive to many persons of a close parallelism. The generally received opinion, however, is that the reason Reasons for special provision.

International and Municipal Law.

for so special a distinction was, that as the municipal law of that period interdicted only the rendering of aid to recognised states, it was no violation of the law, technically speaking, to give assistance to insurgents.

Whatever might be the motives which led to the introduction of the paragraph in question it exists; reasons, unless recited, are no part of the statute, and here are two important facts—The Confederate States of America do constitute a power falling precisely within one of the statutable definitions of the 7th section of the Foreign Enlistment Act; and the queen, by her royal proclamation, has recognised them as a belligerent power of sufficient importance to call forth a declaration of neutrality between the revolted and the unrevolted provinces of America.

Confederate States within the definition of Act.

Equal treatment proper.

Under these circumstances it is very questionable whether, consistently with the pure spirit of non-intervention, a municipal statute like the Foreign Enlistment Act can properly be put in force to the detriment of one belligerent for the benefit of the other. It appears reasonable that a government which has declared for impartial neutrality, ought not to refuse to one what it concedes to the other, or to grant to one what it denies to the other. In answer to this, it will be said that a neutral power is bound to act upon the first of these principles by restraining the subjects from supplying ships to either, and that in so doing, although it may be a great denial to the one that wants ships, and a great boon to the one that lacks none, the action of the neutral state is uniform, notwithstanding the inequality which the accident of the case works out. This reasoning, however, does not accord with the doctrines of Vattel and others before referred to (*ante*, p. 22 and 23). But assuming that it is the duty of

this country to enforce the Foreign Enlistment Act as against both belligerents, the next question is what do the provisions of that act prohibit, and under what circumstances? *International and Municipal Law.*

It is clear that the act interdicts the engagement of persons in the British dominions to serve in Foreign service without license. About this there appears to be no doubt or dispute. This offence of enrolling in the hostile ranks of a foreign state, is a personal act of partisanship; but there is a wide distinction between actually taking up arms for one foreign state against another, and merely selling arms in the fair ordinary course of trade to any customer, regardless of the use to which the purchaser may intend to apply them; and it is important to bear this in mind.

The 7th section is just one of those provisions which opens a large field of discussion as to its policy, and of argument as to its legal construction apart from the question of policy. Perhaps no better course can be adopted in the present juncture of affairs, than that of examining the section in question step by step with the light that has been thrown upon it in the case of the *Alexandra.*

The consequences of an infraction of this 7th section are, that the offender is guilty of a misdemeanour, the ship is liable to forfeiture, and the course of prosecution is the same as in cases of forfeiture under the Customs Laws. The act points to no particular person or class of persons; but "if any person," no matter who, violates the law, the ship is forfeited.

Evidence of persons not parties on the record questioned.

An important question as to the admissibility of evidence of statements by parties other than the claimants on the record, arose in the trial of the *Alexandra.* In conformity with the requirements of the 309th

International and Municipal Law.

section of the Customs Consolidation Act, 1853, the attorney for the claimants appeared for them, claimed the ship, and made oath that he was authorized so to do, and that to the best of his knowledge and belief, the ship was their property, and gave security for costs. If such claim had not been made within the prescribed time, the vessel would by due course of law have been forfeited in default of claim. The object of this law simply is to prevent speculative claims by persons having no interest whatever in the thing seized, and who but for this law might come in and claim, take the chance of the Crown's failing to establish the forfeiture by reason, for instance, of the death before trial of an essential witness or other accidental cause, whereby the fraudulent claimant might, on the Crown's failure, obtain delivery of that to which he had no previous title, and avoid the costs of his speculation if the forfeiture were proved. When this law was enacted, the Crown neither paid nor received costs in Customs cases; this rule of costs was altered by the Customs Consolidation Act, 1853, by the adoption of the rule which prevails in cases between subject and subject.

Object of oath of ownership and security for costs.

The intention of this law of verification of claim and security for costs, was not therefore to determine the question of property in the thing seized; nor was it intended to be accepted as evidence of title on the trial of the cause; nor does this preliminary form any part of the record. On the trial of the *Alexandra*, however, it was contended against the Crown, that the parties who thus came in and claimed by their attorney, were the only true defendants in the cause, and that the statements and admissions of other persons not made in the presence and hearing of these nominal defendants, were inadmissible. If such a rule as this were allowed

Effect of rejecting evidence of admissions by non-claimants.

to prevail, a worse fraud than that which the law of claim and security for costs was designed to guard against might be perpetrated, as it would be competent for the real owners and offenders by collusive transfer of the thing seized to defeat the law by enabling a nominee, in no way connected with the matter in question, to instruct his attorney to appear, claim, make the required affidavit, and give security for costs, and by thus becoming the nominal defendant on the record, shut out all the evidence of admissions even by the wrong-doers, because they were not made in the presence of the collusive defendant. Now that the old rule of costs in Crown cases is abrogated, the sooner the law of claim, affidavit of ownership, and security for costs, is altered the better.

Justice of the case.

It would seem, however, that the common-sense view of the matter is this:—If the illegal act of "any person" having control over and dealing with the ship contrary to the statute be proved, it is immaterial in a proceeding *in rem* whether that person is by a technicality of law the nominal defendant or not; and common justice appears to demand that where the unlawful intent of the wrong-doer is an essential element in the case, proof of admissions by such a person, so having the control and actually doing the unlawful act, of his intent, should be receivable in evidence.

The information, however, charged that persons named therein other than the nominal defendants were concerned, the actual builder of the *Alexandra* amongst others, and some evidence of admissions by them was received. But it is only reasonable to conclude that the object of enumerating and charging by name divers persons whose acts, sayings, and doings

it was intended to prove as well as "divers and very many others," was to prepare the claimants against surprise. Beyond that, the charging of these persons could in itself avail nothing, as it would have been competent to the Attorney-general to have included by name the learned Chief Baron himself without vitiating the information.

Bearing in mind that this was a proceeding *in rem*, it would seem that if an infringement of this act in respect of this ship had been proved against "any person" nominally on the record or not, the requirement of the act would have been satisfied.

The Chief Baron put the case of a shoemaker employed to furnish a burglar with a pair of list shoes to enable him to prosecute his unlawful acts silently, and argued that a declaration by the shoemaker that he was manufacturing a pair of noiseless shoes, would not be evidence against the burglar on a charge of house-breaking. The analogy of the case put does not appear to satisfy the mind unless carried further. The law officers of the crown combined with the supply of the dangerous instrument the element of guilty knowledge and intention on the part of the person supplying it. But suppose A and B contemplate the murder of C, A undertakes to supply B with a pistol, an air-gun, or other dangerous weapon, with a common understanding that the latter is to kill C, though A may stand aloof, it can scarcely be contended that A is not a party to the crime, or a person who is not aiding, assisting, or concerned in the illegal act; and if an inquest were held on the body of C to ascertain the cause of death, or by whose hands he fell, it would be going a long way to say that proof of admissions by A of the culpability of himself could

not be received in evidence. Or to come nearer, What if C heard of the conspiracy to kill him, and sought protection against the conspirators, would not evidence of the admission of both or either of them be admissible in evidence of such conspiracy, and equally admissible in a prosecution to forfeit the weapon, if the law imposed that forfeiture as a consequence of the meditated offence?

If therefore "any person" in Her Majesty's dominions contract with the enemy of any country at peace with this, to fit out and furnish a ship of a warlike character to be used against the friendly power, and does so with a full knowledge of the object, although he may not put the guns on board until the ship is beyond the league, it is difficult to maintain that he has not infringed the law, and that previous statements by him sufficient to condemn the ship, had he been defendant on the record, are inadmissible in evidence as to the ship's liability to forfeiture, merely because the claimant or nominal defendant, *sec. stat.* was not present and assenting when the statements were made.

In a proceeding *in rem* any evidence showing that "any person" having power and control over the ship was doing, or knowingly concerned in the doing of anything with it contrary to the act, would seem to satisfy the requirements of the case, and be fairly admissible.

When proceedings are taken against a ship forfeitable by reason of the acts of any person in connexion with it, and having an unlawful intent, what evidence can be more conclusive of the intent, which exists only in the mind of the wrong-doers, than his own declarations of such intent, and how can the ends of justice be attained if this evidence of his acts and intentions be

International and Municipal Law.

inadmissible? In proceedings "*in personam*" the case is so obviously different as to require no comment.

Locus in quo of offence.

The offence must be committed "within the United Kingdom," or in "Her Majesty's dominions." Very much turns upon this, it having been held by lawyers whose opinions are entitled to great respect, that the offence contemplated by the Act is limited to the equipment, furnishing, fitting out, and arming, as totally distinct from the building of the ship, and that it is no offence against the act to build for and sell a ship (were it even a first-rate man-of-war) to any purchaser, so long as the builder is no party to the actual equipment, armament, and preparation of the ship, within Her Majesty's dominions, for warlike purposes, and has no interest or participation in any such hostile designs of the purchaser. If, therefore, although a complete ship be built and delivered within Her Majesty's dominions by the builder, and thence removed by the purchaser, whether afterwards equipped, fitted out, and armed or not, the builder has committed no offence within the meaning of the act.

quipment, fitting out, &c.

To bring the person charged with the offence within the purview of the act, it must be shown that he did, within Her Majesty's dominions, "equip, furnish, fit out, or arm" the ships, or that he "attempted or endeavoured" to do so, or "procured" it to be done, or that he did "knowingly aid or assist" or "was concerned" in so doing. The words are comprehensive, and they are disjunctive throughout, although the Chief Baron strongly insisted that "equip, furnish, fit out, or arm" meant the same thing. The law officers of the Crown, and particularly the Solicitor-general, contended that each of these words might have a distinct signification, and that the expression, "fit out," as contradistin-

guished from "arm," was capable of a broader interpre- *International and Municipal Law.*
tation than the mere fitting up with additional appliances, arms, &c., of an already prepared ship of war; and in fact that if a person fitted out a ship for warlike purposes, though stopping short of arming, he was violating the law if he did this with the known intent that the vessel should be used by or in the service of the belligerents for whom it was so fitted out against any other power at peace with the queen. Certainly this would seem to be an act opposed to the spirit if not to the letter of the law. But the intention of the act, Real intention of the act.
according to the context, appears to be to prevent Her Majesty's subjects from actually engaging in and taking part in hostile operations against countries in amity with this. They are interdicted from joining in the ranks of the enemy of a friendly state; they must not enlist to serve personally in foreign service without the permission of the state; they must not become personal belligerents by taking part in hostile operations, either by arming and equipping ships to be used by or for one foreign country against another. They must neither equip, furnish, fit out, nor arm British ships, nor augment the armament of foreign ships of war in our ports. They must take no commission to serve in such ships or otherwise as belligerents against a foreign state; but notwithstanding all this, the actual building of ships of any kind, either on speculation or to order, is not prohibited by the act—certainly not expressly forbidden; nor indeed does the word "build," or any synonymous term, occur in a single instance throughout the Foreign Enlistment Act. If it had been contemplated by the Legislature to interdict the building of ships, the omission is most remark- Reason for omitting ships.
able. But that this omission was intentional appears

International and Municipal Law.

probable, and may find its solution in the fact that ships of war have for centuries been classed with contraband articles, which may, like arms and ammunition, be supplied by neutrals to belligerents at their own risk (*ante*, pp. 21, 22, 23, and 30).

Such being the received doctrine of international law and its consequences as to ships, long antecedent as well as subsequent to the passing of the Foreign Enlistment Act, a reason is at once furnished for the non-prohibition of the building and supply of ships, which, in common with arms and other munitions of war, were already subject to the risks and penalties incident to such adventures. From this the argument as to the parallelism with respect to the equal right of the foreigner to invoke the exercise of the municipal law for prohibition of arms, &c., as much as that respecting ships, derives additional force. Ships, being contraband of war, were liable to seizure and confiscation, but no punishment attached to the enlisting and engagement of neutral subjects as actual participators in illegal warlike operations, for remedy whereof alone the passing of the Foreign Enlistment Act appears to have become necessary, since the exercise of the acknowledged right of neutrals to trade in contraband of war at their own risk could not endanger the peace and welfare of the kingdom.

Neutral rights of shipbuilding.

It would seem that the inherent rights of the British shipbuilder, of the ironfounder, the armourer, the gunsmith, &c., to pursue their relative avocations, and to dispose of their products in the ordinary way of commercial business, are not interfered with ; nor is British enterprise, in seeking to avail itself of the best markets (though not without risk), paralyzed by statute law, unless their operations be conducted by them in the

spirit of partisans, and with such an illegal intent as to render them criminal.

Illegal intent.

To constitute the equipping, &c., of a ship an offence it must be committed with intent, and in "order that "such ship shall be employed in the service" of some foreign belligerent against some foreign state in amity with Her Majesty. If then a ship-builder in this country builds a ship with all the requisite adaptations and appliances, short only of putting arms on board, for belligerent purposes, and with a knowledge that it is to be used in hostilities against a particular state in amity with the queen, and that the ship when ready in all other respects for offensive operations, is, in order to evade the law, to receive her armament as soon as she gets clear of Her Majesty's dominions—it is contended that this is so far making common cause with the enemy of the friendly state as to establish the illegal intent, and constitute an act of hostility within the meaning of the statute. In short, it is argued that in the application by him (though in the actual construction of the ship) of appliances which are as essential to her use for warlike purposes as are arms, guns, powder and shot, he is *de facto* fitting out a ship in contravention of the statute.

War ships without armament.

If, however, this be sound law, the intention must certainly be clearly established, because when in ordinary cases the shipbuilder merely executes a contract—no matter with whom, or whether he is acquainted with the purchaser's intentions or not—the moment he has completed his contract, received his price and delivered his ship, his interest in the vessel is gone, his control over her is entirely at an end, and he can hardly be held responsible for the subsequent acts of the purchaser or perhaps sub-purchaser, or other persons into whose hands she may pass.

International and Municipal Law.

It is fully competent to the shipbuilder of a neutral state, according to the best authorities, to build, equip, furnish, fit out, and arm a ship on speculation, and to sail that ship to any belligerent or other country on sale to the best bidder; but if having cleared out for one belligerent state, he falls in with the vessels of the enemy, he incurs the risk of capture, and confiscation of the ship would follow precisely in the same way as with any other contraband of war captured at sea.

War ships built on speculation.

May be sent to belligerents on sale.

Building and arming for sale at home.

If he can lawfully do this, there would seem to be but little doubt of his right to build and even *arm* a ship in the ports of his own country for sale to the first purchaser.

Building per contract.

But a nicer question arises whether, assuming that he may execute a contract for the building of a ship, without being privy to the intention of the purchaser, he could under the Foreign Enlistment Act contract in like manner, and without asking any questions, for the equipping and arming of the ship? Proof of the intent, however, being essential, it can hardly be held without that proof, that he is so far *particeps criminis* in this as to be more liable to prosecution for a misdemeanour than any merchant contracting for the supply of arms or other contraband of war, although the purchaser buying under contract with such intent might be liable. The shipbuilder would no doubt be touching very dangerously on the confines of the prohibitory act by equipping, fitting out, or arming any vessel in this country under such circumstances.

Analogy to sale of arms.

Purely commercial speculations.

So long, however, as the mere builder and trader in ships confines his operations within the scope of ordinary commercial speculations, doing nothing in the capacity of a belligerent, himself taking no part in the war, steering clear of all personal intention to do so, selling

ships indifferently to the one belligerent or the other, without any participation in their subsequent employment and reserving to himself no control over them from the time they leave his hands, it would be extremely difficult to fix him with any breach of the Foreign Enlistment Act. A very able correspondent of the *Times* writing under the *nom de plume* of "Historicus" has happily expressed his view of the question.—

International and Municipal Law.

Doctrine of "Historicus."

"The Foreign Enlistment Act was not intended to, and "did not in fact, operate so as in any way to limit or "control the absolute freedom of neutral commerce. "The Enlistment Act is directed, not against the "*animus vendendi*, but the *animus belligerendi*. It pro- "hibits warlike enterprises, but it does not interfere "with commercial adventure. A subject of the Crown "may sell a ship of war, or he may sell a musket, with "impunity; nay, he may even despatch it for sale to "the belligerent port. But he may not take part in "the overt act of making war upon a people with "whom his sovereign is at peace. The purview of the "Foreign Enlistment Act is to prohibit a breach of "allegiance on the part of the subject against his own "sovereign, not to prevent transactions in contraband "with the belligerent. Its object is to prohibit private "war, and not to restrain private commerce." The distinction here so admirably drawn by "Historicus" appears to have been too much lost sight of in the public discussion of this question. It throws a flood of light on the true intent and meaning of the Foreign Enlistment Act.

Acts and intent of shipbuilder must be free from "animus belligerendi."

The actions and intentions then of the shipbuilder must, to become criminal, go beyond the commercial transaction. It must be proved that he has ulterior objects in view, that he is looking to something more

International and Municipal Law.

than the profit of a business speculation, that what he does in the way of building, equipping, arming, or fitting out expeditionary ships, is done by him with an undoubted *animus* against one of the belligerents, and in the interest of the other—in fact, that he is an aggressive partisan of the latter, and acting not in the capacity of an innocent commercial man, but with hostile intentions towards the belligerent against whom the vessel may ultimately be employed. In fact, the whole question under the 7th section of the Foreign Enlistment Act appears to turn upon proof of illegal intent.

Proof of intent by admissions of builders.

In the trial of the *Alexandra* case, evidence was given of admissions by the builder that he was not a stranger to the designs of the parties who employed him, that they were notoriously the agents of the Southern Confederacy, that the *Alexandra* was not the first ship he had built for them, that he well knew of the exploits of her predecessor the *Oreto* alias *Florida*, spoke triumphantly of her success, and prophesied that the little "gunboat" would achieve a greater celebrity; but even this evidently did not satisfy the Lord Chief Baron that the builder himself was guilty of any breach of the law in fact or intention, in the absence of proof that his actual interest and control over the ship would not cease with the completion of his contract, though as the builder of a creditable ship he might injudiciously glory in the successful results of his skill. One thing it clearly proved, viz., that the builder of the *Alexandra* and the *Oreto* exhibited much less discretion than the builder of the still more celebrated *Alabama* in talking about the objects and intentions of the purchasers. Perhaps it is not too much to say, that but for the incautious loquacity of the builder, the *Alexandra* would never have figured in the Court of Exchequer, in fact that

without this evidence of his admissions there would have been no case for the court or the jury.

Surmise, suspicion, &c., insufficient.

If, however, evidence of intent such as this was insufficient to satisfy the learned judge or the jury, it is obvious that the idle gossip of the shipyard, the surmises of employés, floating rumours, vague suspicions, and careless observations extracted by adverse spies and partisans, in the guise of sympathisers, from the persons with whom they fall into conversation, can never be relied upon to prove that which the act requires. Yet the agents of the belligerent states, after carefully collecting all these things, dressing them up in the form of telling narratives, and laying them before the Government, complain of supineness on the part of the Executive because seizures are not made on grounds which turn out on investigation to be utterly insufficient to warrant such an interference with the liberty of the subject. As eloquently observed by the learned Solicitor-general in his speech in the House of Commons on the *Alabama* question, in March, 1863, "The United "States Government have no right to complain if the act "in question is enforced in the way in which English laws "are usually enforced against English subjects—on evi- "dence, and not on suspicion; on facts, and not on pre- "sumption; on satisfactory testimony, and not on the "mere accusations of a Foreign minister or his agents." And perhaps this discussion on proof of intent cannot be better closed than by a further quotation from the same speech:—"Two things must be proved in every "case to render the transaction illegal—that there has "been what the law regards as the fitting out, arming, or "equipment of a ship of war, and that this was done with "the intent that the ship should be employed in the "service of a foreign belligerent."

International and Municipal Law.

As no other point of doubt of sufficient importance to invite discussion presents itself, it now remains briefly to extract from what has preceded such propositions as are consonant with international and municipal law, and with the decisions of competent tribunals wherever they have become the subject of judicial inquiry; and to deduce from them the conclusions to which they necessarily lead.

The *status* of Great Britain and its incidents.

The queen's proclamation declares that the country is at peace with the rest of the world. War subsists between the Federal and Confederate States of America. We are at peace with both. The Foreign Enlistment Act interdicts the subjects of this country, as a neutral state, from taking part with one foreign power against another with which this country is not at war.

The *status* of the Confederate States.

The political *status* of persons recognized as exercising or assuming to exercise the powers of government in or over any foreign state or any part thereof, constitutes a power within the words of the act, as distinctly as that of any formally acknowledged state. The Confederate States of America come precisely within that definition, and the queen's proclamation recognizes them as a belligerent power.

The offence interdicted by the act.

The interdict of the act applies to participation by the subject in warlike operations against such a power as distinctly as any acknowledged nation.

Declaration of neutrality.

The queen's proclamation declares for strict neutrality between the contending parties.

Position of this country in relation to the belligerents.

The *status* of this country in relation to the Federal and Confederate States is that of neutrality, as sacredly observable between them as if they were two distinct countries.

Neutrality and non-intervention in such a case are convertible terms.

This country cannot concede to the one what it refuses to the other, or deny to the one what it accords to the other. By the settled law of nations traffic between neutral and belligerent states in articles contraband of war is perfectly lawful.

The equality of treatment required.

Traffic between neutrals and belligerents lawful.

There is no penalty incident to such traffic except the risk of capture and confiscation. Ships are contraband of war as much as arms and ammunition. There is nothing in the Foreign Enlistment Act which takes ships out of that category.

Capture and confiscation the sole penalty.

Contraband not altered by F.E. Act.

There is nothing in it which forbids the building and sale of ships to any purchaser at home by the neutral subject, or their transmission for sale or delivery to any foreign country, belligerent or non-belligerent.

Building & sale of ships not forbidden.

There is nothing in it which narrows the rights and privileges of the neutral shipwright to the mere building of ships on speculation; hence it would seem that he may lawfully build a ship by contract, with any purchaser indifferently, for the building of a ship.

Privileges of neutral shipwrights not affected.

It is the active personal co-operation by the subject in foreign contest that the act prohibits. It is the *animus belligerendi* of a subject which renders his otherwise innocent commercial transactions obnoxious to the municipal law. The illegal intent is indispensable to constitute an offence against the act.

Acts with hostile intent only forbidden.

The queen by her royal proclamation, though vested with that power by statute, does not prohibit the exportation, even *sub modo*, of contraband of war. Her Majesty's prerogative does not extend to that without the concurrence of the other states of the realm. It merely proclaims the policy of the Government in the recognition of the contending parties, and the declaration of neutrality. It does not abrogate the law of nations by creating a new offence or adding to the

Operation of the queen's proclamation.

International and Municipal Law.

penal code. It recites the operative clauses of the Foreign Enlistment Act in their entirety; it neither adds to nor diminishes from the force of that statute; but, while enjoining the observance of the law as it is, not only warns her subjects against any violation of its provisions, but points out the consequences which attach to trading in contraband of war, not by reason of its unlawfulness, but to guard them against the fallacy of expecting protection, restitution, or compensation at the hands of the Crown in the event of capture by belligerents.

Application of foregoing propositions to present state of affairs.

Applying these propositions to the present posture of affairs between this country and the transatlantic belligerents, the legitimate inference to be drawn from them appears to be as follows:—

Result as to the rights of British shipbuilders.

The British shipbuilder has the undoubted right of trading with the belligerents in ships as well as arms and other contraband of war, subject only to the risk of capture and confiscation, so long as he takes no part in the contest, reserves to himself no power or control over the application to hostile purposes of the contraband articles supplied by him, but simply confines himself, in his dealings with his customers, to the ordinary course of commercial operations. Subject to these conditions, he may build ships and manufacture arms or other articles contraband of war on speculation, for sale to any purchaser. He may contract for that purpose, and such contracts are not vitiated because the other contracting party happens to be one or other of the belligerent powers, or an accredited agent of those powers.

Caution against abuse of neutral privileges.

Having arrived at and endeavoured carefully to state this conclusion, it is still important to guard against the possibility of any misapprehension which might lead to

the abuse of the privileges of the shipbuilder; therefore, in leaving this subject, it is impossible to insist too strongly on the distinction between the supply of contraband of war to a purchaser by a neutral subject in the ordinary course of business, and the act of such neutral in making common cause with one of the belligerents against the other, by originating or combining with one of those belligerents in a common design to commit hostilities against the other: for if with this intention a ship of war be built it is an offence against the spirit of the act, from the moment her keel is laid until she is fully equipped for her unlawful object. The moment the *animus vendendi* of the builder is superseded by the *animus belligerendi*, the statute comes into play against him.

It may be questionable whether the equipment, furnishing, fitting out, or arming of a ship by a subject in Her Majesty's dominions, apart from any *animus belligerendi*, constitutes an offence against the Foreign Enlistment Act.

The expressions equipment, furnishing, fitting out, or arming of a ship, whether construed as synonymous terms or not, cannot be held to include the unforbidden act of building a ship; but the act of a neutral in contracting with one of the belligerents to equip or arm a ship in this country, with a knowledge of the fact that she was to be used by the purchaser to commit hostilities against a friendly power, would be so far contrary to the spirit of the act as to render him liable to penal consequences, and the ship to forfeiture. The arming or augmentation of the warlike force of a foreign ship of war in our ports would clearly be so, under the 8th section of the act. These risks, however, the British shipbuilder as yet does not appear to have encountered.

CHAPTER VI.

CONCLUDING OBSERVATIONS.

Concluding observations.

Inconsistencies of an able commentator.

THE ink employed in the last chapter to pass a well-deserved eulogium on "Historicus" was scarcely dry, before that able writer, with a strange perversity of genius, resumed the pen only to sully his own fair fame by the advocacy of new-fangled theories directly opposed to the facts and arguments by which he had acquired distinction in his earlier epistles. The castigator of Hautefeuille, whom he unsparingly condemns for broaching doctrines inconsistent with the established law of nations, falls himself into the same error. The satirist of Phillimore, upon whom he fixes a similar charge of inconsistency, condescends to bring himself to the level he condemns. The series of letters with which he favoured the public, and of which any legal author might be proud, derived their excellence less from the nervous eloquence he displayed than from the fact that his arguments were based upon the incontrovertible principles of international law, supported by references to the highest authorities, and borne out by the unequivocal decisions of competent legal tribunals. The great research, the unerring discrimination, and legal astuteness exhibited in those letters, not only reflected the highest credit upon the talent and well-directed industry of the author, but gave to his labours a value which the lucubrations of the mere theorist, however plausible their glozing, could never have attained. Suddenly descending from the eminence he had achieved, he

plunges into unsupported sophistries, regardless of law and precedent, and resorts to the timorous dictates of questionable expediency.

Concluding observations.

In his letter of December 19th, 1862,* he says—"I unhesitatingly assert, in contradiction to M. Haute-"feuille, that the trade in contraband with either "belligerent, by private persons of the neutral state, "within the territory, is a lawful trade; that it is not "the duty of a neutral government to prohibit such a "trade within its own territory; and that the bellige-"rent state can have no ground of complaint against "the neutral government in respect of such a trade." In the same letter he quotes, and most emphatically indorses, the decision of Justice Story in the supreme court of the United States, that "there is nothing in "our laws, or in the law of nations, that forbids our "citizens from sending armed vessels as well as muni-"tions of war to foreign ports for sale. It is a commer-"cial adventure which no nation is bound to prohibit, "and which only exposes the persons engaged in it to "the penalty of confiscation." That there may be no misapprehension as to his meaning, no reticence on his part as to the existence of the Foreign Enlistment Act—of which America has a counterpart—he affirms, in his letter of four days afterwards,† that "the Foreign Enlist-"ment Act was not intended to, and did not in fact "operate, so as *in any way* to limit or control the *absolute* "*freedom* of neutral commerce. The enlistment act is "directed, not against the *animus vendendi*, but the *animus* "*belligerendi*. . . . . A subject of the Crown may "sell a ship of war as he may sell a musket, to either "belligerent, with impunity. . . . . The purview

* The *Times*, December 23, 1862.
† The *Times*, December 26, 1862.

Concluding observations.

"of the Foreign Enlistment Act is to prohibit a breach "of allegiance on the part of the subject against his "own sovereign, *not to* prevent transactions in contra- "band with the belligerents."

In the teeth of all this, in his letter of September 9, 1863,* referring to "the iron-clads supposed to be in "course of construction for the Confederate Govern- "ment," he says, "Whatever doubt or difficulty there "may be with respect to the *animus* of the shipbuilder, "there can be none whatever as to that of a belligerent "government which effects or intends to effect such a "purchase! On their part, it is indisputably a bellige- "rent and not a commercial intent," and he counsels diplomatic action against the prime movers in the affair.

What, in the name of common sense, can he mean? What other object can a belligerent be supposed to have than a *belligerent* in contradistinction to a *commercial* intent. If that renders the dealings of the neutral void or illegal, is it not fatal to his unequivocally enunciated doctrine that the subject may sell a ship of war, as he may a musket, to either belligerent with impunity? What becomes of his unqualified dictum that the Foreign Enlistment Act does "not limit or control the absolute "freedom of neutral commerce," nor "prevent trans- "actions in contraband with the belligerent?"

He who manfully insists that the law should be respected, and "that the errors of false teaching are "immediate and most disastrous," after laying down the law with the firmness of a Solon, is the first to set it at nought. He maintains "the absolute legality *of all* "*manner of trade within the neutral territory* and the "*absolute irresponsibility of the neutral government for the*

* The *Times*, September 11, 1863.

"*traffic of its subjects*, whether in the sale or transport of "contraband;"* and yet, in the face of this, he fixes a charge upon the Confederate Government, in trading *with* the neutral, "of deliberately procuring the con- "summation of an act which our law has solemnly "forbidden," and counsels interference "and remon- "strance with the offending state" in respect of "the "iron-clads *supposed*" to be for them.† Supposed! How unwary this in comparison with the grave caution of the learned Solicitor-general, who deprecated interference except "on evidence, and not on suspicion." *Concluding observations.*

Not satisfied with this, "Historicus" in the same letter imputes to the Confederates, on the suggestive guess of Mr. Dayton, that their "main object is not "so much the direct possession of these formidable "weapons of war, as the indirect mischief which their "construction may produce between the Government "of this country and the United States," as if there were no sufficient reason, on the part of the Confederates, whilst engaged in war, to possess an arm of offence in which their enemy abounds, without travelling out of the realms of probability to attribute to the South any other motive than that which, under the circumstances, is most natural—viz., the desire to obtain those essential instruments of war in which they are most deficient.

Nor is he more felicitous in his assumption of parallel cases to support his novel theory. "If, for instance," he says, "we found the French Government deliberately "engaging in contracts with smugglers to evade and "defraud our revenue laws, we should find little diffi- "culty in knowing how to deal with the case." *Inaptitude of assumed parallel case.*

In the first place, this is begging the question;

* The *Times*, December 25, 1862.

† The *Times*, September 11, 1863.

Concluding observations.

because if he were right in his doctrine, that trade between belligerents and neutrals in the neutral territory is not unlawful, no evasion of or fraud upon the law is practised. Secondly, it is the every-day practice for foreign subjects to evade and defraud our revenue laws, but the penalty is confiscation of the contraband articles seized, and fine or imprisonment, on personal prosecution and conviction of the individual smuggler, —not diplomatic or any other action against the government of the offender. Such a thing was never heard of as a remonstrance to the French or any other government because a subject of that government had been guilty of a violation of our revenue laws. Herein consists the only analogy between the two cases, and it tells against his argument, the government of the neutral country not being answerable to the belligerent for the individual acts of the subjects, any more than the government of one foreign country is for evasions by its subjects of the fiscal laws of another. No one has insisted on this more strenuously than "Historicus" himself; and if that which he has so ably contended for in his earlier essays is law, the interference he suggests is in diametrical opposition to that law, and in direct violation of that non-intervention or impartial neutrality which this government has elected to observe.

Dangerous assumption as to evidence.

That it is the law is vouched by the abundant authorities which he quotes, whereas not a paragraph in his recent letter is supported by a single reference to a case in point. "Historicus" affirms that "evidence very far "short of that which might suffice to convict the ship-"builder of a violation of the Foreign Enlistment Act, "would justify our Government in treating the Con-"federate authorities as persons procuring, or meditating "to procure, a breach of its spirit and its letter;" but

he is very dreamy as to the application of a legal remedy, though he who counsels more than negation of the laws he has ably maintained before, in order to appease the unjust anger of the Federals, lest it should embroil us in war with them, is less chary as to hostilities with the Confederates, in case his dubious expedient of calling them to account should fail: for, says he, "if asked upon what evidence and in what "manner we should proceed, I answer as to the "evidence—That the passing of the ironclads into the "hands of the Confederate Government, whether "directly or indirectly through some colourable trans-"fers, would be sufficient proof that the whole transac-"tion was one originated and instigated by them." Well! it would then be too late to detain them, if liable to detention in the face of his own doctrine that the transaction of sale and purchase of contraband of war by a neutral subject to a belligerent in the neutral state is perfectly lawful. So this questionable mode of proceeding being gone, and the evidence of possession by the Confederate Government obtained, still reticent as to the fact that if the sale and purchase were lawful, the consequent possession must be lawful too, he says, "As to the measures of redress, they would consist in all "those acts of reprisal, and if necessary, of hostility by "which an offended government vindicates its violated "sovereignty." Strong measures these! Even if the law were, as he has recently sought to make it, doubtful, would he counsel the same course, under similar circumstances, were France and America, or France and Russia, the belligerents? and if he did, would not the Government of this county, professing neutrality between the conflicting parties, hesitate to follow such advice? If so, is it either dignified or politic, assuming

Concluding observations.

Doubtful measures of redress.

Concluding observations.

that it could in this case be done with comparative impunity, to venture upon an expedient which might hereafter be drawn into an inconvenient precedent? Again as to the evidence he deems sufficient—whatever may be the fact, the proof is difficult of attainment if the parties are driven to concealment. As necessity is the mother of invention, so distress in war is the parent of the twin sisters strategy and evasion.

A nation fighting for life and liberty cannot be expected to be overscrupulous as to the means of procuring the indispensable implements of war, nor the less so when a government, under the guise of neutrality, accords to the adversary that which is denied to her. She finds in this additional motives to circumvention, and justifies it from a conviction, right or wrong, which prejudice strengthens, that she is only surmounting difficulties unfairly thrown in her way. It may be asked how she will do this.

Difficulty of detection.

To those who are better acquainted than "Historicus" with the wiles and artifices of the smuggler, and the difficulties of detection and punishment, a hundred methods suggest themselves. Unsay the law which "Historicus" has so ably propounded, that such traffic is lawful, and the belligerent government will carefully avoid appearing in the transaction. His purchases, his contracts, will be made by agents, ay, by sympathizing aliens. The vender, eager for the lucrative profits incident to the circumstances of the case, will ask no questions beyond those upon satisfactory answers to which he can make sure of his price. If it be a ship, she will be made to comply with all the conditions of our fiscal laws which are essential to her due clearance from our shores. If a transfer take place after her departure, who will undertake to prove that it is colourable?

Evasion the result of prohibitory laws.

suspicion will not do it—nay all this may be *bona fide.* England being the mart for ships—forbid our builders to supply them to belligerents, and the foreigner steps in, buys on speculation, and makes his market by afterwards selling to either belligerent who will pay him best. The only consequence is that the Frenchman, the Belgian, the Italian, or the Swede, takes the larger profit, which the builder at home, if unrestrained, would have secured. Say that there is a risk in all this, and that "Historicus" on mere proof that a ship had passed by transfer into the hands of the Confederate, would venture on the reprisals he threatens, and that the Confederate was driven to further stratagem, what is there to prevent the purchaser from affecting a voyage to the Federal States, under pretence of selling there, but, time and place agreed upon, falls in with, and becomes a willing prize to the *Alabama* or the *Florida?* Will "Historicus" advise because she has passed by capture (preconcerted it may be, but unknown) into Confederate hands, that the Government of this country should make reprisals on that of the Confederates, because a ship, *prima facie* the property of a subject of France, has become an apparent victim to a foreign belligerent power? These matters grow more and more complicated at every step; and if "Historicus" knew the hours of labour and anxiety which the prosecution of the *Alexandra* entailed upon the law officers of the Crown, and upon those who were concerned in the investigation of that case before trial, he would not so lightly suggest the adoption, on bare suspicion, of *ad captandum* "measures of redress," trusting to the chance of evidence ultimately turning up to justify the act, whether that act be capture of some other vessel by way of reprisal, or of the supposed offending ship.

Concluding observations.

Concluding observations. Failure of justification, in such a case, between nation and nation might entail consequences far more serious than the liability to pecuniary damages incident to the wrongful detention of a ship in our own ports.

Inexpediency of timid counsels. To whatever cause the transition may be ascribed, it is self-evident that "Historicus," having quitted the beaten path of legal certitude which he once so nobly trode, has lost himself in the labyrinths of doubtful policy. If it be war with the United States that he dreads, it is not likely to be averted by the adoption of timorous counsels or time-serving submission; nor can there be anything in his arguments or his fears to justify perversion of the law for political ends. To hold out such a hope to those who are interested in subverting it, is only to deceive and to disappoint the more.

"Historicus" has gained respect by the legal erudition which his earlier letters exhibit, and it is not extraordinary that his later epistles, notwithstanding their inconsistency, should have had some weight in changing the current of this controversy.

Opinions of the Press. That public journal which is pre-eminent for the power and lucidity of its articles, and the discriminating skill with which it seizes upon the salient points of every question with which it deals, thus concentrates the leading propositions of law as to the rights of neutrals in their dealings with belligerents in contraband of war :—

"It is not denied that a neutral may sell munitions "of war, ships included, to a belligerent. International "law deals considerately with neutrals, and limits the "extent to which their customary trade may be cur-"tailed in aid of belligerents and their operations. It "is not our fault that the Americans are fighting

"each other, and our share in the suffering produced "by the war ought to be as light as possible. We, "therefore, or any other neutrals, are entitled to pur- "sue our ordinary business in all its branches, provided "only that we do not violate the principle of neutrality "by refusing to one belligerent what we grant to the "other. If the goods in which we deal are contraband "of war, they are liable to confiscation; but even that "trade, subject to the risk, is perfectly lawful. Accord- "ing to these doctrines, it is undoubtedly competent to "any British shipbuilder to build a ship and sell it, as "another merchant might sell a battery of field-pieces "or a cargo of gunpowder. Even if the ship be mani- "festly and exclusively designed for purposes of war, "the transaction is not necessarily unlawful, for the "construction of ships of war for foreign states is noto- "riously a branch of our customary trade. We can "thus, without much difficulty, see our way to both "the construction and sale of such vessels."

Concluding observations.

But when approaching the *vexata quæstio*, touching interference with the iron-clads, all argument becomes inconclusive, not from want of ability in the commentator, but because no express statute exists to determine the point; no dictum of law has been enunciated by the great international jurists; no precedent presents itself illustrating the case, even by analogy; no decision of any tribunal throws the light of its authority upon it; hypothesis furnishes the premises; the deductions are consequently inconclusive, and all action upon the case is questionable.

Vexata quæstio.

"The *Alabama*," it is said, "was not delivered at a "southern port, nor is it sure that she ever entered "one." But by what law or authority does this come to be a *sine qua non?* "The *Florida* has run in and

Probability insufficient.

Concluding observations.

"out of Charleston, but she only entered those waters "as a ship already in commission fully manned and "fully equipped. Where and how was this equipment "effected? If it was not effected in a Confederate "port, it must have been effected in *some* neutral port, "and that deprives the adventure of its lawfulness." If this were an obvious conclusion, how does it affect the question whether the government of the country of the neutral furnishing the ship has the right to seize or interfere? If it be lawful for him to sell and deliver, and for the belligerent to purchase and receive the unarmed ship, there is, *de facto*, nothing, at or previous to the time of her departure, to justify her detention; unless such justification is to be found in the mere hypothesis, that although she has done no wrong here, she may possibly do so in some other neutral port, the intention to do so being inferred! Yet it is suggested that by some such process as this we may arrive at the conviction that an act, legal in itself, is part of "an "adventure which, if so planned, is unlawful in its "inception." But is it consistent with English law and justice to arrest the innocent on mere suspicion that he may become criminal?

Inference that two lawful transactions may constitute one unlawful act.

Notwithstanding the doctrine laid down by the Supreme Court of the United States that even armed ships are merchantable contraband of war (*ante*, p. 24), it is contended that a "shipbuilder may not sell a ship "ready armed, for that is not a customary trade, and "no such sales are effected. But if the purchaser, after "receiving the empty hull, goes elsewhere to purchase "guns, and elsewhere to obtain men and stores, then "the transaction *in the aggregate* amounts to the equip- "ment and despatch of a hostile expedition from the "neutral territory." Assuming that this is sound law,

it may be an argument for subsequent reprisals, if that course be justifiable, when the aggregation is complete, but not for seizure of the empty hull prior to departure, on the mere conjecture that the purchasers of the vessel may also purchase guns and provide men and stores elsewhere. When a ship has once quitted our waters, untainted by any illegal act, our responsibility is at an end. *Concluding observations.*

But it is asked, "When the *Alabama* commenced "her attacks on the enemy's shipping, from what port "had she sailed?" and this is alleged to be "the im-"portant question." Why it is so does not clearly appear. There seems to be some vague impression that it is essential to the nationalization of a ship that she must enter the ports of the nation to which she belongs, and that there is some magic in the performance of a voyage from some given destination to another to stamp her ownership, or qualify her for any legitimate mission, whether as a trader, a ship of war, or a privateer, as if the mere entry into some destined port would give a sanction or a sanctity to her proceedings which she could not enjoy without. It is true that a British merchant ship cannot enjoy what are called British privileges until she has obtained a British certificate of registry; and that no alien ship can, in trading with this or any other country, claim the advantages to which the country is entitled by treaty or otherwise, without evidence of her nationality. It is true that she must carry her credentials, her register, or some other instrument authorized by the government whose protection she claims. A public ship and her nationality are known, and conclusively known, by her commission and her flag; but it is not necessary that she should have entered the ports of the country to receive the one or **Nationalization of ships.**

Concluding observations.

be invested with the other. "As between nations she "is," says a modern authority, "the property of the "state whose commission she bears. No foreign tri- "bunal can inquire into the title of her sovereign, or "demand production of her bill of sale, although she "was built in the yards of the country in which that "court presides and originally fitted out for illicit war."*

Imputation on shipbuilders questioned.

But to proceed: the journal from which we have been quoting adds, "that the transactions in question "have been conducted in such a manner as to indicate "a consciousness of trespass in some direction or other." . . . "No shipbuilder has openly avowed that he was "building a ship for a belligerent power, but that he "intended to confine himself throughout the transaction "to the limits imposed by the law. The vessels have "been built without any admission of their real desti- "nation, and despatched covertly or under pretext." If this were so (though the contrary is the fact, as will presently be shown), would it be extraordinary that the shipbuilder, notwithstanding his conviction of the perfect legality of his proceedings, should be driven to more than ordinary caution when his premises are infested by spies, the lawfulness of his proceedings questioned by unscrupulous adversaries, and retailed to the Government through the resident ministerial agents of a jealous power, with every sophistical argument that a skilful hand, aided by an *ex parte* case fitted to his purpose, can wield to contravene or evade the liberal application of the dictum of one of our ablest legal advisers of the Crown, that proceedings in this country should be had "on evidence, not on suspicion."

Danger of interference on suspicion.

But this is nothing in comparison with the suggestion of those who contend for the arbitrary detention of the

* The Ocean, the River, and the Shore. Part I., p. 187.

ships of the subject, not on actual proof of any wrong done by him, but on the mere supposition that, after they leave our admiralty jurisdiction, something may be done there which, though it cannot lawfully be done here, may lawfully be done elsewhere by some one else. *Concluding observations.*

If an act lawful in itself here, is to be treated as unlawful on the mere conjectural anticipation that something more may be done elsewhere, which if done here might constitute that act a crime, could it surprise any one that our shipbuilders should be circumspect to a fault, though they thus incur the charge of suspicion or concealment? But have they, as before alleged, been thus uniformly cautious? The evidence on the late trial of the *Alexandra* proves that, if the candour contended for be a virtue, Messrs. Miller & Sons are entitled to full praise for the ample exhibition of it. They stated openly that they were building the *Alexandra* for the agents of the Confederate States, that such was her real destination, and everybody knew it; and what was the result? The seizure and prosecution of the ship! The days and weeks and months of anxiety, trouble and expense entailed by this yet unfinished litigation have been the bitter fruits of candour. Reasons for timidity of shipbuilders. Effects of candour.

If, on the contrary, the shipbuilder does not betray the confidence of his employers by openly declaring that he is building this ship for the Federals, or that for the Confederates, the imputation of concealment imperils his property, and subjects it to seizure on the ground of suspicion. If he frankly confesses that he is engaged in the execution of a lawful contract for the supply of contraband to either of the belligerents, the fate of the *Alexandra* stares him in the face. Dilemma arising from uncertainty of law and its administration.

But, as if the danger of reserve on the one hand and candour on the other were not enough, with the choice Inquisitorial proceedings un-English.

Concluding observations.

of evils, to perplex the shipbuilder, it is gravely suggested that, in a country where no man can properly be called upon to criminate himself, he must submit to the un-English ordeal of an official inquisition as to the objects and purposes of himself and his employers, with the chances of being impaled on the horns of the dilemma in which he is involved by the equivocal state of the law and the vacillating teachings of time-serving writers as to the administration of it. Ask Messrs. Laird what account they are prepared to give of their proceedings, and they will naturally say—"Messrs. "Miller told the truth, and their ship was seized!" Ask the builders on the Clyde the same question, and they will reply—"Messrs. Laird declined to answer, and "their ships are detained!"

Impolicy of creating new difficulties.

Yet if, consistently with the law of nations, "it is "undoubtedly competent to any British shipbuilder to "build a ship and sell it as another merchant might "sell a battery of field-pieces or a cargo of produce," why do violence to the true spirit of neutrality by endeavouring needlessly to disturb it? Why harass our shipbuilders by tortuous refinement of argument, and seek by overwrought ingenuity to throw vexatious difficulties in the way?

Inflexibility of universal rules.

In order to the honest observance of those broad principles of neutrality which ought to constitute the governing rule of nations, we must neither try them by, nor seek to adapt them to, the special circumstances of a possibly exceptional case. The law must not, either from private or political motives, be strained to meet the convenience of particular states.

The iron-clads.

This proposition may be illustrated by the present case of the iron-clads. Ships as well as arms are contraband of war. To-day the Northern States require

from us arms, but not ships. The Southern States want ships, but not arms. The North urges the interdiction of the sale of ships, whilst the sale of arms is unrestricted. *Concluding observations.*

If the case were reversed to-morrow, should we be prepared to reverse the *modus operandi*, to deny arms to the South, and permit ships to go to the North? These opposite processes cannot both be consistent with any recognized principle of universal application, but absolute non-interference is; and although tergiversation on the part of one state cannot affect generally accepted rules as between others, any departure from them may, as already shown, be inconveniently quoted against the vacillating state itself should similar complications arise.

There is nothing in the position of the antagonistic powers to warrant even a modification of the settled principles of neutrality. Both belligerents have been recognized as existing powers; we have declared for strict neutrality; and, to use the appropriate language of a modern authority before quoted, "we must regard all "nations as of equal power, possessing equal rights, "equal intelligence, equal interest in the observance of "the law, and equally prepared and determined to "vindicate their rights, and to repel every inroad upon "them. To assume the contrary would imply that the "strong has a right to impose a law on the weak; "and not only to impose, but to vary it at his "pleasure."*

If there be any grave reason why this question should be viewed as one of policy, in subservience to which the provisions either of the Law of Nations or of the Foreign Enlistment Act should as far as practicable be interpreted, there is much to be said on both sides. *Political aspect of the case.*

* The Ocean, the River, and the Shore. Part i., p. 300.

Concluding observations.

So long as a plain and obviously unmistakable statute remains unrepealed, it is the duty of the subject to observe, and of the executive to enforce it, without looking to ulterior consequences. If it affects the liberty of the subject, doubts are generally decided in his favour, particularly when the law is penal. If political, should a particular interpretation of a doubtful provision be attended with pernicious results to the community at large, perhaps it is reasonable to expect that an opposite construction might be adopted as most consistent with sound policy and the presumed wisdom and intention of the legislature. A few observations therefore, may not be out of place here as to the policy of imposing restrictions calculated to hamper the commerce of the country in cases where the national interests do not imperatively demand the sacrifice.

Effect of war on neutral commerce.

When foreign wars occur, particularly between states with which we carry on extensive commercial intercourse, the interests of this country must more or less suffer. In the present instance this is more particularly the case, because not only are our ordinary mercantile transactions between this and the belligerent states diminished by the blockade of a cotton-producing territory, but an important branch of British industry is paralyzed, the flow of a large amount of capital through this country is arrested, and incalculable injury is inflicted. Of this we make no complaint against the belligerents, because it is not the designed but accidental consequence of the war. Nevertheless, the fact exists; and is it not enough that a neutral state should patiently submit to the consequent loss, without being restrained from the exercise of another branch of trade, which, being incidental to a state of war, serves in some

measure to supplement that loss by widening the channel for the influx of capital into the country. *Concluding observations.*

The manufacture of arms and ammunition, and the building of ships, both mercantile and naval, do not merely constitute a most important branch of British industry, but to *these*, and particularly to the latter, this country owes perhaps more than to anything else her maritime supremacy. Arms, ammunition, and ships of war, are not in request in time of peace. It is war that furnishes the market for these wares; and were England prevented by her own laws from availing herself of her natural and best opportunity, nothing could be more suicidal than such a restriction. Manufacture of arms, ships, &c., important trades of England. Time of war England's opportunity.

What is the consequence, if the argument be followed to the end, particularly in reference to the present posture of affairs? Here is a proclamation avowing in unmistakable language, that "Her Majesty is happily at "peace with all the world." This might happen were all the other nations of the earth at war; and if, under such circumstances, the British subject be precluded from furnishing ships to any nation with whom this country is in amity, he would be shut out from the market of the whole world, when his skill would be most in request and his business most profitable. It would also result in the transfer of this most important branch of British industry from our own shipyards to those of other countries whose subjects are free from the operation of so arbitrary a law. Effects of restraint.

Where, then, is the necessity for inverting the natural order of things, or for interpreting the laws of nations by the rule of contrary, to the manifest injury of the trade and commerce of our own country? Is it the dread of war that warps the judgment of the advocates of this truckling policy? If such fears are not absolutely Dread of war without cause chimerical.

Concluding observations. groundless, the sacrifice of principle to which they point is utterly inconsistent with the honour, the integrity, and the dignity of a great country.

If America is bent on war, illegal concessions will not avert it.

If America really is bent on war with England, it is utterly absurd to suppose that it will be averted by those unreasonable not to say illegal concessions, by the refusal of which, it is timidly argued, that hostilities will be provoked. The concessions contended for amount to neither more nor less than these—arbitrary interference with commercial rights and privileges of the neutral subject—the perversion of the Municipal Laws of this country—the repudiation of the common law of nations—and last, not least, the compulsory interpretation of those laws, whatever the honest opinions of our judges may be, in direct opposition to the ruling of the courts of the United States themselves!

Extravagant propositions.

These propositions are so startling as to appear almost incredible when thus nakedly exposed; but that they are not overdrawn is abundantly testified by the continual repetition in the public press on both sides of the Atlantic of announcements like these. If the iron-clads in Messrs. Laird's yard are allowed to leave this country, the United States will declare war. If the case of the Alexandra is decided in favour of the claimants, it will inevitably lead to hostilities. If England will not violate the acknowledged principles of neutrality, by treating the Confederate States as rebels, and by refusing to them what is allowed to the Federals, war will certainly ensue.

Impartiality of English law.

Is the boasted impartiality and unbending majesty of English law a mere fiction? Is the England of the nineteenth century to be told that policy demands that she should do violence to the acknowledged rules by which the other nations of the earth are governed, and

that her own laws must bend to the capricious dictates of a foreign power, lest our inflexible integrity should plunge us into war? The idea is chimerical! If it is the fitful murmur of complaint that reaches us from the opposite shores of the broad Atlantic that moves us to a departure from the path of rectitude, our friendly relations are not the more likely to be preserved by timorous concessions. Although, as the Solicitor-general observed, every allowance should be made "for the natural feeling "of irritation on the part of the American nation," the attitude of firmness, in reliance on "the eternal prin-"ciples of justice," though the expression excites the sneer of the satirist, is best calculated to maintain peace.

Concluding observations.

Firmness essential.

But when America comes calmly to deliberate upon and weigh the cause of action, there will not be wanting in that intelligent community a sufficiently high sense of moral right to guard them against the folly of attempting to fix a quarrel upon this country, on the ground that we would not do violence to the great principles of international law universally accepted by the civilized nations of the earth—principles which she herself may lay claim to the honourable distinction of having, through the medium of her own courts, been more instrumental than any other country in establishing upon a solid and intelligible basis. The idea of a war at the hands of the United States because we would not, when it appeared to subserve her interests, set at nought that code in which she and her ablest jurists have had so prominent a share in illustrating, systematizing, and promulgating, involves a proposition so monstrous that it could not be tolerated for a moment.

Why should America depart from her own doctrines?

Only let the cause of quarrel be made known, and the sympathies of every nation under the sun would

Sympathies of civilized nations.

Concluding observations.

be with us. The civilized world could do no less than make common cause against such an infraction of public rights.

Acts of neutral subjects no cause of war against state.

Once more—The individual act of a neutral subject trading in contraband of war with either of two belligerents, affords to the other no *jus belli* against the neutral state to which that subject belongs; and if anything could take this out of the acknowledged rule in such cases, it would be where the neutral government really interferes to prevent the subject from supplying to the one that which it allows to the other. Nor would the government of any country maintain its claim to respect, and its character for justice or impartial neutrality, by denying to the weaker what it allows to the stronger. It is injudicious intervention, that creates complications and departure from settled principles, that renders subsequent justification difficult when such acts come to be called in question. Upon this subject no one has written more lucidly than he whose subsequent mystification it has been deemed fair to criticise. His recent laches, however, do not detract from the value of his former contributions to the cause of truth, and law, and justice.*

Merits of "Historicus" and "Phocion."

* These pages were already in type ere "Historicus" published his further letter, explanatory and defensive, dated September 16th (the *Times*, September 18, 1863). As he complains that the drift of his argument has been wholly misapprehended, it is but fair to direct the reader's attention to his explanation. It is obvious, that since he shifted from his original ground he has not written in the same clear, terse, vigorous, and authoritative style. This cannot be from a want of power. He has given unquestionable proof of the contrary. His failure to convince, or even to make himself clearly understood, must therefore be attributable, not to the feebleness of the logician, but of his premises, since all his rhetorical skill could not render his deductions acceptable even to those whom his talents had prepossessed in his favour.

But his explanation falls short of satisfying any careful reasoner of the justice of the new views he advocates. To show this it is not necessary here to follow him throughout. A passage or two will suffice. He says:—

The laurels which "Historicus" in his palmy days so ably competed for, ere "Phocion"* stepped into the arena to bear away the chaplet from his brow, cannot be divested of the impress of that masterly genius, whose lustre, unobscured by the dust his own hand has raised, still serves to light the pathway of legal truth. *Concluding observations.*

In bringing to a conclusion this humble essay the appropriate climax to one of his epistles cannot be overlooked:—"Belligerents already sufficiently exasperated "are mischievously instructed to consider themselves "the victims of imaginary wrongs, arising out of the "supposed violations of unreal rights. It is of the last Complaints of America answered by "Historicus."

"It may happen that no proof may be attainable against the shipbuilder "(which in his case amounts to legal innocence), and yet that abundant proof "as against the foreign government may be acceptable. This will easily "appear from the following considerations. The offence against the Foreign "Enlistment Act consists in guilty knowledge and guilty intent. Now, even "assuming it proved that the ship is really destined for the warlike services "of a foreign belligerent Government, it may be difficult, and even impos-"sible, to prove that the shipbuilder either knew its destination or partici-"pated in the intent of its equipment. But, if the fact of its real destination "is established, no such ambiguity or difficulty of proof can be alleged on "behalf of the foreign Government. Of *its* knowledge and participation in "the belligerent intent of the equipment there can, of course, be no doubt. "Here there is precisely a case in which, though the legal remedy fails "against the subject for want of proof, the diplomatic remedy against the "foreign Government has its proper application, grounded upon a sound "foundation of truth." Now, all this reads very smoothly, but what of it? If what "Historicus" has so frequently reiterated, with authority in support, be true, viz., that it is lawful for the neutral to sell a ship to either belligerent—the sale being lawful, how can the purchase be unlawful, and wherein does the notable offence of either party consist? It is enough, however, that he now acquits the innocent shipbuilder, and leaves it to the Executive to infer and act upon the inference, when the ship has reached her destination, that the belligerent has done wrong in buying what the shipbuilder was free to sell. The proposition is perfectly innocuous; for he may rest assured, that without better justification than this no government will resort to diplomatic action, nor will our ships ever sweep the seas to make reprisals upon the property of those who have bought our ships in the ordinary and lawful course of trade. That "Historicus" may have no grounds of complaint, the letter in question is given *in extenso* at the end of this work.

* *Vide* Note on next page.

Concluding observations.

"importance to eradicate from the public mind on "both sides of the Atlantic these pernicious errors, on "whatever authority they may be promulgated. The "interests of peace demand that there should be no "doubt upon this question. It is no part of the duty "of a government to prohibit or prevent the trade of "its subjects in contraband of war; and the belligerent "government has no right to consider itself aggrieved "by the non-performance of an obligation to which the "neutral state is not subject. The traffic in contra-"band of war within the neutral territory is absolutely "lawful. If the neutral subject engages in the transport "of contraband, the belligerent must be content with "his remedy by capture, and he is entitled to look for "no other. If the reassertion of these principles "founded in reason, settled by law, consolidated by "experience, accepted by the unanimous accord of "nations, tends in any degree to remove that irrita-"tion which is the unhappy fruit of ignorance inflamed "by passion, the object of this letter will have been "accomplished."*

Having been led by the discussions in the public journals† during the progress of this work to reopen and further dilate in this chapter upon some of the points which had previously been considered as disposed of, it may be asked to what these further disquisitions lead? At the risk of being somewhat tautological, it

* The *Times*, December 23, 1862.

† Since the completion of this chapter, the pen of "Phocion" has contributed through the columns of the *Times* of September 18, 1863, a further letter containing much useful information, historical and argumentative, and which derives additional value from the masterly comments which the same journal has bestowed upon it. In these, and particularly the latter, the broad distinction between the right of the neutral to build and to equip ships is so ably drawn, that no apology need be offered for appending them with the last letter of "Historicus" to this volume.

would appear that these pages cannot be more aptly concluded, than by a brief summary of what the neutral shipbuilder may and may not do under circumstances like the present.

Concluding observations.

Résumé of what neutral shipbuilders may and may not do.

It is still an open question where the building of a ship ceases, and where the equipping, furnishing, fitting-out, and arming begins. If, however, the neutral may lawfully build, by contract or for sale, a ship of war, it would follow that he may do all that is necessary to the proper construction of the hull, engines, machinery, masts, rigging, and every thing short of actual armament.

Question where building ceases and equipping begins.

Builder may do all, short of arming.

In this view of the case he may, for example, put in a powder magazine, but cannot supply the powder. He may make her portholes, and fix her ring-bolts, but not supply the ordnance. He may give the requisite strength to the timbers, and prepare the decks for carrying swivel guns, but cannot supply the guns themselves. He may provide accommodation for a given number of men, but cannot provide the crew. In short, whatever is essential to, and forms part of the actual construction of the ship, and which cannot subsequently be added without disturbing or altering the structure, may lawfully be done.

He may complete the structure, but not supply munitions of war, or crew.

If, however, to carry this further, it is lawful according to the decisions of the courts of the United States, for a neutral to make and sell an armed ship of war, the question is still more simplified, and the distinctions pointed out in the preceding proposition become needless.

If he may sell armed ships, question simplified.

How far the courts of this country may, when the case of the *Alexandra* comes to be argued, affirm either of the above propositions, remains to be seen. But subject to that, according to all existing authorities of any weight, and the opinions of the majority of those

Preceding propositions abide coming argument.

Concluding observations. writers who have recently examined and discussed the question carefully, the following appear to be the safest

Conclusions according to existing decisions. conclusions to be deduced from the facts and arguments taken as a whole.

Neutral may build ships of war. It is perfectly lawful for the neutral shipbuilder to build ships, vessels of war not excepted, for either of two belligerents with whom the sovereign is not at war.

Not equip or arm. But he cannot without the royal licence equip, furnish, fit out, or arm ships within the sovereign's dominions for the hostile use of either belligerent against the other, for that would be an infringement of the royal prerogative, and a violation of the Foreign Enlistment Act.

Neutral may sell ships to belligerents and deliver, subject to risk of capture. It is perfectly lawful for the neutral shipbuilder to sell and deliver ships, vessels of war not excepted, to either of two foreign belligerents with whom the sovereign is not at war, in the neutral port; or to send such ship for sale to either of them, subject to the risk of capture and confiscation by the other. But he cannot in the sovereign's dominions man a ship with

Cannot man ship with fighting crew. a fighting crew, or take any part with either belligerent in hostile operations against the other, for that would equally be an infringement of the royal prerogative and of the municipal law.

Neutral may make, sell, or export arms to belligerents. It is perfectly lawful for the neutral subject to manufacture, sell, and export, to either of two belligerents with whom the sovereign is at peace, any arms and munitions of war. But it is questionable whether he can lawfully send out, contemporaneously with the departure of a ship supplied by him, munitions of war to equip, furnish, fit out, or arm such ship out of the sovereign's dominions for warlike operations by one belligerent against the other, with the knowledge that they are to be so used: for, although the junction be

effected beyond the admiralty league, that would be an evasion of the Foreign Enlistment Act. But so long as the supply of the munitions of war by a neutral to the belligerents is a fair mercantile transaction, totally independent of and unconnected with the sale of a ship to the same belligerents, even should they, after delivery to them, use those munitions of war to fit out and arm a ship supplied by him, he is not guilty of any infraction of the law, because he has no more power or right to restrict the purchaser, than he has to co-operate with him, in the use and application of them.

Concluding observations.

Supply must be fair mercantile transaction.

If a belligerent ship come into a neutral port for repairs, the neutral subject may reinstate her, by repairing damages to her hull, masts, rigging, or machinery; but he may not supply her with guns or other munitions of war, nor replace any that have been lost or destroyed, nor exchange any of her arms for others; nor can he recruit her military crew, though she may take mariners on board to navigate her home, in case fever or loss shall have rendered such aid necessary. In short, if he add to the number of guns, change those on board for others, add to her equipment, or augment her warlike force, he is guilty of a misdemeanour, and liable to fine or imprisonment, or both, under the 8th section of the Foreign Enlistment Act. *Vide* p. 85.

Neutral may repair foreign ship, but not augment her force.

On reference to the preceding pages, it will be seen that each of the above propositions is founded in law, or supported by high authority, if not in every case confirmed by competent tribunals. In them may be found a sufficiently safe guide for that course which alone comports with the strict neutrality which all are anxious honourably to maintain.*

* The able work which has been already quoted (The Ocean, the River and the Shore) contains so clear and concise an exposition of the rights and

Concluding observations.

Few thoughtful persons in this country believe that the belligerent states will ever be reunited. Whenever their unhappy differences are adjusted, the once United States will probably constitute at least two separate powers, the magnitude of whose natural resources and the extent of whose territories will be amply sufficient to elevate them to high positions in the family of nations. They will each be fully entitled to our respect; and it is our interest to secure their friendship, or at least to avoid giving them needless offence. The re-union of the opposing states, under the pretext of making common cause against England, is with some a favorite theory. Both, weary of the evils of a fruitless contest, and alike desirous of an excuse for terminating it, might be tempted to such a course, and the more so if the Confederates have any cause for animosity against us. Should they not rejoin, we shall have the less reason to calculate on their cordial co-operation in the event of a war with the other states. The wiser policy is to deal with both in that true spirit of impartial neutrality, which alone consists in the sacred observance of the recognized law of nations.

Let England be true to herself and to the world at large by paying implicit respect to those laws; and whatever the result of the pending struggle, whatever the position into which she may drift, the fault, if any, will not be hers, and her flag, unsullied by dishonour wherever it is unfurled, will float triumphant in the breeze.

liabilities of neutrals in respect of ships of war viewed as contraband, that a place is assigned to it in the appendix (*post* p. 110). It is worthy of perusal, in connexion with the question of the alleged detention of the iron-clads in Messrs. Laird's yards, as well as the case of the *Alexandra*.

APPENDIX.

[COPY PROCLAMATION.]

BY THE QUEEN.—A PROCLAMATION.

Victoria R.

Whereas, we are happily at peace with all Sovereigns, Powers, and States:

And Whereas, Hostilities have unhappily commenced between the Government of the United States of America, and certain States styling themselves the Confederate States of America:

And Whereas, we, being at Peace with the Government of the United States, have declared our Royal Determination to maintain a strict and impartial neutrality in the contest between the said contending Parties:

We, therefore, have thought fit, by and with the advice of our Privy Council, to issue this our Royal Proclamation.

And We do hereby strictly charge and command all our Loving Subjects to observe a strict neutrality in and during the aforesaid Hostilities, and to abstain from violating or contravening either the Laws and Statutes of the Realm in this Behalf, or the Law of Nations in relation thereto, as they will answer to the contrary at their Peril.

And Whereas, in and by a certain Statute, made and passed in the 59th Year of His Majesty King George the Third, intituled an Act to prevent the Enlisting or Engagement of His Majesty's Subjects to serve in a Foreign Service, and the Fitting out or equipping, in His Majesty's Dominions, Vessels for Warlike Purposes without His Majesty's Licence, it is amongst other things declared and enacted as follows:

§ 2. That if any natural-born Subject of His Majesty, His Heirs and Successors, without the Leave or Licence of His Majesty, His Heirs or Successors, for that Purpose first had and obtained, under the Sign Manual

of His Majesty, His Heirs or Successors, or signified by Order in Council, or by Proclamation of His Majesty, His Heirs or Successors, shall take or accept, or shall agree to take or accept, any Military Commission, or shall otherwise enter into the Military Service as a Commissioned or Non-Commissioned Officer, or shall enlist or enter himself to enlist, or shall agree to enlist or to enter himself to serve as a Soldier, or to be employed or shall serve in any Warlike or Military Operation, in the Service of or for or under or in Aid of any Foreign Prince, State, Potentate, Colony, Province, or Part of any Province or People, or of any Person or Persons exercising or assuming to exercise the Powers of Government in or over any Foreign Country, Colony, Province, or Part of any Province or People, either as an Officer or Soldier, or in any other Military Capacity; or if any natural-born Subject of His Majesty shall, without such Leave or Licence as aforesaid, accept, or agree to take or accept, any Commission, Warrant, or Appointment as an Officer, or shall enlist or enter himself, or shall agree to enlist or enter himself, to serve as a Sailor or Marine, or to be employed, or engaged, or shall serve in and on board any Ship or Vessel of War, or in and on board any Ship or Vessel used or fitted out, or equipped or intended to be used for any Warlike Purpose, in the Service of or for or under or in Aid of any Foreign Power, Prince, State, Potentate, Colony, Province, or Part of any Province or People, or of any Person or Persons exercising or assuming to exercise the Powers of Government in or over any Foreign Country, Colony, Province, or Part of any Province or People; or if any natural-born Subject of His Majesty shall, without such Leave and Licence as aforesaid, engage, contract, or agree to go, or shall go to any Foreign State, Country, Colony, Province, or Part of any Province, or to any Place beyond the Seas, with an Intent or in order to enlist or enter himself to serve, or with Intent to serve in any Warlike or Military Operation whatever, whether by Land or by Sea, in the Service of or for or under or in Aid of any Foreign Prince, State, Potentate, Colony, Province, or Part of any Province or People, or in the Service of or for or under or in Aid of any Person or Persons exercising or assuming to exercise the Powers of Government in or over any Foreign Country, Colony, Province, or Part of any Province or People, either as an Officer or a Soldier, or in any other Military Capacity, or as an Officer or Sailor, or Marine, in any such Ship or Vessel as aforesaid, although no enlisting Money or Pay or Reward shall have been or shall be in any or either of the Cases aforesaid actually paid to or received by him, or by any Person to or for his Use or Benefit; or if any Person whatever, within the

United Kingdom of *Great Britain* and *Ireland*, or in any part of His Majesty's Dominions elsewhere, or in any Country, Colony, Settlement, Island, or Place belonging to or subject to His Majesty, shall hire, retain, engage, or procure, or shall attempt or endeavour to hire, retain, engage, or procure, any Person or Persons whatever to enlist, or to enter or engage to enlist, or to serve or to be employed in any such Service or Employment as aforesaid, as an Officer, Soldier, Sailor, or Marine, either in Land or Sea Service, for or under or in Aid of any Foreign Prince, State, Potentate, Colony, Province, or Part of any Province or People, or for or under or in Aid of any Person or Persons exercising or assuming to exercise any Powers of Government as aforesaid, or to go or to agree to go or embark from any part of his Majesty's Dominions, for the Purpose or with Intent to be so enlisted, entered, engaged, or employed as aforesaid, whether any enlisting Money, Pay, or Reward shall have been or shall be actually given or received, or not; in any or either of such Cases, every Person so offending shall be deemed guilty of a Misdemeanor, and upon being convicted thereof, upon any Information or Indictment, shall be punishable by Fine and Imprisonment, or either of them, at the Discretion of the Court before which such offender shall be convicted.

§ 7. And it is in and by the said Act further Enacted, That if any Person, within any Part of the United Kingdom, or in any Part of His Majesty's Dominions beyond the Seas, shall, without the Leave and Licence of His Majesty for that Purpose first had and obtained as aforesaid, equip, furnish, fit out, or arm, or attempt or endeavour to equip, furnish, fit out, or arm, or procure to be equipped, furnished, fitted out, or armed, or shall knowingly aid, assist, or be concerned in the equipping, furnishing, fitting out, or arming of any Ship or Vessel, with Intent or in order that such Ship or Vessel shall be employed in the Service of any Foreign Prince, State or Potentate, or of any Foreign Colony, Province, or Part of any Province or People, or of any Person or Persons exercising or assuming to exercise any Powers of Government in or over any Foreign State, Colony, Province, or Part of any Province or People, as a Transport or Store Ship, or with Intent to cruize or commit Hostilities against any Prince, State, or Potentate, or against the Subjects or Citizens of any Prince, State, or Potentate, or against the Persons exercising or assuming to exercise the Powers of Government in any Colony, Province, or Part of any Province or Country, or against the Inhabitants of any Foreign Colony, Province, or Part of any Province or Country, with whom His Majesty shall not then be at War;

or shall, within the United Kingdom, or any of His Majesty's Dominions, or in any Settlement, Colony, Territory, Island, or Place belonging or subject to His Majesty, issue or deliver any Commission for any Ship or Vessel, to the Intent that such Ship or Vessel shall be employed as aforesaid, every such Person so offending shall be deemed guilty of a Misdemeanor, and shall, upon Conviction thereof, upon any Information or Indictment, be punished by Fine and Imprisonment, or either of them, at the Discretion of the Court in which such Offender shall be convicted; and every such Ship or Vessel, with the Tackle, Apparel, and Furniture, together with all the Materials, Arms, Ammunition, and Stores, which may belong to or be on board of any such Ship or Vessel shall be forfeited; and it shall be lawful for any Officer of His Majesty's Customs or Excise, or any Officer of His Majesty's Navy, who is by law empowered to make Seizures, for any Forfeiture incurred under any of the Laws of Customs or Excise, or the laws of Trade and Navigation, to seize such Ships and Vessels aforesaid, and in such Places and in such Manner in which the Officers of his Majesty's Customs or Excise and the Officers of His Majesty's Navy are empowered respectively to make seizures under the Laws of Customs or Excise, or under the Laws of Trade and Navigation; and that every such Ship and Vessel, with the Tackle, Apparel, and Furniture, together with all the Materials, Arms, Ammunition, and Stores which may belong to or be on board of such Ship or Vessel, may be prosecuted and condemned in the like Manner, and in such Courts as Ships or Vessels may be prosecuted and condemned for any Breach of the Laws made for the Protection of the Revenues of Customs and Excise, or of the Laws of Trade and Navigation.*

* Corresponding Section of the Act of Congress—Ch. 88—April 20, 1818:—§ 3. That if any Person shall within the limits of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out, or arming of any Ship or Vessel, with intent that such Ship or Vessel shall be employed in the Service of any Foreign Prince or State, or of any Colony, District, or People, to cruize or commit Hostilities, against the Subjects, Citizens, or Property of any Foreign Prince or State, or of any Colony, District, or People, with whom the United States are at Peace, or shall issue or deliver a Commission within the Territory or Jurisdiction of the United States, for any Ship or Vessel to the intent that she may be employed as aforesaid, every Person so offending shall be deemed guilty of a high Misdemeanour, and shall be fined not more than ten thousand dollars, and imprisoned not more than three years. And every such Ship or Vessel, with her Tackle, Apparel, and Furniture, together with all Materials, Arms, Ammunition, and Stores, which may have been procured for the Building and Equipment thereof, shall be forfeited, one half to the use of the Informer, and the other half to the use of the United States.

§ 8. And it is in and by the same Act further Enacted, That if any Person in any Part of the United Kingdom of *Great Britain and Ireland*, or in any Part of His Majesty's Dominions beyond the Seas, without the Leave and Licence of His Majesty for that Purpose first had and obtained as aforesaid, shall, by adding to the Number of the Guns of such Vessel, or by changing those on board for other Guns, or by the Addition of any Equipment for War, increase or augment, or procure to be increased or augmented, or shall be knowingly concerned in increasing or augmenting the Warlike Force of any Ship or Vessel of War, or Cruizer, or other armed Vessel which at the Time of her Arrival in any Part of the United Kingdom, or any of His Majesty's Dominions, was a Ship of War, Cruizer, or armed Vessel in the Service of any Foreign Prince, State, or Potentate, or of any Person or Persons exercising or assuming to exercise any Powers of Government in or over any Colony, Province, or Part of any Province or People belonging to the Subjects of any such Prince, State, or Potentate, or to the Inhabitants of any Colony, Province, or Part of any Province or Country under the Control of any Person or Persons so exercising or assuming to exercise the Powers of Government, every such Person so offending shall be deemed guilty of a Misdemeanor, and shall, upon being convicted thereof, upon any Information or Indictment, be punished by Fine and Imprisonment, or either of them, at the Discretion of the Court before which such Offender shall be convicted.

Now, in order that none of our subjects may unwarily render themselves liable to the Penalties imposed by the said Statute, We do hereby strictly command, that no Person or Persons whatsoever do commit any act, Matter or Thing whatsoever, contrary to the Provisions of the said Statute upon Pain of the several Penalties by the said Statute imposed, and of our High Displeasure.

And We do hereby further warn all our loving Subjects and all Persons whatsoever entitled to our Protection, that if any of them shall presume, in contempt of this our Royal Proclamation, and of our High Displeasure, to do any acts in derogation of their Duty, as Subjects of a Neutral Sovereign, in the said Contest, or in violation or contravention of the Law of Nations in that behalf; as for example, and more especially by entering into the Military Service of either of the said Contending Parties as Commissioned or Non-Commissioned Officers or Soldiers; or by Serving as Officers, Sailors, or Marines, on board any Ship or Vessel of War or Transport, of or in the Service of either of the said Contending Parties; or by

serving as Officers, Sailors, or Marines, on board any Privateer bearing Letters of Marque of or from either of the said Contending Parties; or by engaging to go or going to any place beyond the Seas, with intent to Enlist or Engage in any such Service, or by procuring or attempting to procure within Her Majesty's Dominions at Home or Abroad others to do so; or by fitting out, arming, or equipping any Ship or Vessel to be employed as a Ship of War or Privateer or Transport, by either of the said Contending Parties; or by breaking or endeavouring to break any Blockade lawfully and actually established by or in behalf of either of the said Contending Parties; or by carrying Officers, Soldiers, Despatches, Arms, Military Stores, or Materials, or any article or articles considered and deemed to be Contraband of War according to the Law or Modern usage of Nations, for the use or service of either of the said Contending Parties, all Persons so offending will incur and be liable to the several Penalties and Penal consequences by the said Statute, or by the Law of Nations, in that behalf imposed or denounced.

And We do hereby declare that all our Subjects, and Persons entitled to our Protection, who may misconduct themselves in the Premises, will do so at their peril and of their own wrong, and that they will in nowise obtain any Protection from Us against any liabilities or final consequences, but will on the contrary, incur our High Displeasure by such Misconduct.

Given at our Court at the White Lodge, Richmond Park, this 13th day of May in the year of our Lord, 1861, and in the 24th year of our Reign.

GOD SAVE THE QUEEN.

VIOLATIONS OF OUR NEUTRALITY.

TO THE EDITOR OF THE "TIMES."

SIR,—Some superficial criticisms which have been passed upon a letter which I recently addressed to you, show me that the drift of my argument has been wholly misapprehended by writers obviously not very conversant with this species of discussion. I shall therefore ask your leave to add a few observations which may tend to elucidate the matter.

It is objected to my suggestion of diplomatic action in the place of legal procedure in the case of the suspected vessels, that, if there is no case for legal procedure, diplomatic action would be equally inadmissible—in short, that nothing would justify the one which would not equally lay the foundation for the other. A very little reflection will show that this is a fallacy. The legal procedure is applicable to persons within the jurisdiction of the Crown, while the diplomatic action is appropriate to persons without its pale. Now, it may well be that a violation of the Foreign Enlistment Act may take place under such circumstances that no offence might be committed by any one within the jurisdiction, and yet that as against a foreign government or other persons without the jurisdiction the offence might be complete. For instance, supposing that the Federal Government were to give an order for the equipment of a vessel-of-war in this country, but the order was so managed that the shipbuilder was *bona fide* deceived into the belief that the commission came from the Turkish Government. In such a case it is clear that the shipbuilder who has no *mens rea* is innocent, but in my judgment it is equally certain that the foreign government which had deliberately procured the violation of the law ought to be made to answer for its breach. In this case it is clear that the success of a criminal prosecution would be no test or measure of the diplomatic remedy. Or, take another case. Suppose a foreign government succeeds in spite of the provisions of our law in enlisting men in this country, and the men so enlisted are carried out of the pale of our jurisdiction. Here the law has been flagrantly violated, yet there can be no judicial redress, because there is no one within the jurisdiction upon whom our procedure can operate. Is such an offence therefore to be perpetrated with impunity? Clearly not. It is the business of the sovereign authority of the State to vindicate the dignity of its laws against the offender, who can be reached by its arm alone. Here again, then, the judicial procedure is no measure of the diplomatic remedy.

I have never said, as I see I am represented to have done, that, because we cannot obtain proof against our own subjects, we should equally in the absence of proof proceed against the foreign offender. What I have said is, that where one method of proceeding fails against one party for want of proof, we should proceed in the appropriate method against the other party against whom the proof is complete. I have already pointed out that cases may easily occur in which the shipbuilder may be absolutely innocent, while the foreign government may be clearly guilty. In precisely the same manner it may happen that no proof may be attainable against the shipbuilder (which

in his case amounts to legal innocence), and yet that abundant proof as against the foreign government may be acceptable. This will easily appear from the following considerations. The offence against the Foreign Enlistment Act consists in guilty knowledge and guilty intent. Now, even assuming it proved that the ship is really destined for the warlike service of a foreign belligerent government, it may be difficult, and even impossible, to prove that the shipbuilder either knew its destination or participated in the intent of its equipment. But, if the fact of its real destination is established, no such ambiguity or difficulty of proof can be alleged on behalf of the foreign government. Of *its* knowledge and participation in the belligerent intent of the equipment there can, of course, be no doubt. Here there is precisely a case in which, though the legal remedy fails against the subject for want of proof, the diplomatic remedy against the foreign government has its proper application, grounded upon a sound foundation of proof.

There is another point well worthy of observation, which may frequently make diplomatic action a more fitting and proper remedy than judicial procedure. The offence against the Foreign Enlistment Act consists mainly in the intent of the parties. Now, the intent can very often only be gathered from the act itself when completed. You cannot dive into the breasts of men and divine their motives, but it is the ordinary presumption of law that a man intends the natural and probable consequences of his actions. Now, in the judicial proceeding consequent on the seizure of a ship, which necessarily takes place before it has reached its ultimate destination, if the matter is contrived with any adroitness, there will be the greatest possible difficulty in proving the inchoate and as yet unconsummated intention. So, likewise, in the case of the enlistment of a British subject for foreign service, in violation of the statute. Until the act is complete, by the actual departure of the man and his employment in the service of the foreign state, it would be next to impossible to establish the intention and consequently the offence. But when the man or the ship has passed into the service of the foreign state, then the original intention, which before that was revocable and difficult to prove, becomes finally and certainly established. Still, unfortunately, the very event which has thus supplied the deficient proof of the intent has at the same time rendered the judicial remedy either inapplicable or inefficient, because the man and the ship are by that time beyond the reach of our laws. There remains then only the diplomatic redress against the offending state, which remedy, as I have shown, is founded on abundant proof,

and may be made adequate by the means I have indicated to the vindication of our laws and of our neutrality.

The whole matter may be thus summed up—whether in judicial procedure or in diplomatic action a sufficient basis of proof is equally necessary. But the one is no measure of the other. A government, like a court of law, demands reasonable evidence of the facts upon which it is to proceed. Neither one nor the other require absolute demonstration, which is seldom to be had. A government, like a jury, ought to act upon the fair and convincing moral presumption which arises out of the circumstances of the case upon which it is called to decide. Policy and law are equally governed by reason, and do not suffer themselves to be defeated and deluded by trickery and chicane.

I have added these few remarks (which to lawyers would be superfluous) in elucidation of my last letter, in order that your unprofessional readers may not be misled by the shallow fallacies which I have seen disseminated in some provincial journals, not otherwise unintelligent, but which may be fairly excused for their ignorance on subjects not lying within the scope of their ordinary employment.

From the extraordinary sensitiveness exhibited by the avowed advocates of the Confederate cause in any discussions affecting the vessels in question, it should seem that the friends of the South, at least, have very little doubt as to the real destination of the ships, the escape of which they are so eager to favour. I observe that in these quarters the allusion to reprisals in my last letter has given great offence. I can only say that I never intended to suggest such proceedings, except as the *ultima ratio* by which every government proceeds to enforce unheeded remonstrances. I am far from assuming that the Confederate authorities would treat with disregard a representation on the part of the English Government against any attempt to violate or to elude our laws. On the contrary, I firmly believe that such a representation would be entirely effective. But, if it unfortunately should not be so, then I must take leave to say that in my humble judgment the evil consequences would be more justly visited upon those who contrive than upon those who suffer by a breach of our laws.

For my part it is for English, not for American interests, on either side of the quarrel, to both of which I am equally indifferent, that I desire to see the dignity of our laws vindicated and the inviolability of our neutrality efficiently protected.

Sept. 16. HISTORICUS.

ON THE DUTIES OF A NEUTRAL STATE.

TO THE EDITOR OF THE "TIMES."

SIR,—It seems to be a prevalent notion that it is the privilege of a belligerent power, arising out of a state of war, and not the right of a neutral state, incidental to its rights of sovereignty (*jura majestatis*), to determine whether it is fit that the subjects of the neutral state should be prohibited from fitting out and arming within its territory the vessels of war of an enemy power, and, further, that it is inconsistent with perfect neutrality for a state to allow the vessels of war of any belligerent power to be fitted out and armed within its territory. The latter position, however, appears not to have been the view of the supreme court of the United States when it held that—

"A neutral nation may, if so disposed, without any breach of her neutral "character, grant permission to both belligerents to equip their vessels of "war within their territory; but without such permission the subjects of "such belligerent powers have no right to equip vessels of war, or to "increase and augment their force, either with arms or with men, within "the territory of such neutral nation. Such unauthorized acts violate her "sovereignty and her rights as a neutral."—2 *Crouch's Reports*, p. 364.

The judgment of the Supreme Court of the United States in the above case is valuable, not merely because it places in its true light the offence of equipping a vessel of war within the territory of a neutral state, without its licence, to be employed in the service of a belligerent power, but likewise because it defines the precise nature of the equipment of a vessel of war which, under such circumstances, is an offence against the sovereignty of a state and a violation of its rights as a neutral power. It belongs to the sovereign power of every state exclusively to authorize all armaments within its territory; and, accordingly, the equipment of a vessel with arms or with men for the purposes of war, if it be effected without the licence of the sovereign power within the territory of which it takes place, is a trespass against its sovereignty, whether such equipment is effected by one of its own subjects, or by a subject of a foreign power. It is immaterial, as regards the offence against the sovereignty of a state, whether such equipment takes place in its ports during a time of general peace, or at a time when war exists between other powers; but if it takes place at a time when war exists between other powers, and after the state has declared its

intention to remain neutral, such equipment will not only be an offence against its sovereignty, but a violation of its neutrality, if the vessel is to be employed in the service of either belligerent. The correspondence of Mr. Jefferson, the Secretary of the United States, with M. Genet, the Minister Plenipotentiary of the French Republic, in reference to the outrageous conduct of the latter person which led to the passing of the American Foreign Enlistment Act of 1794, places this question in its true light. M. Genet, in his despatch of the 27th of May, 1793, had contended that the armament of privateers in the port of Charleston, by citizens of the United States, to cruise under commissions from the French Republic, was among the ordinary transactions of merchants (*operations particulières des négocians*), which the President of the United States could neither authorize nor impede. Mr. Jefferson, in his reply (5th of June, 1793), alludes first of all to a conversation with M. Genet, in which he had expressed to him the deliberate opinion of the President to be that—

"The arming and equipping vessels in the ports of the United States to "cruise against nations with which they are at peace, was incompatible with "the territorial sovereignty of the United States."

He then proceeds to reply to the observations in M. Genet's despatch on the subject of arming privateers. "After fully weighing again," he says, "all the principles and circumstances of the case, the result appears still to "be that it is the right of every nation to prohibit acts of sovereignty from "being exercised by any other within its limits, and the *duty* of a neutral "nation to prohibit such as would injure one of the warring powers."

The language of Mr. Jefferson in the above passage illustrates most appropriately the principle which the Congress of the United States had in view in passing the Foreign Enlistment Act of 1794, which was not intended to alter the common law, but simply to place beyond dispute the constitutional right of the President of the United States to enforce it throughout the Union. Mr. Jefferson's language deserves the more attention because he had taken pains in a previous despatch to draw a distinction between a memorial of the British Ministry, which he conceived to be not warranted by the law of nations, against the exportation of contraband of war from American ports, and a memorial of the same Minister against the arming and manning of privateers in those ports. "In one of these memorials" he says:—

"It is stated that arms and military accoutrements are now buying by a "French agent in this country, with an intent to export them to France.

"We have answered that our citizens have always been free to make, vend, "and export arms; that it is the constant occupation and livelihood of some "of them. To suppress their callings—the only means, perhaps, of their "subsistence—because a war exists in foreign and distant countries in which "we have no concern, would scarcely be expected. It would be hard in "principle, and impossible in practice. The law of nations, therefore, "respecting the rights of those who are at peace, has not required from "them such an internal derangement of their occupation. It is satisfied "with the external penalty pronounced in the President's proclamation, that "of confiscation of such portion of these arms as shall fall into the hands "of any of the belligerent powers on their way to the ports of their enemies. "To this penalty our citizens are warned that they will be abandoned; and "that the purchases of arms here may work no inequality between the par- "ties at war, the liberty to make them will be enjoyed equally by both."

A broad line of demarcation must accordingly be drawn between the constructing and repairing a vessel of war, which is a transaction of commerce, and the arming and manning of such a vessel, which is an act of sovereignty in the port of a neutral state, and this line of demarcation is not merely suggested by reason, but has the sanction of usage. Thus, reason suggests that the ships of war equally with the ships of commerce of a belligerent power should be allowed, on the score of humanity, the privilege of asylum in neutral ports for the purpose of obtaining supplies to enable them to proceed to sea with safety to their crews. Reason also suggests that no distinction can be made between the distress of a belligerent vessel of war which arises from the casualties of war, and the distress of a belligerent vessel of war which arises from the casualties of the sea, if such distress compels her to seek a temporary refuge from the perils of the sea in a neutral port. Under either state of circumstances she may refit herself in neutral waters for the purposes of navigation, without either offending against the sovereignty of the neutral state or violating its neutrality; but, however great may be the necessities of a belligerent vessel of war for purposes of carrying on hostilities, as distinguished from purposes of navigation, even if she has lost all her guns and half her crew from casualties of the sea, reason suggests that for a neutral state to permit her to recruit her armament or her crew within its ports would be to allow its territory to be made subservient to hostilities. On the other hand, any attempts on the part of the commander of such a vessel to arm or man his vessel, without the permission of the neutral state previously obtained, would be an offence against its

rights of sovereignty (*jura majestatis*). The usage of nations is in complete accordance with the dictates of reason in these matters, and the common law of nations is derived from no other sources than reason and usage—*jus gentium commune in hanc rem non aliunde licet discere quam ex ratione et usu.* Great Britain has hitherto carefully conformed herself to this usage of nations in allowing the vessels of war of the Federal equally as of the Confederate States of America to repair and refit themselves in British ports for purposes of navigation, while she has refused to allow them to recruit either their armaments or their crews. France is acting on similar principles at the present moment in regard to a Confederate vessel of war, and the Government of the United States has formally avowed its adherence to the traditional law of Europe on this subject in a state paper issued from the Attorney-general's office on the 28th of April, 1855, in which the following passages occur:—

"By the law of nations belligerent ships of war enjoy asylum in neutral "ports for the purpose of obtaining supplies or undergoing repairs, according "to the discretion of the neutral sovereign, who may refuse the asylum abso- "lutely, or grant it under such conditions of duration, place, and other "circumstances as he shall see fit, provided that he be strictly impartial in "this respect to all the belligerent powers.

"When the neutral state has not signified its determination to refuse the "privilege of asylum to belligerent ships of war, either belligerent has a "right to assume its existence and to enter on its enjoyment, subject to "such regulations and limitations as the neutral state may please to pre- "scribe for its own security."

The usage of nations will accordingly sanction a belligerent vessel of war availing itself of the facilities of a neutral port to repair and refit itself for navigating the high seas in safety, while the same usage forbids the sovereign of the neutral port to allow it to recruit either its armament or its crew.

The analogy of the practice of belligerent vessels of war obtaining supplies and undergoing repairs in the ports of a neutral state, without any offence against its sovereignty or any violation of its neutrality, so long as such supplies and repairs are confined to the necessities of navigation, may tend to make clear the distinction of right which exists between the act of a person procuring a vessel of war to be constructed or repaired on account of a belligerent power in the port of a neutral state, and the act of such a person in procuring it to be armed and manned. The latter act is an encroachment upon the sovereignty of a neutral power, and as such may be

a violation of its neutrality; the former will not trench upon any prerogative of sovereignty, and does not affect either the duty or the right of a state as a neutral power. That the British Foreign Enlistment Act was intended by Lord Castlereagh and Mr. Canning to check encroachments upon the sovereignty of the British Crown, and not to create a new offence unknown to the common law of England, seems to be a necessary inference from the tenour of the debates in both houses of parliament during the passing of the Act. Whether the language of the Act expresses or goes beyond the intention of its authors, is a question which awaits the decision of the courts in Westminster-hall.

PHOCION.

THE "TIMES," SEPTEMBER 19, 1863.

A letter which we yesterday published from our correspondent "Phocion" throws still fresh light on the apparently unfathomable question of the Confederate steamers. It appears that on certain specified conditions neutrals may not only build vessels of war for belligerents, but equip them too. These conditions simply stipulate for the preservation of neutrality in such proceedings; but as this to many readers will seem a pure impossibility, it will be desirable to explain what "neutrality," in the language of public law, really means. It means not so much doing nothing, as doing no more for one belligerent than for the other. As regards any direct or deliberate participation in the war, a neutral must of course be absolutely inactive; but as regards the supply of succours to either belligerent, he may be as active as he pleases in the way of trade, provided always—and this is the very essence of the law—that he does not show to one belligerent any more favour than to the other. It follows that we should have been perfectly justified either in furnishing munitions of war in any quantities to Federals or Confederates indiscriminately, or in refusing such supplies to both. We have adopted the former course, and if the Confederates have derived less advantage from our markets than the Federals, that is only because the Federals, having command of the sea, succeed in blockading the ports of their enemy and depriving him of the imports desired. So far, therefore, is neutrality from implying any cessation of all dealings with belligerents, that both parties in America have relied to a great extent on this country for the means of prosecuting the war. The Federals have drawn munitions

of war from us in prodigious quantities, and have imported thousands upon thousands of men besides. The Confederates have had stores to a considerable amount, as many consignments of arms as they could smuggle into their ports, and a liberal contribution in the shape of a loan. Yet all this while, though both Northern and Southern armies have only kept the field by the aid of our markets, our neutrality has been maintained without violation. We have not sacrificed our trade, nor were we called upon to do so; but we have opened this trade with absolute impartiality to both belligerents alike.

But now comes the question of shipbuilding for belligerents, and not only of building vessels but of arming and manning them. Our correspondent distinctly states that even the equipment of vessels of war for the use of belligerents is not absolutely prohibited to neutrals. "A neutral nation "may, if so disposed, without any breach of her neutral character, grant "permission *to both belligerents* to equip their vessels of war within its terri- "tory; but without such permission the subjects of such belligerent power "have no right to equip vessels of war, or to increase and augment their "force, either with arms or with men, within the territory of such neutral "nation." That is the law as laid down by the Supreme Court of the United States. Thus, the equipment of Confederate steamers in our ports might have been perfectly lawful had we chosen to make it so. We had only to offer facilities of the same kind to the Federals, and Floridas and Monitors might have been built and equipped side by side in British yards. But this privilege was never proclaimed. Great Britain never did grant permission to either North or South to equip their war ships within British territories. The Confederates, therefore, have no right to despatch their steamers from our ports, and if any such design is suspected on reasonable grounds we are justified in taking measures to prevent it. Still, however, the argument is not exhausted.

It has been shown on former occasions that, in the maintenance of a genuine neutrality, we should not allow to both belligerents a privilege which only one of them needs, nor refuse to both a privilege with which only one of them can conveniently dispense. So completely, again, are both Northerners and Southerners, as belligerents, on the same footing before us, that our correspondent "Historicus" suggests an application rather to the Confederate Government itself than to its agents in this country on the question at issue. He thinks that we may have a clear case against President Davis, though not against the shipbuilders with whom the President's agents may be dealing. But if we remonstrate with the Confederate Government,

the Confederate Government will be equally entitled to remonstrate with us; and what should we say if, when this diplomatic controversy were opened, Mr. Jefferson Davis should complain of our policy in respect of shipbuilding as one-sided and inconsistent with true neutrality? Suppose he were to say that it was not impartial conduct in us to forbid the one thing which was necessary to the Confederates and unnecessary to the Federals, when we, might allow it to both without any breach of neutrality? If the privilege of not only building but equipping vessels of war is a privilege which may be either granted or refused by neutrals to belligerents, like the privilege of purchasing warlike stores, and if, in conceding or withholding any of these privileges we are bound to hold the balance evenly, might not our prohibition of the adventures in question be deemed unfair?

Our answer to this would be that, if the equipment of a vessel of war in a neutral port is really consistent with neutrality in the eye of the law, the doctrine can only be accepted by a considerable strain upon reason. To build, arm, and man a vessel of war from a neutral port is surely to fit out a hostile expedition from that port; and as an expedition may be great or small, it follows that a neutral might thus take almost any conceivable share in war, provided only that the aid it lent to one side was not greater than the aid it was ready to lend to the other. But is that a reasonable doctrine? It appears to us that the supply of munitions, money, or material differs essentially in character from the supply of an armed ship of war. We can understand that even such vessels as are now lying in the Mersey might be sent across the Atlantic, and delivered at Wilmington or Charleston without any more breach of neutrality than is committed in the despatch of a field battery to New York. In that case they would be empty hulls, and would only receive their crews, their commissions, and their offensive capacities from the belligerent state itself. But if the successive processes by which a ship of war is created are all performed in a neutral country, that gives the adventure a perfectly different character, and amounts either to a participation in the war on the part of neutrals, or to the employment of neutral territory for purposes of war by a belligerent. If it is, then, said that a neutral power may, if it pleases, permit its territory to be so employed, we reply that the permission imports so very much more than a mere permission to buy rifles and gunpowder that it is no wonder the latter should be granted while the former is withheld. We are very sure that it would be a bad thing for most countries, and especially for England, if the practice of equipping vessels of war in the controverted fashion were recognized or established,

nor do we see that the commercial interests of the country require any such latitude of adventure. It is certainly reasonable that the customary trade of a shipbuilder in a neutral state should be preserved from injury as well as other trades; but it is plain that such trade has no connexion with that "equipment" of the ship to which objection is taken. It is no part of the shipbuilder's business to arm a ship with cannon or equip her for action. If it is said that the builder proposes no such equipment, then the reply is that when an equipment is manifestly contemplated by some parties or other the unlawful intention may be defeated. The suggestion of "Historicus" is that such transactions should be stopped by warning given or complaint addressed to belligerent powers, but we confess we should prefer to see a direct prohibition take the shape of law. We entirely agree with our correspondent in looking at the matter from a British point of view. We are thinking neither of Federal interests nor of Confederate interests, but of our own; and these we are convinced would be best consulted by all possible discouragement of the practice in question.*

WHITWORTH GUNS VERSUS STEAM-RAMS.

TO THE EDITOR OF THE "TIMES."

SIR,—The correspondent of the *New York Tribune* will have startled many of the warm friends of neutrality in Great Britain by its announcement that the citadel of Charleston has been laid in ruins by the fire of a battery, of which half the guns were manufactured in British workshops, and must have been exported from a British port since the commencement of hostilities. The battery in question which accomplished the destruction

* If by these is meant the discouragement of all participation by the vender with the purchaser of ships and arms, in the hostile application of them, the advice may be sound, but if the proposals to prohibit by the laws of this country, the proper exercise by its subjects of the commercial rights which are enjoyed by all other nations in common with our own, the wisdom of it is questionable. So long as the common law of nations is understood and observed by all, it would be injudicious to forge new chains for British industry, which would not fetter other countries whilst its very existence would incite those to claim its enforcement, when it serves their purpose, as in the case of the Foreign Enlistment Act. There is little probability of the British legislature imposing such suicidal restrictions.—*Vide* the next article in the appendix (p. 107) and the marvellously clear and concise exposition of the whole subject inclusive of the question here raised.—Ed.

of Fort Sumter consisted, as it appears, of four guns, two of which were American 200-pounder Parrott's and two were British 80-pounder Whitworth's. The correspondent of the *New York Tribune*, in describing the action of these guns, states that "something over 700 shots were fired from the 200-pounder Parrott's, of which more than half struck the fort. From the Whitworth's 222 solid shot were fired, of which 98 hit the fort and 124 went over or fell short." It will have occurred most probably to some of your readers, that it is hardly consistent with the good faith of a neutral nation that Great Britain should have permitted guns of such a novel character and of such extraordinary powers of destruction to be exported from British ports to the Federal States to be employed against a Power with which Great Britain is at peace, more particularly as such guns can be procured in no other country but Great Britain. It has lately been pointed out by one of your correspondents in a letter deprecating in strong terms the commerce of neutrals in war ships, that the British Crown has authority by Act of Parliament (16th and 17th of Victoria, cap. 107) to forbid by Order in Council the exportation of arms and munitions of war to the Federals equally as to the Confederate States. The municipal law of Great Britain has, therefore, placed no impediment in the way of the Executive Government prohibiting the exportation of Whitworth guns to be employed against a power with which Great Britain is at peace, and the question naturally suggests itself, how is the inactivity of the British Government in this matter to be reconciled with the avowed neutrality of the British Crown?

The Executive Government of Great Britain has pursued on occasion of this unhappy war its traditional policy of perfect indifference between the contending parties, in which, to use the language of Lord Stowell (1, *Dodson*, p. 244), the essence of neutrality consists. It has hitherto adhered to the principles which Mr. Canning maintained in 1823 to be most consistent with that *bona fide* impartiality which becomes a neutral state. It has interdicted no branch of trade in British ports which was permitted before the hostilities. The principles which are at the foundation of British policy in this matter may be briefly explained. Any change which a nation may make upon war breaking out between other nations by interdicting any branch of commerce with the subjects of either belligerent in its ports, may expose its good faith as a neutral nation to question, wherever that change operates more prejudicially against the one than against the other of two belligerent parties. On the other hand, the maintenance of an order of trade

which existed in the ports of a nation prior to the commencement of hostilities between other nations, and against which no complaint has been raised in time of peace by either of two belligerent nations, cannot expose a neutral nation to any imputation of bad faith towards either belligerent. If it happens that the one belligerent derives from such order of trade in a neutral port more advantage than the others, the neutral state may with justice allege that, if her continuing to allow free access to her markets, to the subjects of either belligerent equally as to the subjects of other nations, is attended with more benefit to one of the belligerent parties than to the other, it is by reason of the alteration which has taken place in the mutual relations of the parties towards each other, over which she has no control, and not by reason of any alteration in her conduct towards either of them.

Let us consider for a moment the impracticability of any other policy in the case of a great commercial state like Great Britain. It may be granted that every independent state has an absolute right to make laws for the regulation of the trade of foreign merchants in its ports, and that this right is not affected by the circumstance that other nations are at war with one another, further than, if it wishes to observe a state of neutrality between two belligerent nations, it must not prohibit to the subjects of either belligerent nation a trade in its ports which has been open to them while the nations were at peace with one another, if the effect of such prohibition will be to impede the military operations of the one nation and to favour the other. Three courses of action are consequently open to every neutral government:—It may endeavour, in the first place, to carry out a prohibitive system, which will have the appearance of perfect fairness towards both the belligerents, by denying to the subjects of either belligerent the liberty of purchasing in its ports any articles which are adapted to warlike uses. It will be found, however, in practice, that no limit can be set to such articles, for even provisions, which are *prima facie* not articles of warlike use, may be needed by one of the belligerents to victual an invading fleet, and Great Britain did not hesitate to capture and confiscate, at the risk of war with the Hanse Towns, 60 of their vessels, which were carrying corn to Spain to victual the armada destined to invade Great Britain. A nation, therefore, which desires to be neutral in fact, and not in appearance, must go further and prohibit all trade in its ports to the subjects of both belligerent Powers; but even such an extension of her prohibitive system will be found to fail in operation, for neutral carriers will hasten to the markets which are closed against belligerent purchasers, and the supplies of war, which will

find their way to the belligerent powers through the indirect channels of neutral trade, will soon make good to either belligerent any deficiencies arising from the stoppage of its ordinary channels of direct trade. There remains a third and extreme course—namely, for a neutral nation to close its ports against all foreign trade; but even this act of self-sacrifice would fail in securing the result which alone could justify it, for it can never be attended with an equality of operation in regard to both belligerents. But the usage of nations warrants no such extreme course. On the contrary, Mr. Pickering, the United States' Secretary of Foreign Affairs, in his despatch of January 16, 1797, which he addressed to Mr. Pinckney, the United States minister at Paris, in defence of the principles of neutrality adopted by the United States, and contested by the Government of the French Republic, has most appositely stated the rule of law which is binding on nations in this matter:—

"Perhaps no rule is better established than that neutral nations have a "right to trade freely with nations at war, either by carrying and selling "to them all kinds of merchandise, or permitting them to come and purchase "the same commodities in the neutral territory; in the latter case not refus- "ing to one power at war what it permits another to purchase; with this "exception in respect to articles of contraband, that if the cruisers of one "of the belligerent powers meet at sea with such articles destined to the "ports of their enemies, the neutral vessels may be captured, and the con- "traband goods will be lawful prize to the captors, but the residue of their "cargo and the vessels themselves are to be discharged."

But it may be said that Whitworth guns, being only procurable in Great Britain, are distinguishable from other articles of merchandise which may be procured in other countries with equal facility, and that Great Britain does not maintain a *bona fide* neutrality in regard to the two belligerent parties in North America if she permits the agents of the Federal States to purchase in British markets articles of such a novel and exceptional character, and of which she has an exclusive monopoly.

But, if the Executive Government of Great Britain were to put in force the provisions of its municipal law (16th and 17th of Victoria, cap. 107), and to prohibit the export of Whitworth guns, its conduct would give rise to a well-founded remonstrance on the part of the Federal States, on the ground that such prohibition was calculated to impede the military operations of one of the belligerent parties and to favour the other, which would be inconsistent with the good faith of a neutral nation. Let us consider whether

any substantial distinction exists between Whitworth guns and steam-rams. It is unquestionable that war-ships, as articles of trade, come under no other category than contraband of war. They are enumerated in various lists of contraband which occur in treaties of commerce to which Great Britain has been a party, and there are numerous decisions of the High Court of Admiralty of England and of the Court of Appeal at the Cockpit to the same effect, in regard to ships of war going from a neutral port for sale to an enemy's port. In the case of a vessel called the *Brutus*, which had been condemned in the Vice-Admiralty Court of Halifax as contraband of war, the Lords of Appeal sitting at the Cockpit expressed their reasons for confirming the judgment of the Vice-Admiralty Court to be, that she was built, as the report of the surveyors clearly established, for purposes of war, not for peace, and was going to be sold to the enemy (5, *Robinson's Reports*, *Appendix*, p. 1). It will, perhaps, not be disputed that ships suitable for purposes of war, if they are neither armed nor manned, may be sent, like other munitions of war, from a neutral port for sale to a belligerent port, subject to the right of seizure by the enemy while they are *in transitu* on the high seas. But it may be said that steam-rams are novel instruments of warfare, and are distinguishable from ordinary war-ships by the circumstance that they can only be procured at the present moment in British shipyards. Let it be assumed that this objection is as well founded as in the case of Whitworth guns. The Government of Great Britain, as a neutral power, is not thereby relieved from its obligation under the common law of nations to abstain from interdicting a branch of trade within its territory which was open to all nations before the commencement of hostilities between the Federal and the Confederate States, when the effect of such an interdict will clearly be to impede the military operations of one of the belligerent parties, and to favour the other.

It seems to be assumed in certain quarters that there is a provision in the American Foreign Enlistment Act which prohibits a citizen of the United States from building a war-ship and sending forth such a vessel from a port of the United States for sale to a belligerent country. There is, however, no such provision to be found either in the original Act of Congress of 1794 or in the later act of 1818; on the contrary, the act of 1818, which is the law now in force in the Federal States, allows a citizen of the United States not merely to equip for the purposes of navigation, but even to arm a ship of war and to send it to sea, upon his entering into a bond that he will not employ his vessel to commit hostilities against any power with

which the United States is at peace. The American Acts of Congress, like the British Act of Parliament, were intended to keep the power of the sword in the hands of the sovereign authority of the State, and the feeling of duty by which the cabinet of General Washington was actuated in proposing the law of 1794 is well described in a letter addressed by Governor Morris, the United States minister at Paris, on the 12th of October, 1793, to M. Deforques, the French Minister of Foreign Affairs:—

"Every Government which permits its citizens to fit out privateers, arms "with the destructive sword of war hands which are interested to extend "its ravages, and renders itself responsible for the abuses which result from "so dangerous a delegation of sovereignty."

The sympathies of the British nation are in perfect harmony with the spirit that breathes through the above passage, and the Government of Great Britain has formally recorded in the face of the civilized world its resolution on the subject of privateering when it signed the Declaration of Paris (16th April, 1856), under which privateering (*la course*) is and remains abolished among the nations which are parties to that declaration. But the undue pressure which is exerted upon Great Britain at the present moment on behalf of the Federal States, in order to induce the British Government to prohibit the building of war-ships by British subjects for the purpose of sale to the agents of a belligerent power, or for the purpose of transport to the ports of a belligerent nation, points to another object than the abolition of privateering. The United States of America had deliberately refused to accede to the Declaration of Paris abolishing the use of privateers, unless the powers which are parties to that declaration will agree to renounce absolutely the right of a belligerent to capture private property on the high seas. It was a main object of Benjamin Franklin, at the time when he negotiated the treaty of commerce of the 10th of September, 1785, between Prussia and the United States, to obtain for all merchandize on the high seas which was private property an immunity from belligerent capture, in cases where it was not of a contraband character and under transport to an enemy's country. The policy of Benjamin Franklin in 1785 continued to be the policy of the United States in 1856, and is the policy of the Federal States in the present day. It may be a wise and a humane policy, as every policy must be which tends to mitigate the evils of war; and an ardent desire to promote this particular policy may serve to explain the one-sidedness of view of writers who are shocked at a Confederate ship of war destroying private property on the high seas, but express no horror at a

Federal general bombarding the peaceful residences of private citizens on land with live shells filled with Greek fire. It would be a step greatly conducing to the advancement of this policy, if the European powers could be induced, at the instance of the Federal States, to prohibit their subjects from building ships of war and selling them to belligerent powers. The usage of nations, however, is otherwise. And so long as the right of a belligerent power to interdict all trade between neutral merchants and an enemy's country, by blockading the entire coast of the enemy and confiscating the private property of all merchants who seek to trade with the blockaded coast, is exercised by the Federal States—"the very attempt to do which" has been described, in a State paper issued so recently as the 28th of April, 1855, from the office of the Attorney-general of the United States, "as an outrage on the law of nations, which can be carried out only by "the perpetration of every kind of violence and fraud on the neutral nations;" and so long as such an extreme exercise of the right of blockade by the Federal States is acquiesced in by the neutral nations of Europe, from a sense of duty, because it has the sanction of usage—it can hardly be expected that Great Britain should abandon the identical platform of established usage in a matter which concerns her duty towards the other belligerent power, and her right as a neutral power to allow the citizens of either belligerent power to trade freely in her ports.

PHOCION.

THE "TIMES," MONEY MARKET AND CITY INTELLIGENCE,
of September 26, 1863.

Much surprise is excited among the impartial merchants in the city at the doctrines promulgated by casual writers from day to day on the question of neutral obligations and the Liverpool iron-clads. The international law on the subject, as the commercial world at present understand it, is, that according to all the statutes respectively by the United States and England, and the decisions of their superior courts, vessels of war may be built here for any state, whether belligerent or otherwise, that chooses to order them, provided they are not built and sent to sea with the intention that British subjects should use them for hostile purposes. This being the law recognized by both countries, the natural impression would be that a strict regard for neutrality would induce us to observe it to the very letter, and that at all events even those who might consider the condition of the law too lax, and that it would be expedient for us to alter it before we are certain that the

United States are prepared to make a similar alteration, would at least insist that the Government should not to favour any party, stir a step against it, or outside of it, until it had been duly changed by Parliament. Yet writers are to be found who declare that this scrupulous adherence to our law of neutrality would be "an offence against neutrality," and that if such vessels are allowed to depart, the United States will have a title to complain—a statement which simply amounts to an assertion that we shall violate our obligations to them if we act upon their own admitted laws of neutrality whenever the operation of such laws does not happen to be in their favour. The aim of all these persons would appear to be, not to promote, but to prevent the exercise of neutrality. They make no demand that measures should be enforced for stopping the supply of munitions of war to the Northern States, which now constitutes one of our important branches of trade, nor to the enticing of British subjects from Ireland and elsewhere to recruit the Northern armies. The Confederates may be shot down by English-made cannon, but the Federals must not have their cotton and tea seized by English-built ships; and all kinds of sophistical and special pleading is resorted to to establish some fanciful distinctions between these respective classes of belligerent supplies, although it is plain we enter a path of danger the moment we attempt refinements of that description. In matters of this sort the only safe plan must be to declare that we are ready to build or make any instruments for which we can find customers to pay us, even including a supply of Greek fire if it should be wished for. Even the Federals themselves scarcely go so far in their pretensions as some Englishmen are found to go for them; and only three weeks back the *New York Journal of Commerce* admitted that if England stopped the iron-clads, it would be only fair she should stop the supply of arms and ammunition to themselves. As to the argument that an international law to prevent vessels being built for a belligerent might at a future time prove highly beneficial to ourselves, all that can be said with regard to it is that there will be time enough to consider it when the United States have signified their wish to change their present law, since there can be few who will suppose that if we now without some guarantee set an opposite precedent, that precedent will be held sacred in our favour, supposing at any time we should be at war with them. There would be no objection to a discussion of the whole matter in Parliament, where the paramount necessity of keeping open our trading rights, and of not allowing them to be sacrificed to suit the desires of a government to avoid temporary disquietude would be duly argued; but it is felt by many persons

that these constant exhortations to the Ministry to stretch or override the actual law in anticipation of parliamentary action, are likely to prove very injurious, and also that they hear an unpleasant resemblance to the views of the Federal politicians who are ready utterly to disregard every point of their own Constitution on the plea of exigency. If there is true impartiality in any circle in the world, it is among the traders of the city of London. Merchants cannot afford to take sides. They want neutrality in its rigid sense—not a neutrality that is to be set aside or relaxed when one of two parties threatens war if we are stubborn. It may be remarked, moreover, that among our well-informed merchants there is no sentiment even of concealed partisanship. They have their opinion of the Federal conduct of the war, and they express it; but they do not fancy that the South loves us more than the North, or suppose that Messrs. Mason and Slidell, and those that they represent, have changed the views they have proclaimed against England for the last twenty years. Neither do they forget that, come what may throughout the future, all our great trading relations with America must as heretofore be with the North. But they know the Americans well enough to see, that just in proportion as we give way to any unjust pretensions, or manifest the slightest desire to purchase peace by timid words or acts, so do we encourage their aggressive tendencies, and beget the very danger it is wished to deprecate. When it was lately sought on high authority to frighten us into a seizure of the iron-clads—with or without law—on the ground that their departure would be a signal for the United States to attack us, a blow was struck at the cause of peace which it would be difficult to repair. Every one must have noticed that the wild threats against this country with which the New York press inflame their ignorant and credulous readers, have gained strength with every concession made; while the submission to France in face of her bold defiance of all their most cherished ideas and dogmas is developed precisely to a similar extent. We received some civility after the affair of the Trent, and people in the city remembering the tone of all their correspondence at that period, and contrasting it with that which they get at present, feel they have reason to apprehend that if the cry of concession for expediency sake be suffered to increase, the peril will become beyond control. A system which tends to stimulate the worst points of the Northern character is more cruel to the North even than it is hurtful to ourselves; and hence it is among the real friends of the respectable portion of the American public that the greatest regret is felt at any absence of dignity that may be betrayed on this side.

EXTRACTS FROM "THE OCEAN, THE RIVER, AND THE SHORE."
PART I. p. 378, *et seq.*

Although a ship which sails forth armed and manned for the service of the enemy, is an enemy's ship, the neutral subjects are not by reason of war to be disturbed in their trades and vocations. Except so far as they are restrained by municipal laws, shipbuilders may build vessels of every description, without stint in quality and number; they may build line-of-battle ships by the dozen, iron-clads and steamers for whoever will buy them. They may equip them in readiness for battle, in the perfection of machinery and the panoply of war. The builder is exemplarily impartial. If one belligerent grudge the acquisition to the other, he has only to offer a higher price and he will surely obtain the menacing frigate, or, if she be already sold, a similar or a better vessel. War-ships may be in progress of building for the hostile belligerents in the same yard. The enemies may supply themselves with artillery and rifles from the same assortment and stock.

After the ship is built, we may inquire into her character and pursuits. She may have been purchased by a neutral; if so, the neutral may put his war-crew on board her, and she may sail to her destined port. She may have been purchased by or for, or given to, a belligerent; if so, she is the belligerent's vessel, and as such, as soon as she has left the neutral waters, whatever her destination, the adversary may intercept, capture, and condemn her, if he can. She may be unsold, the property of the builder, or she may have been purchased by neutrals on speculation, to be offered for sale in another market. As soon as she has left the protected region, her character depends on her destination; if that be to a neutral port, however near the coasts of a belligerent, to be sold there, although the agents of one belligerent only are waiting to bid for her, she constitutes the unassailable, the unquestionable, even, according to the strictest notions of belligerent rights, the innocent goods and chattels of the owner. If the adverse belligerent want her, unless he can bargain for her on the sea, he must go to the market and offer a tempting price. But when her destination is to the belligerent, there arises a conflict between the neutral and belligerent rights; the neutral is entitled to sell his vessel, and to send her where he thinks it most to his advantage for sale; but the belligerent, on the natural right of defence, is entitled to intercept the weapons with which he will otherwise be assailed. The right of self-defence against destruction is a higher right than that of the trader to

sell his ship, and when two rights come in conflict, that which is paramount must prevail. The war-ship destined to a belligerent port for sale is subject to this right; she is contraband of war.

But this, which is the foundation and, with its incidents, the limit of the rights of war in respect of contraband, does not affect the trader with guilt: although the expression guilty is a convenient mode of distinction in speaking of capture and search.

The ship which has been sold to a belligerent, whether armed or unarmed, is then to be considered by the adversary, whatever her destination, an enemy's ship. The ship of war sent by the neutral owner to an enemy's port for sale is simply contraband of war.

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